

Disclosure

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Introduction

In relation to investigations started on or after 4th April 2005, disclosure is governed by Parts 1 and 2 of the Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003. Essentially, there are stages to the process:

- (1) Prosecution disclosure
- (2) Defence disclosure
- (3) Continuing review by the prosecution.

The Basics

CPIA 1996, s.3 sets out what the prosecution must disclose. In short, this is anything that has not already been disclosed, that might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the defendant. This remains the test throughout, including up to the point of conviction, acquittal, or the case being dropped.

The Attorney General has produced guidelines on the management of Unused Material, which are an excellent exposition of what is expected of what is expected from the prosecution.

Once a defence statement has been served upon the prosecution, the defence may make an application to the court under s.8 CPIA if there is reasonable cause to believe that there is prosecution material that is required to be disclosed and has not been, seeking an order that the prosecutor discloses it.

Rules for these applications (together with applications regarding Public Interest Immunity) are dealt with in Part 25 of the Criminal Procedure Rules.

Public Interest Immunity

PII operates to prevent material from being disclosed where it is decided that the public interest in not disclosing the material outweighs the public interest in disclosing material to a defendant that could assist him.

There are a number of examples that we will consider below. It is important to note, though that these are not exhaustive and can change as “*social conditions and social legislation develop*” (D. v. NSPCC [1978] AC 171).

Informants

There is plainly a public interest in maintaining the anonymity of informants and this has been upheld in cases over the last 200 years. This is because of the public interest in encouraging these sources of information.

In R. v. Adams [1997] Crim LR 292, it was said that when the disclosure of a document to a defendant might reveal the identity of a police informer, the judge who has to balance the public interest in protecting the identity of a police informer against the public interest in ensuring justice for a defendant accused of a criminal offence must always bear in mind the words of Lord Esher MR in Marks v Beyfus (1895) LR 25 QBD 494 at p 498:

“.. If upon the trial of a prisoner the judge should be of the opinion that the disclosure of the name of the informant is necessary or right to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that

which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."

If a witness who is called at a trial is a participating informant in the very instance with which the trial is concerned, there would have to be a very strong countervailing interest for his status not to be revealed; if it is not revealed, there is a serious danger that the jury will be misled and, indeed, a serious danger that the witness will give misleading answers in evidence (R. v. Patel [2001] EWCA Crim 2505).

Observation Posts

PII protects the identity of a person who has permitted surveillance/observations to be conducted from his premises. Obviously, revealing the location of the premises would do just that, so PII also covers the address and any other information that could reveal the identity in question. The person does not have to fear violence in order to be protected.

If, however, the location can be revealed without identifying the occupier, then it should be revealed (R. v. Johnson [1988] 1 WLR 1377). Johnson also laid down the correct procedure when using observation posts:

- (1) The police officer in charge of the observation, who should be of no lesser rank than sergeant, should testify that he had visited the observation posts & ascertained the attitude of the occupiers to the use of the premises & to disclosure which might lead to their identification.
- (2) An inspector should then testify that immediately before the trial he visited those places & ascertained whether the occupiers were the same persons as those at

the time of the observations.

(3) If they were not he should testify as to their attitude to the use made of the premises and to possible disclosure which might lead to their identification.

(4) The judge should explain to the jury when summing up or at some other point the effect of his ruling to exclude the evidence of the location.

In R. v. Brown and Daley (1988) 87 Cr. App.R. 52, it was held that PII does not attach in the same way to observations conducted from police cars. PII may though be justified for some other reason, for example protecting police methods and investigation techniques.

The judge should warn the jury about the potential handicap faced by the defence because the location is withheld from them, and the resulting need to pay special attention to any disadvantage caused (R. v. Hewitt; R. v. Davis 95 Cr. App. R. 81).

Police Reports and Manuals

PII attaches to reports sent by the police to the DPP/CPS, on the basis that there should be freedom of communication between them in order for the criminal justice system to function.

PII also applies to the police Public Order Manual, which contains techniques for dealing with public disorder and demonstrations (Gill v Chief Constable of Lancashire, The Times, 3rd November 1992). R. v. Brown and Daley (above) extends this protection for police techniques more widely.

Police Complaints Investigations

While the reports of investigating officers are automatically covered by PII, documents obtained or created for the purposes of investigating a complaint are not automatically covered. They may or may not be, depending on the circumstances.

Social Service Records

The records of Social Services Departments and other similar organisations (e.g. the NSPCC) do attract PII, but this is not a blanket thrown over every record automatically. Each case and each document must be considered individually.

Applications for disclosure are (and ought to be) made in cases where Social Services Records or Education Records exist for the complainant or a witness. The current practice is that the police shall first notify the local authority when they believe the authority may hold records pertinent to an investigation.

The local authority shall look at the files (or instruct counsel to do it on their behalf) and highlight relevant material, based on the police request. This will be provided to the police (not including family court papers, or without consent, medical reports).

The police and CPS will treat these documents as sensitive material, and will review it in line with their general obligations of disclosure. If anything should be disclosed under CPIA, the CPS will notify the local authority, who may make representations as to why it should not be disclosed.

The CPS will not disclose any material to the defence without agreement from the local authority, or a court order following a PII hearing.

When a defence statement is served by a defendant, it should be sent to the local authority for them to review their papers again, to see if there is further material to disclose. If there is, it will be made available for the police to review.

Applications for PII

In R. v. H. [2004] 2 AC 134, the House of Lords laid down the approach to these applications:

- “(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.*
- (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If no, disclosure should not be ordered. If yes, full disclosure should (subject to (3), (4) and (5) below be ordered.*
- (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.*
- (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?”*

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in

appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

- (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If no, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
- (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
- (7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

Throughout his or her consideration of any disclosure issue the trial judge must bear constantly in mind the overriding principles referred to in this opinion. In applying them, the judge should involve the defence to the maximum extent possible without disclosing that which the general interest requires to be protected but taking full account of the specific

defence which is relied on. There will be very few cases indeed in which some measure of disclosure to the defence will not be possible, even if this is confined to the fact that an ex parte application is to be made. If even that information is withheld and if the material to be withheld is of significant help to the defendant, there must be a very serious question whether the prosecution should proceed, since special counsel, even if appointed, cannot then receive any instructions from the defence at all.

R. v. Ricky West [2005] EWCA Crim 517 held that there should be the most searching investigation of the facts upon which PII is asserted, by the police, the prosecution and the court. There should also be great caution in the handling of the PII hearing.

The court must study the material upon which PII is asserted (R. v. H., above).

CPIA ss14-16 provide for reviews of the decision not to disclose because of PII. Of particular interest is the right of a defendant to apply for a review at any time between the decision and verdict.

Other categories of Disclosure

People who may have witnessed an incident giving rise to criminal charges, including those who call 999 to report an incident.

R. v. Heggart [2001] Archbold News 2

Rewards paid, or discussions about rewards to be paid to informants who are prosecution witnesses.

R. v. Allan [2004] EWCA Crim 2236, R v Smith [2004] EWCA 2212. In Smith, a co-defendant was to be paid a reward for giving evidence at the others' trial. They were entitled to disclosure of the records regarding the reward – particularly once he denied expecting one when he gave evidence.

A co-defendant's defence statement

Subject to any PII issues, the prosecution have an obligation to disclose a defendant's defence statement if it might reasonably be expected to assist a co-defendant's case (R. v. Cairns [2003] 1 Cr. App. R. 38).

Pre-committal Disclosure

Disclosure prior to committal is reduced, compared to that at/after committal. Previous convictions of prosecution witnesses (to assist with bail applications) and anything that could assist with early preparation for trial (e.g. eye-witnesses that the prosecution do not rely upon) should be disclosed, but the prosecutor should always be alive to anything that should be disclosed at an early stage. He should ask himself what, if any, immediate disclosure is required by justice and fairness (R. v. DPP, ex parte Lee [1999]2 Cr. App. R. 304)

Post-trial Disclosure

In R. v. Makin [2004] EWCA Crim 1607, it was said that “the duty of disclosure continues as long as proceedings remain whether at first instance or on appeal”. Even after (as in that case) a defendant pleads guilty, there remains an obligation to disclose material that meets the test.