

<b>CONDUCTING INVESTIGATIONS - DISCLOSURE</b>			
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## 1 INTRODUCTION

### 1.1 Purpose

This guidance identifies considerations for disclosure throughout the investigation process. This guidance incorporates key points arising from the recently revised Attorney General's Guidelines on Disclosure (Guidelines)<sup>(1)</sup> and the revised Code of Practice produced under Section 23(1) of the Criminal Procedure and Investigations Act 1996 (CPIA)<sup>(2)</sup> (Code). The revised Guidelines and Code came into force on 31<sup>st</sup> December 2020. They only apply to England and Wales.

The ongoing duty to consider disclosure and carry out activities described in this guidance starts from the beginning of an investigation, i.e. from when preliminary enquiries are conducted, and is an integral component of investigation management. This guidance covers disclosure to the point at which ONR currently tasks a Solicitor Agent to undertake prosecution proceedings on its behalf, following which disclosure is managed by ONR's Solicitor Agent.

This guidance draws extensively from key areas of the Guidelines and the Code. The CPS (2005) Disclosure Manual<sup>(3)</sup> provides additional guidance. Further advice and support is available from ONR's Investigation Resource Group.

The requirements of CPIA come into effect from the outset of an investigation. It is reasonable to consider that criminal proceedings could be a proportionate enforcement outcome from the start of a formal investigation.

CPIA is only relevant to criminal investigations in England and Wales, as are the documents referenced above.

### 1.2 Definitions

The definitions found in the CPIA Code of Practice are below.

**Table 1 - Table of Definitions**

Term/Acronym	Description
Investigator	Any [fully warranted ONR inspector] involved in the conduct of a criminal investigation. All investigators have a responsibility for carrying out the duties imposed on them under this code, including in particular recording information, and retaining records of information and other material
Officer in charge of an investigation [Lead Investigator]	The [ONR inspector] responsible for directing a criminal investigation. They are also responsible for ensuring that proper procedures are in place for recording information, and retaining records of information and other material, arising in the investigation
Disclosure officer	The person responsible for reviewing and assessing all material obtained or generated during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it and certifying that they have done this; and disclosing material to the accused at the request of the prosecutor. [A solicitor agent or prosecuting counsel cannot act as disclosure officer, though they can provide advice on disclosure and facilitate the duty.]
Prosecutor	The authority [ONR] responsible for the conduct, on behalf of the

	Crown, of criminal proceedings resulting from a specific criminal investigation. [ In cases brought by ONR, the role will be filled within ONR by the lead investigator unless otherwise assigned in writing. A solicitor agent may undertake prosecution proceedings on behalf of the lead investigator in England and Wales.]
Material	Material of any kind, including information and objects, which is obtained or inspected in the course of a criminal investigation and which may be relevant to the investigation. This includes not only material coming into the possession of the investigator (such as documents seized in the course of searching premises) but also material generated by them (such as interview records, e mails, and any notes made by the investigator).
Relevant material	Material may be relevant to an investigation if it appears to an investigator, or to the inspector in charge of an investigation (lead investigator), or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case
Sensitive material	Material, the disclosure of which the disclosure officer believes would give rise to a real risk of serious prejudice to an important public interest;

Within ONR, the lead investigator, disclosure officer and prosecutor role may be undertaken by a single individual.

## 2 GUIDANCE

### 2.1 Background

The forward to the Guidelines notes the following about disclosure in criminal trials:

'Proper disclosure of unused material remains a crucial part of a fair trial and is essential to avoiding miscarriages of justice. Disclosure remains one of the most important and complex issues in the criminal justice system...'

It is of note that an investigation, as well as seeking to identify/clarify the causation that has triggered the decision to carry out the investigation, will be investigating whether there has been any criminality, i.e. breach of relevant legislation that ONR enforces. That criminality could lead to a criminal trial.

The Guidelines are issued by the Attorney General for investigators, prosecutors, and defence practitioners on the application of the disclosure regime contained in the Code. They make it clear that every accused person has a right to a fair trial. This right is a fundamental part of our legal system and is guaranteed by Article 6 of the European Convention on Human Rights (ECHR). The disclosure process secures the right to a fair trial.

The resource requirement for proper disclosure can be high, particularly if it is only considered towards the tail end of any investigation. Therefore, for reasons of efficiency the potential need to disclose should be considered at the outset of any investigation.

Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. They should be familiar with the

Code, in particular their obligations to **retain** and **record** the relevant material, to **review** it and to **reveal** it to the approval officer and to the prosecutor.

The guidelines set out high level principles which should be followed when the disclosure regime is applied throughout England and Wales. An important principle is that **disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a schedule completing exercise.**

The rest of this document is arranged to reflect the key considerations to be made when carrying out an investigation. Those considerations will help to ensure a fair trial.

### **3 THE INVESTIGATION**

#### **3.1 Requirements of the Act**

Section 23(1) of CPIA says the following, which shapes how a criminal investigation should be pursued, and how material collected and generated during the course of the investigation should be handled:

23.— Code of practice.

(1) The Secretary of State shall prepare a code of practice containing provisions designed to secure—

(a) that where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued;

(b) that information which is obtained in the course of a criminal investigation and may be relevant to the investigation is recorded;

(c) that any record of such information is retained;

(d) that any other material which is obtained in the course of a criminal investigation and may be relevant to the investigation is retained;

(e) that information falling within paragraph (b) and material falling within paragraph (d) is revealed to a person who is involved in the prosecution of criminal proceedings arising out of or relating to the investigation and who is identified in accordance with prescribed provisions;

#### **3.2 Pursuing the investigation; knowledge and skills**

From the Guidelines, the following is relevant:

- Investigators and disclosure officers should be deployed on cases which reflect their training, skills, and experience. The conduct of an investigation is reflected in the ability to carry out effective disclosure. The specific strategy and approach to disclosure that will be taken must always be considered at the start of each investigation.
- Investigators should approach the investigation with a view to establishing what actually happened. They should be fair and objective. **They should ensure that all reasonable lines of inquiry are investigated whether they point towards or**

**away from the suspect.** What is 'reasonable' will depend on the context of the case. *A fair investigation does not mean an endless investigation.*

- In some investigations it may be appropriate for the lead investigator to seek engagement with the defence at the pre-charge stage (laying of Information(s)). This is likely to be where it is possible that such engagement will lead to the defence volunteering additional information which may assist in identifying new lines of inquiry. Annex B of the Guidelines sets out the process for any such pre-charge engagement.

## **4 MATERIAL**

### **4.1 Retaining and recording material**

When conducting an investigation, an investigator should always have in mind their obligation to retain and record all relevant material. All relevant material must be retained. Although the Guidelines say non-relevant material does not need to be retained, the investigator should exercise caution in reaching that conclusion. The investigator should be particularly mindful of the fact that some investigations continue over a significant period of time. Material that is incapable of impact may change over time and it may not be possible to foresee what the issues in the case will be. Ultimately, the decision on whether to retain material is one for the investigator and should always be based on their assessment of the relevance of the material and the likelihood of it having any impact on the case in future. The advice provided to ONR investigators is that all material obtained or generated during the course of an investigation should be retained.

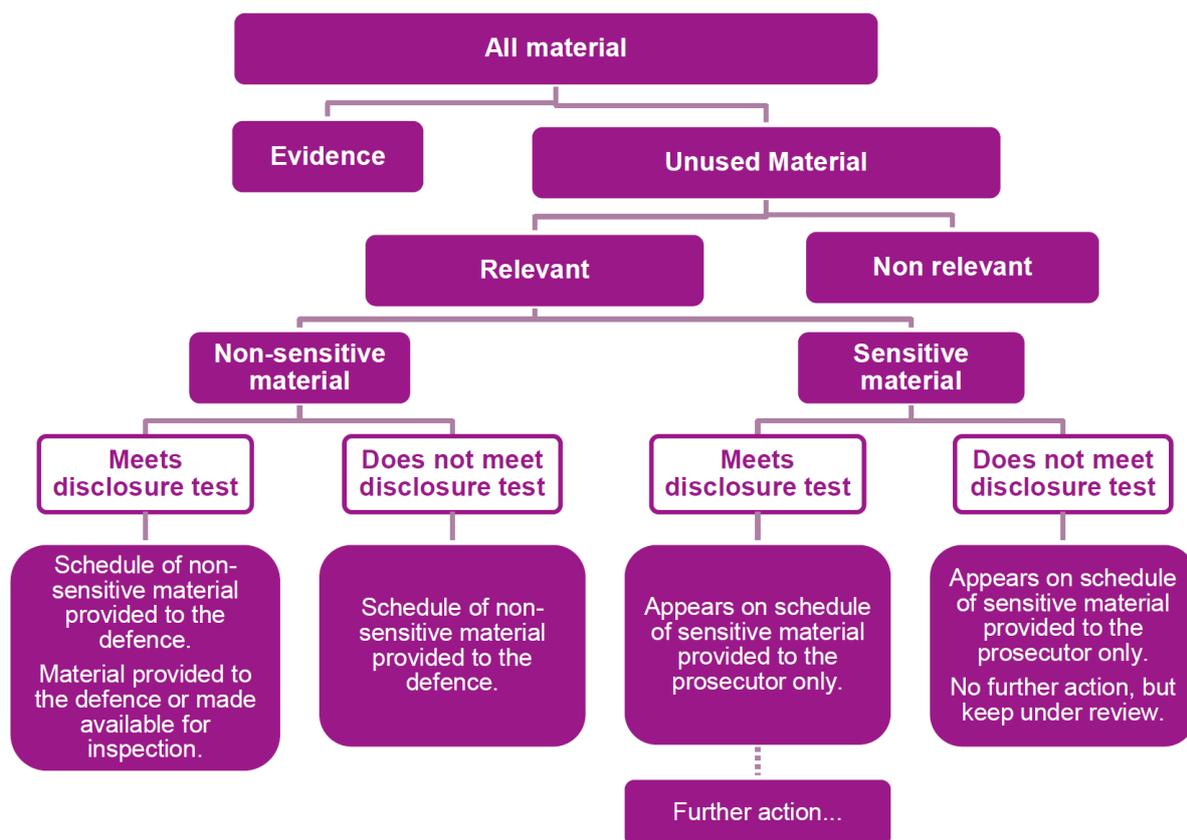
### **4.2 Relevant material**

When conducting an investigation, an investigator should always have in mind their obligation to retain and record all relevant material. Material which is presumed to meet the test for disclosure must always be retained and recorded. All relevant material must be retained, whereas non-relevant material does not need to be retained.

The reader is referred back to the definition above on what is *relevant material*. Also, to the Guidelines and the Code.

The diagram below illustrates the way the investigator and disclosure officer should be thinking about material collected or generated during the course of a formal investigation. The lead investigator should ensure that material is categorised and consequently treated in the correct manner.

It is of note that material only becomes evidence if it has been collected and managed in the correct way. ONR-ENF-GD 012, Guide to collecting and exhibiting material as evidence<sup>(4)</sup>, and ONR-ENF-GD-019, Accessing Health and Safety Laboratory services for investigation purposes<sup>(5)</sup> contain further information on this subject.



### 4.3 Sensitive material

Sensitive material is defined in the Code (see above definitions). However, the Code does give further guidance on what could constitute sensitive material. Examples of such material that are relevant to the work of ONR may include the following, among others:

- material relating to national security
- material received from the intelligence and security agencies
- material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods
- material given in confidence
- material relating to the identity of persons who may be in danger if their identities are revealed
- material supplied to an investigator during a criminal investigation which has been generated by an official of a body concerned with the regulation or supervision of bodies corporate or of persons engaged in financial activities, or which has been generated by a person retained by such a body;
- material relating to the private life of a witness.

Material such as internal communications and internal discussions in relation to the investigation/prosecution are not automatically sensitive. They may be non-relevant or legally privileged, in which case they should not be scheduled. However, discussions which show prejudice do not meet the 'sensitive material' criteria.

#### **4.4 Third party material**

From the Guidelines:

'Third party material is material held by a person, organisation, or government department other than the investigator and prosecutor, either within the UK or outside the UK. Third parties are not directly involved in the case in question but may hold information relevant to it.

The CPIA Code and these guidelines make clear the obligation on the investigator to pursue all reasonable lines of inquiry in relation to material held by third parties within the UK.'

What does this mean practically: material not in the possession of an investigator or prosecutor falls outside the CPIA requirements for disclosure i.e. *if you do not have it you cannot disclose it*. It is for investigators, in consultation or discussion with prosecutors where appropriate, to pursue all reasonable lines of inquiry. However, if as a result of the duty to pursue all reasonable lines of inquiry, the investigator or prosecutor obtains or receives material from a third party, then it must be dealt with in accordance with the CPIA 1996 with regards to disclosure.

#### **4.5 Holders of third-party material – Government or a Crown body**

During an investigation it may become apparent that a Government department or another Crown body has material that may be relevant to an issue in the case. N.B. *The Nuclear Decommissioning Authority (NDA) is not a Government department or part of the Crown.*

The investigator should inform the Government department or Crown body at the earliest opportunity of the nature of the case and the relevant issues in the case and ask whether it has any relevant material. They should assist the Government department or Crown body in understanding what may be relevant in the context of the case in question.

Crown Servants have a duty to support the administration of justice and should take reasonable steps to identify and consider such material. This extends to revealing to the investigator the extent of the searches conducted and the existence of any information which they believe may be relevant to the issues in the case, to supply them with that information unless it is protected to the issues in the case, and to supply them with that information unless it is protected in law, subject to legal professional privilege or attracts public interest immunity.

If access is denied to relevant material, the investigator or prosecutor should consider the reasons given by the Government department or Crown body and what, if any, further steps might be taken to obtain the material. The final decision on further steps rests with the prosecutor.

#### **4.6 Third-party material – other domestic bodies**

An investigator may believe that a third party (for example a local authority, hospital, doctor, provider of forensic services, or CCTV operator) has material or information which might be relevant to the case. If so, then reasonable steps should be taken to secure and consider the material held by the third party where it appears that such material exists and that it may be relevant to an issue in the case. What is reasonable varies on a case by case basis.

A third party has no obligation under the CPIA to reveal material to investigators or prosecutors. There is also no duty on the third party to retain material which may be relevant to the investigation and, in some circumstances, the third party may not be aware of the investigation or prosecution.

Warranted investigators may consider use of powers provided to them by the Health and Safety at Work etc. Act 1974 and the Energy Act 2013.

#### **4.7 International enquiries**

Issues about international enquiries should be referred to the Investigation Resource Group (IRG).

#### **4.8 Electronic material**

The exponential increase in the use of technology in society means that many routine investigations are increasingly likely to have to engage with digital material of some form. It is not only in large and complex investigations where there may be large quantities of such material. When dealing with large quantities of digital material prosecutors and investigators should apply the principles contained in Annex A to the Guidelines.

Where investigations involve a large quantity of digital material it may be impossible for investigators to examine every item individually, therefore there should be no expectation that this should happen. However, a strategy for dealing with digital material should be formulated and set out in the **Disclosure Management Document (DMD)** (see below).

Information about collecting material in an electronic format for the purposes of evidence are found in ONR-ENF-GD-019.

### **5 THE DISCLOSURE TEST**

The following sub-section from CPIA is relevant:

3(1) The prosecutor must—

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which [ might reasonably be considered capable of undermining ] the case for the prosecution against the accused [ or of assisting the case for the accused ],

or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)

This gives rise to what is described in both the Code and the Guidelines as the disclosure test. This is a continuing obligation on the prosecutor and is relevant to the work of both the investigator and the disclosure officer. They must be mindful of the test and review material that has been collected or generated during the course of the investigation to see whether there is material that could undermine the case for the prosecution against the accused, or assist their case. This must be revealed to the prosecutor.

## **6 THE DISCLOSURE PROCESS**

### **6.1 Managing disclosure – log of disclosure decisions**

Potential disclosure should be thought about right from the outset of a formal investigation. This should be logged in the schedule of material collected (see legal forms). The specific strategy and approach to disclosure that will be taken must always be considered at the start of each investigation (for ONR this will involve collaboration between the investigator and the material officer; see ONR-ENF-GD-017<sup>(6)</sup>). This is to ensure all material is recorded and retained, and so that a full log of disclosure decisions and the reasons for those decisions can be kept on file and made available to the prosecutor. Any prosecutor must be able to see and understand previous disclosure decisions before carrying out their continuous review function. If disclosure becomes necessary, then the log will help in the creation of the **DMD** (see below.)

### **6.2 Revelation to the prosecutor**

The diagram above referred to the preparation of schedules, there is a schedule of non-sensitive material, and one of sensitive material. In both cases, on receipt of the schedules the prosecutor must make a judgement on whether the material on the schedules meets the disclosure test or does not.

Prosecutors only have knowledge of the matters which are revealed to them by investigators and disclosure officers. The schedules are the means by which that revelation takes place. Therefore, it is crucial that the schedules detail all of the relevant material and that the material is adequately described. This process will also enable defence practitioners to become appraised of relevant material at the appropriate stage of the investigation. Any material having the potential to meet the disclosure test should also be detailed on the Disclosure Officer's report, providing a rationale for meeting the test. This helps to reinforce transparency of process.

Material, and relevant material are described in the definitions. Material which could have an impact on the outcome of any fair trial is that material discovered by the investigator which could aid the defence/undermine the prosecution case. The decision as to relevance requires an exercise of judgment and, although some material may plainly be relevant or non-relevant, ultimately this requires a decision by the disclosure officer or investigator.

### **6.3 Material which is presumed to meet the test for disclosure – the 'Rebuttal presumption'**

The Guidelines describe material where there is an expectation it will meet the test for disclosure. If that material of the type described below was not disclosed, then it would likely lead to a query from any Defence as to whether the disclosure process had been properly followed.

For ONR, the following material is likely to include information which meets the test for disclosure (a non-exhaustive list):

Initial reports as described in table 1 of ONR-ENF-GD-005 <sup>(7)</sup>, 'Receive notification and act upon'.

Contemporaneous notes such as:

- any record or note made by an investigator (including notebook entries and other handwritten notes) on which they later make a statement, or which relates to contact with suspects, victims or witnesses.
- Key Decision Logs (KDL)
- an account of an incident or information relevant to an incident noted by an investigator in manuscript or electronically.
- CCTV footage, or other imagery, of the incident in action.

Interview records (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);

Any material casting doubt on the reliability of a witness e. g. relevant previous convictions and relevant cautions of any prosecution witnesses and any co-accused.

This list is reflected in paragraph 5.4 and 6.6 of the Code. This material, in addition to all other material which may be relevant to an investigation, must be **retained** and described on the schedule by the investigator/disclosure officer. It is likely that some of this material will need to be redacted (e.g. any personal, confidential information. This could include a person's date of birth, address, email address and phone number.)

As this material is likely to contain information which meets the test for disclosure, this material should be passed to the prosecutor.

This list of material is not intended to cause automatic disclosure – investigators and prosecutors should always apply the disclosure test and consider each list of material carefully in the context of the case in question.

## **7 DISCLOSURE MANAGEMENT DOCUMENT**

### **7.1 What is a disclosure management document?**

A disclosure management document (DMD) is produced by the prosecutor in the criminal case, following consultation with the disclosure officer. (The disclosure officer will be able to offer an explanation as to how the disclosure exercise has been conducted, and explain for example how third party material has been requested.) It outlines the strategy and approach taken in relation to disclosure and should be served to the defence and the court at an early stage. DMDs will require careful preparation and presentation which is tailored to the

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individual case. The investigator should provide information for use in the DMD and the prosecutor should prepare it.

A DMD is a living document which should be amended in light of developments in the case and kept up to date as the case progresses. DMDs are intended to assist the court in case management and will also enable the defence to engage from an early stage with the prosecution's proposed approach to disclosure.

Production of the DMD lies with the prosecutor. This document does not cover this stage. The lead investigator should liaise with the Solicitor Agent on production of the DMD as and when appropriate. DMDs are most likely to be beneficial in cases where there is

- a. Substantial or complex third party material;
- b. Digital material in which parameters of search, examination or analysis have been set;
- c. Cases involving international enquiries;
- d. Cases where there are linked operations;
- e. Non-recent offending;
- f. Cases involving material held or sought by the investigation that is susceptible to a claim of legal professional privilege.

DMDs should be prepared in all Crown Court cases. A template DMD is found in Annex C of the Guidelines.

## REFERENCES

**Table 2 - References**

<b>Doc. Ref. No.:</b>	<b>Title</b>
1	<a href="#">Attorney Generals' Guidelines on Disclosure</a>
2	<a href="#">CPIA Code of Practice 2020</a>
3	<a href="#">CPS (2005) Disclosure Manual</a>
4	ONR-ENF-GD 012, Guide to collecting and exhibiting material as evidence
5	ONR-ENF-GD-019, Accessing Health and Safety Laboratory services for investigation purposes
6	ONR-ENF-GD-017 The Role of the ONR Material Officer
7	ONR-ENF-GD-005 Process for Conducting Investigations