



The DPP's Guidance on Disclosure in Criminal Matters

Office of the Director of Public Prosecutions, Turks and Caicos Islands

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Foreword

The Office of the Director of Public Prosecutions of the Turks and Caicos Islands must be lauded for this commendable move of making, and publishing this policy document:

‘The DPP’s Guidance on Disclosure in Criminal Matters’.

Among the fair trial provisions in the 2011 Constitution of the Turks and Caicos Islands, is the right of every person accused of committing a crime to be afforded facilities to prepare for their defence. Within that broad prescription, is the right of an accused person to information uncovered during police investigations which may make the case against him, as well as information which may hurt the case against him and will work to his advantage.

Within this seemingly incongruous double-pronged aspiration of a society to do justice to its own even when their actions ran counter to the dictates of the law, is the duty thrust upon the Prosecutor of the case against an accused person to ensure fairness to the accused person, even while he performs his duty of proving his or her guilt beyond a reasonable doubt. Thus, in these islands as in a number of Commonwealth jurisdictions, the role of the Prosecutor has evolved from a focus on establishing guilt, to becoming a minister of justice who seeks justice in the interest of the society in whose name the prosecution is conducted. In this role, the Prosecutor is required to adhere to the principles of disclosure, sometimes, to his or her hurt.

As a corollary, towards the achievement of just outcomes, responsibility is also placed on the defence to disclose information which may assist in the management of the trial including the identification of the issues in dispute, witnesses to be called by the defence and other material which may guide reasonable lines of enquiry, preventing what has been referred to as “ambush defence”.

Disclosure is therefore a tool in case management that focuses on the attainment of justice in criminal trials. That end is the objective of the publication we laud today: *‘The DPP’s Guidance on Disclosure in Criminal Matters’*, a document that may properly be referred to as a legacy policy issued by a transformational leader in the administration of criminal justice in these Islands. The publication of this guidance is an embrace of a significant component of the constitutionally-guaranteed principle of the fair trial of criminal cases in this country, and a giant step towards its achievement.

The Criminal Justice Stakeholder Group (CJSG) celebrates this giant step in the march towards excellence with the Director of Public Prosecutions, Mr. Eugene Otuonye KC, his formidable team of excellent attorneys, and his entire office. On behalf of the CJSG, I extend my heartiest congratulations to them all for this achievement, which is: one more initiative that reveals their commitment to the proper administration of criminal justice in these Islands. We applaud their hard work and industry that have caused the Turks and Caicos Islands to meet international standards of best practices in the administration of criminal justice.

M.M. Agyemang

Chief Justice and Chair, Criminal Justice Stakeholder Group

14 November 2023

Preface

On June 2023, I circulated for Stakeholders' review and feedback, a draft of the **DPP's Guidance on disclosure in criminal matters (the Disclosure Guidance)**. The Stakeholders' feedback was overwhelmingly positive with a recurring suggestion for training for Prosecutors and Investigative Officers on the Disclosure Guidance. The Hon Chief Justice was gracious to offer us the prestigious platform of the Judicial Education Institute Week 2023 (JEI 2023) in September 2023 to kick start the training. Indeed, the training session provided another opportunity for Stakeholders, including learned colleagues of the public and private Bar and Judicial Officers, to share their views and best practice experiences on disclosure - all of which have been incorporated in this final version.

While circulating the draft Disclosure Guidance in June 2023, I had noted, and hereby reiterate, that disclosure in criminal matters has remained a challenging and difficult issue throughout the common law adversarial criminal justice system. In the UK, their chequered disclosure history has led to the passage of the Criminal Procedure and Investigative Act of 1996 (CPIA), augmented with CPIA Code of Practice, Attorney General's Guidelines, several Reviews, etc. Yet, the problem is still not fully sorted, especially in the practical application of the disclosure regime. As the Rt. Hon Lord Justice Goldring, KC, once rightly observed:

“...full compliance with the duties of disclosure must be seen as fundamental for investigators, prosecutors and defence lawyers and advocates. Each person engaged in the process has an individual responsibility. It will not always be easy. There is no 'quick fix'. Judges will provide the necessary leadership as is appropriate. The days of the 'ambush defence' are over...”
(underlined supplied)

The TCI criminal justice system and its Stakeholders are determined to address the disclosure problem somehow, but one step at a time. The new Criminal Procedure Rules (CPR) with its overriding objective is one such step. I am pleased that the formulation and publishing of this **Disclosure Guidance** is another step, supporting the CPR to ensure that criminal matters are dealt with justly. Of course like the CPR, the Disclosure Guidance remains a living document, subject to periodic review as its practical out-workings will require.

It remains to express our profound gratitude to James Wood, KC, with whom we consulted on the initial draft. The views and best practice experiences shared by our Law Enforcement Partners, especially the Royal Turks and Caicos Islands Police Force (RT&CI PF), our learned colleagues of the Office of the Director of Public Prosecutions (DPP), the Defence Bar and the Judicial Officers were invaluable – we are grateful indeed. Many thanks to Supt. Dean Holden of the RT&CI PF for co-presenting with me on the Disclosure Guidance during the JEI Week 2023. And to the Chief Justice, Hon. Mrs. Justice Mabel Agyemang for her unwavering support and encouragement in this endeavour as Chair of both the Criminal Justice Stakeholder Group and the JEI – we are most obliged, my Lady.

Eugene Otuonye, K.C.
Director of Public Prosecutions.

13 November 2023

Table of Contents

| Section | Title | Page No. |
|---------|---|----------|
| 1 | Introduction | 5 |
| 2 | The Disclosure Regime | 6 |
| 3 | Balancing disclosure obligations and the right to privacy and family life | 10 |
| 4 | Initial Disclosure | 12 |
| 5 | Continuing Disclosure | 13 |
| 6 | Material and Test for Disclosure | 13 |
| 7 | The Investigation, Investigating Officers and Disclosure | 15 |
| 8 | Third Party Material | 18 |
| 9 | Material held by Government Departments | 20 |
| 10 | Other Domestic Bodies | 20 |
| 11 | International Enquiries | 21 |
| 12 | Electronics Material | 22 |
| 13 | Revelation of Material to Prosecuting Counsel | 23 |
| 14 | Revelation of Sensitive Material | 24 |
| 15 | Assessment by the Investigating Officer | 25 |
| 16 | Assessment by Prosecuting Counsel | 26 |
| 17 | Applications for non-disclosure in the public interest | 26 |
| 18 | Material relevant to sentence | 28 |
| 19 | Post-conviction | 28 |

1.0 Introduction

1.1 This Guidance is issued by the Director of Public Prosecutions (DPP) for Prosecuting Counsel (which term includes outside Prosecuting Counsel instructed by the DPP). This Guidance is also for Investigating Officers as envisaged by the RTCIPF – ODPP Preparation of Case File Policy. It provides the practical guidance on the application of the disclosure regime primarily contained in the Criminal Procedure Rules 2021 (The CPR) and related matters (*See in particular: Rules 45, 79 and 80 of the CPR*). It considered and took into account, the Prosecution’s disclosure obligation under the common law, relevant case law and best practice regimes especially in the United Kingdom.

1.2 This Guidance outlines the high-level principles which should be followed when the disclosure regime is applied throughout the Islands. However, it is not the unequivocal statement of the law at any one time, nor is it a substitute for a thorough understanding of the relevant legislation, common law, policies and case law on disclosure applicable to Turk and Caicos Islands

1.3 Every accused person has a right to a fair hearing. This right is a fundamental part of our legal system and is guaranteed by section 6 of the Constitution of the Turks and Caicos Islands. It is a right to be exercised, not in a vacuum, but within the framework of the administration of the criminal law, the purpose of which:

“...is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public...”. (per Lord Steyn in Attorney General’s Reference (no 3 of 1999) [2001]2 AC91, 118)

1.4 The overriding objective of the new CPR of the Turks and Caicos Islands is to ensure that criminal cases are dealt with justly and it is the duty of the Court and all parties and participants, at every stage of the proceedings to advance this overriding objective. In particular, each party shall actively assist the Court in fulfilling its duty to give effect to the overriding objective of the CPR.

1.5 The disclosure process generally, and this Guidance in particular, are aimed at not only securing the accused person’s right to fair hearing within the framework of the administration of the criminal law, but to give effect to the overriding objective of the CPR, namely, that criminal cases are dealt with justly (*See: Rule 4 of CPR*).

2.0 The Disclosure Regime

Disclosure by Prosecution under the Criminal Procedure Ordinance

2.1 The starting point for the statutory framework for disclosure is section 9(7) of the Criminal Procedure Ordinance. It provides:

“(7) If an accused enters a plea of not guilty to the information, the Judge shall give all necessary directions for the date and conduct of the trial including but not limited to—

..... (b) giving directions in respect of disclosure by the prosecution including the date by which such disclosure must be made”

Disclosure by Prosecution under the Criminal Procedure Rules

2.2 In 2021, the Judiciary of the Turks and Caicos Islands launched the Criminal Procedure Rules, which expanded the framework of disclosure. In particular, rules 45 and 79 of the CPR place additional requirements on the prosecution in terms of the disclosure orders which can be made by the court. Rule 45 provides:

“(1) Directions given by the court pursuant to rule 44 should include—

- (a) fixing a date by which the prosecution must disclose to the accused all the evidence they intend to rely upon at trial;
- (b) fixing a date by which the prosecution must disclose all other material in its possession including material that they do not intend to use at trial which materially weakens the prosecution case or assists the accused; and
- (c) fixing a date by which the prosecution must confirm if any material in its possession that they do not intend to use at trial, which materially weakens its case or assists the accused, has been served on the accused.

(2) The prosecution shall disclose material under subrule (1)(b) unless the Magistrate or Judge orders that such material should not be disclosed in the public interest.

(3) Any application for an order under subrule (2) may be made with or without notice to the accused depending on the sensitivity of the material concerned.

(4) An accused person or his Attorney may make an application to the court to permit the accused and his Attorney to inspect and copy relevant prosecution material if not made available under sub-rule (1)(b)”

2.3 Rule 45 must be viewed in line with its sister provisions set out in rule 79 which Provides:

“(1) The prosecutor must disclose to the accused any prosecution material used or unused which has not previously been disclosed to the accused.

(2) The prosecutor must disclose evidence which may be exculpatory or in the opinion of the prosecutor might undermine the case for the prosecution against the accused unless the judge excludes such material in the public interest.

(3) Give to the accused a written statement that there is no material of a description mentioned in subrule (2).

(4) A defendant or his Attorney may make an application to the Court to permit the defendant to inspect and copy relevant prosecution material if not made available under sub-rule (1) or (2)”

Disclosure by Prosecution under the Legal Profession Ordinance

2.4 The Legal Profession Code of Professional Conduct made under section 16 of the Legal Profession Ordinance imposes a disclosure obligation on the Prosecuting Counsel. Rule 36 thereof provides:

“When engaged as a prosecutor, the Attorney's prime duty is to see that justice is done through a fair trial upon the merits and not primarily to seek a conviction. And to that end he shall not withhold facts tending to prove either guilt or innocence of the accused. The prosecutor must act fairly and dispassionately. He should make timely disclosure to the accused or his Attorney (or to the court if the accused is not represented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence. Where prosecuting counsel has in his possession statements from persons he does not propose to call as witnesses, he should regard it as normal practice to show such statements to the defence”

Disclosure by Prosecution under the Common Law

2.5 Prosecuting Counsel’s statutory duty of disclosure applies from the point of a direction being made under r.45 CPR in the Magistrate’s Court or in the Supreme Court. However, Prosecuting Counsel must also consider their duties under the common law which apply at all stages of a case, from charge to sentence and post-conviction (see sections 18 and 19) and regardless of anticipated or actual plea.

2.6 These duties may require Prosecuting Counsel to disclose material to the accused outside the statutory scheme consistent with the interests of justice and fairness. An example of this is

where it would assist the accused in the preparation of the defence case, prior to plea and regardless of anticipated plea. This would include material which would assist in the making of a bail application, material which may enable the accused to make an early application to stay the proceedings as an abuse of process, material which may enable the accused to make representations about the trial venue or a lesser charge, or material which would enable an accused to prepare for trial effectively.

Disclosure by Defence under the Criminal Procedure Rules

2.7 The CPR, pursuant to Rule 80, also creates disclosure obligation for the defence. This Guidance, strictly speaking, does not govern disclosure by defence. However, consistent with the over-riding objective of the CPR, it is envisaged that, as a Minister of Justice, an Officer of the Court, and a party to the proceedings, Prosecuting Counsel will assist the Court, to the fullest extent possible, to ensure that the defence also discharges his disclosure obligation pursuant to Rule 80 of the CPR aforesaid. In doing so, Prosecuting Counsel, will be well guided by our learning from case law such as *Sexius v Attorney General of Saint Lucia* (2017) UKPC 26.

Rule 80, provides:

“(1) Where the defendant intends to plead and give evidence of a special defence other than an alibi, he shall give notice of such defence to the Court and to the prosecutor and shall make available to the prosecutor, any information which might be of material assistance to that defence;

(2) Where the defendant intends to plead an alibi, he shall give notice of such defence to the Court and to the prosecutor in accordance with section 5 of the Evidence (Special Provisions) Ordinance and rule 46, by giving notice of such defence to the Court and to the prosecutor and shall make available to the prosecutor, any information which might be of material assistance, including— (a) the name and address of any witness the defendant believes is able to give evidence in support of the special defence, if the name and address are known to the defendant when the statement is given; (b) any information in the defendant’s possession which might be of material assistance in finding any such witness, if his name and address are not given.

(3) The accused shall where the prosecutor has complied with rule 79 file and serve a defence statement on the prosecutor; and the Court on the date fixed in the Scheduling Order.

(4) For the purposes of this rule, a defence statement is a written statement—

- (a) setting out in general terms the nature of the accused’s defence;
- (b) indicating the matters on which he or she takes issue with the prosecution; and
- (c) setting out in the case of each such matter, the reason why he or she takes issue with the prosecution, and signed by the Defendant and his Attorney.

2.8 These provisions primarily make up the body of the statutory and common law disclosure regime in the Turks and Caicos Islands. They are an important part of the criminal justice system that ensure trials are conducted in a fair, objective and speedy manner.

The ambit of the Disclosure Regime

2.9 A fair trial does not require consideration of irrelevant material. It does not require irrelevant material to be obtained or reviewed. It should not involve spurious applications or arguments which aim to divert the trial process from examining the real issues before the court.

2.10 The disclosure regime does not require Prosecuting Counsel to make available to the accused either neutral material or material which is adverse to the accused. This material may be listed on Form TCI 6A (Disclosure of Non-Sensitive Unused Material), alerting the accused to its existence, but does not need to be disclosed: Prosecuting Counsel should not disclose material which they are not required to, as this would overburden the participants in the trial process, divert attention away from the relevant issues and may lead to unjustifiable delays.

2.11 Disclosure should be completed in a thinking manner, in light of the issues in the case, and not simply as a form completing or box checking exercise. Prosecuting Counsel need to think about what the case is about, what the likely issues for trial are going to be and how this affects the reasonable lines of inquiry, what material is relevant, and whether material meets the test for disclosure.

The Disclosure Regime, the Investigative Officers and the Prosecuting Counsel

2.12. There will always be a number of participants in prosecutions and investigations. Communication within the prosecution team is vital to ensure that all disclosure issues are given sufficient attention by the right person.

2.13. A log of disclosure decisions and the reasons for those decisions should be kept on file and made available to the prosecution team. Prosecuting Counsel must be able to see and understand previous disclosure decisions before carrying out their continuous review function.

2.14. Investigating Officers must be fair and objective and must work together with their supervisors and, where appropriate, Prosecuting Counsel to ensure that disclosure obligations are met. Investigating Officers should be familiar with the RTCIPF – ODPP Preparation of Case File Policy - in particular their obligations to retain and record the relevant material, to review it and to reveal it to Prosecuting Counsel (see paragraphs 11 and 12 of the Policy).

2.15. The conduct of an investigation provides the foundation for the entire case, and may even impact on linked cases. The specific strategy and approach to disclosure that will be taken must always be considered at the start of each investigation.

2.16. Where there are a number of Investigating Officers assigned to a case there should be a lead officer who is the focus for enquiries and whose responsibility it is to ensure that the Investigating Officer's disclosure obligations are complied with. Regular case conferences should be held, as required, to ensure that Prosecuting Counsel are apprised of all relevant developments.

3. Balancing disclosure obligations and the right to privacy and family life

3.1. Investigating Officers and Prosecuting Counsel need to be aware of the delicate questions which arise when both the right to a fair trial and the privacy of complainants and witnesses are engaged.

3.2. In fulfilling disclosure obligations, the Investigating Officer (or in consultation with Prosecuting Counsel) may decide that it is necessary to request and/or process personal or private information from a complainant, victim or witness to pursue a reasonable line of inquiry. This may include, but is not limited to, digital material.

3.3. When seeking to obtain and review such material, Investigating Officers and Prosecuting Counsel should be aware that these lines of inquiry may engage that individual's constitutional rights and those rights in respect of other parties within that material. Such material may also include sensitive data.

3.4 When seeking to satisfy their disclosure obligations in these circumstances, Investigating Officers and Prosecuting Counsel should apply the following principles:

- a. Collecting and/or processing personal or private material can only be done when in accordance with the disclosure regime, strictly necessary, and proportionate.
- b. In order to be in accordance with the disclosure regime, and necessary, an Investigating Officer must be pursuing a reasonable line of inquiry in seeking to obtain the material. What constitutes a reasonable line of inquiry may be informed by others, including Prosecuting Counsel and the accused. Seeking the personal or private information of a complainant, victim or witness will not be a reasonable line of inquiry in every case – an assessment of reasonableness is required (see below for an example).
- c. The assessment of reasonableness must be made on a case-by-case basis and regard may be had to:
 - (i) the prospect of obtaining relevant material; and
 - (ii) what the perceived relevance of that material is, having regard to the identifiable facts and issues in the individual case.
- d. If, by following a reasonable line of inquiry, it becomes necessary to obtain personal or private material, Investigating Officers will also need to consider:
 - (i) what review is required;
 - (ii) how the review of this material should be conducted;
 - (iii) what is the least intrusive method which will nonetheless secure relevant material;

- (iv) if the particular parameters for searching best suited to the identification of relevant material;
 - (v) if the provision of the material in its entirety to the Investigating Officer strictly necessary; or alternatively, could the material be obtained from other sources, or by the Investigating Officer viewing and/or capturing the material in situ? An incremental approach should be taken to the degree of intrusion.
- e. The rationale for pursuing the reasonable line of inquiry and the scope of the review it necessitates, should be open and transparent. It should be capable of articulation by the Investigating Officer making the decision. It should provide the basis for:
 - (i) consultation with Prosecuting Counsel,
 - (ii) engagement with the defence and,
 - (iii) the provision of information to the witness about how their material is to be handled.
- f. The refusal by a witness to provide private or personal material requires an Investigating Officer and Prosecuting Counsel to consider the information the witness has been provided (and could be provided) with regard to the use of their personal material, the reasons for refusal, and how the trial process could address the absence of the material.
- g. Disclosure of such material to the defence is in accordance with the disclosure regime and necessary if, but only if, the material meets the disclosure test in the disclosure regime and rule 45 CPR in particular. Personal information which does not meet this test but is contained within the material to be disclosed should be redacted.
- h. Where there is a conflict between the right to fair trial (secured by disclosure obligations) and the rights to private and family life, Investigating Officers and Prosecuting Counsel should bear in mind that the right to a fair trial is an absolute one. Where Prosecuting Counsel and Investigating Officers work within the framework provided by r.45 CPR, any unavoidable intrusion into privacy rights is likely to be justified, so long as any intrusion is no more than necessary.

Examples

3.5 There will be cases where there is no requirement for the police to take the devices of a complainant/witness or others at all, and no requirement for any examination to be undertaken.

Examples of this could include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will contain any material relevant to the period in which the conduct is said to have occurred

and/or the complainant through age or other circumstances did not have access to a phone at that time.

However, decisions will depend on the facts of the case in question. For example, in the case of a sexual offence committed opportunistically against a stranger, a mobile phone could contain first complaint evidence. Investigating Officers should always carefully consider what is relevant for the case in question.

3.6 A case might, for example, involve a complainant contacting the police to make an allegation of an offence against a person they had met that same day. The suspect may accept that they met the complainant but deny the allegation. The complainant and suspect communicated on a single medium. The investigating Officer may consider it is a reasonable line of enquiry to view the messages from the day on which the two persons met as, before and after, they are highly likely to be relevant. They may contain material about what was expected or not expected when the complainant and suspect met, the nature of their relationship, and the response after they met, all of which may cast light on the complainant's account and the suspect's account. That is unlikely to require the Investigating Officer taking custody of the phone or obtaining a large volume of data.

3.7 If, by way of example and contrast, the complainant alleged coercive and controlling behaviour over a period of years, including manipulative conduct over various platforms, a larger quantity of data may be relevant and require review and retention by the Investigating Officer by different means.

4 Initial disclosure

4.1 The defence must be provided with copies of, or access to, any prosecution material not previously disclosed, which might reasonably be considered capable of materially weakening the case for the prosecution against the accused, or of assisting the case for the accused.

4.2 In order for Prosecuting Counsel to comply with their duty of initial disclosure they must analyse the case for the prosecution, the defence case, and the likely trial issues. Prosecuting Counsel can anticipate the likely issues on the basis of information available (such as any explanation provided by the accused in interview).

4.3 Prosecuting Counsel could seek engagement from the defence in order to aid understanding of the defence case and the likely issues for trial at an early stage. This engagement may assist in ensuring that any further reasonable lines of inquiry can be identified and pursued. Without engagement from defence at an early stage, the accuracy of disclosure can be compromised.

4.4 Prosecuting Counsel must review Forms 6 and 6A prepared by Investigating Officers thoroughly at an early stage and must be alert to the possibility that relevant material may exist which has not been revealed to them or material included which should not have been. If no Forms are provided, if there are apparent omissions from the Forms, or if documents or other items are inadequately described or are unclear, Prosecuting Counsel must request properly

completed Forms from the Investigating Officer. Investigating Officers must comply with any such request. A log of such communications should be kept by Prosecuting Counsel.

5.0 Continuing Disclosure

5.1 The obligation of continuing disclosure is crucial and particular attention must be paid to understanding the significance of developments in the case on the unused material and earlier disclosure decisions. After service of initial disclosure, Prosecuting Counsel must keep under review whether or not there is prosecution material which might reasonably be considered capable of materially weakening the case for the prosecution against the accused, or of assisting the case for the accused, which has not previously been disclosed. This obligation is a continuous one, and it can be beneficial for it to take place in tranches, particularly in large and/or complex cases.

5.2. In particular, Prosecuting Counsel should consider any issues raised by the defence at the first Case Management Hearing in the Magistrate's Court or the Supreme Court, as well as during any further hearings. Any matters or requests raised by the defence, at any stage, should also be carefully considered.

6.0 Material and Test for Disclosure

Definitions

6.1

(a) Disclosure Test

Material that might reasonably be considered capable of materially weakening the case for the prosecution against the accused, or of assisting the case for the accused.

(b) Relevant Material

Material may be relevant to an investigation if it appears to an Investigating Officer, or to that person's supervisor, 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.

(c) Reasonable Line of Inquiry

A reasonable line of inquiry is that which points either towards or away from the suspect. What is reasonable will depend on the circumstances of the case and consideration should be given to the prospect of obtaining relevant material, and the perceived relevance of that material.

Determination of Material likely to meet the test for disclosure

6.2 In deciding whether material satisfies the disclosure test, consideration should include:

- a. The use that might be made of it in cross-examination;
- b. Its capacity to support submissions that could lead to:
 - i. The exclusion of evidence;
 - ii. A stay of proceedings, where the material is required to allow a proper application to be made;
- c. Its capacity to suggest an explanation or partial explanation of the accused's actions;
- d. Its capacity to undermine the reliability or credibility of a prosecution witness;
- e. The capacity of the material to have a bearing on scientific or medical evidence in the case.

Material likely to meet the test for disclosure

6.3 The following material, which is produced and obtained in the majority of investigations is likely to include information which meets the test for disclosure:

- a. records which are derived from tapes or recordings of telephone messages (for example 911 calls) containing descriptions of an alleged offence or offender;
- b. any incident logs relating to the allegation;
- c. any record or note made by an Investigating Officer (including police notebook entries and other handwritten notes) on which they later make a statement or which relates to contact with suspects, victims or witnesses;
- d. an account of an incident or information relevant to an incident noted by an Investigating Officer in manuscript or electronically;
- e. records of actions carried out by officers (such as house-to-house interviews, CCTV or forensic enquiries) noted by a police officer in manuscript or electronically;
- f. CCTV footage, or other imagery, of the incident in action;
- g. any previous accounts made by a complainant or by any other witnesses;

- h. interview notes (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);
- i. 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.
- j. Material relating to the accused's mental or physical health, intellectual capacity, or to any ill treatment which the accused may have suffered when in the Investigating Officer's custody.

6.4 When providing CCTV footage, or other imagery, of the incident in action as material which is likely to meet the test for disclosure, Investigating Officers should include all relevant footage that is not provided as evidence. It may be that the entirety of the footage contains both relevant and irrelevant material. Irrelevant footage should not be provided to Prosecuting Counsel in the first instance. It may be the footage requires clipping or editing to achieve this. The remainder should be listed clearly on the unused material schedule.

6.5 Material should not be viewed in isolation. Whilst items taken alone may not be reasonably considered capable of materially weakening the prosecution case or assisting the case for the accused, several items together can have that effect.

6.6 The material listed in paragraph 6.3 in addition to all other material which may be relevant to an investigation, must, in the first instance, be retained and listed on Form TCI 6A by the Investigating Officer. It is likely that some of this material will need to be redacted.

7.0 The Investigation, Investigating Officers and Disclosure

7.1. Consideration of disclosure issues is an integral part of an investigation and is not something that should be considered in isolation.

7.2. Investigating Officers should approach the investigation with a view to establishing what actually happened. They are to be fair and objective.

7.3 Investigating Officers 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. Investigating Officers must give thought to defining and articulating the limits of the scope of their investigations. When assessing what is reasonable, thought should be given to what is likely to be obtained as a result of the line of inquiry and how it can be obtained. An Investigating Officer may seek the advice of Prosecuting Counsel when considering which lines of inquiry should be pursued where appropriate.

Recording and Retention of Material for Disclosure Purposes

7.4 When conducting an investigation, Investigating Officers should always have in mind their obligation to retain and record all relevant material. Material which is presumed to meet the test for disclosure, as set out in the relevant section of this Guidance, must always be retained and recorded. All relevant material must be retained, whereas non-relevant material does not need to be retained.

7.5 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 Investigating Officer or that person's supervisor.

7.6 Investigating Officers must inspect, view, listen to, or search all relevant material. The Investigating Officer must provide a personal declaration that this task has been completed (Form TCI 5). In some cases, a detailed examination of every item of material seized would be disproportionate. In such cases the Investigating Officer can apply search techniques. Whatever the approach taken by Investigating Officers in examining material, it is crucial that Investigating Officers record their reasons for a particular approach in writing. Where third party material is under consideration, reference should be made to the section of this Guidance relevant to third party material.

7.7 Investigating Officers should seek the advice and assistance of their supervisors, or Prosecuting Counsel when in doubt as to their responsibility as early as possible. They must deal expeditiously with requests by Prosecuting Counsel for further information on material, which may lead to disclosure.

7.8 Where supervisors or Prosecuting Counsel have reason to believe that the Investigating Officer has not inspected, viewed, listened to or searched relevant material, or has not done so sufficiently or has not articulated a reason for doing so, they should raise this issue with the Investigating Officer and request that it is addressed. Prosecuting Counsel may also assist Investigating Officers and supervisors in defining the parameters of review and the methodology to be adopted.

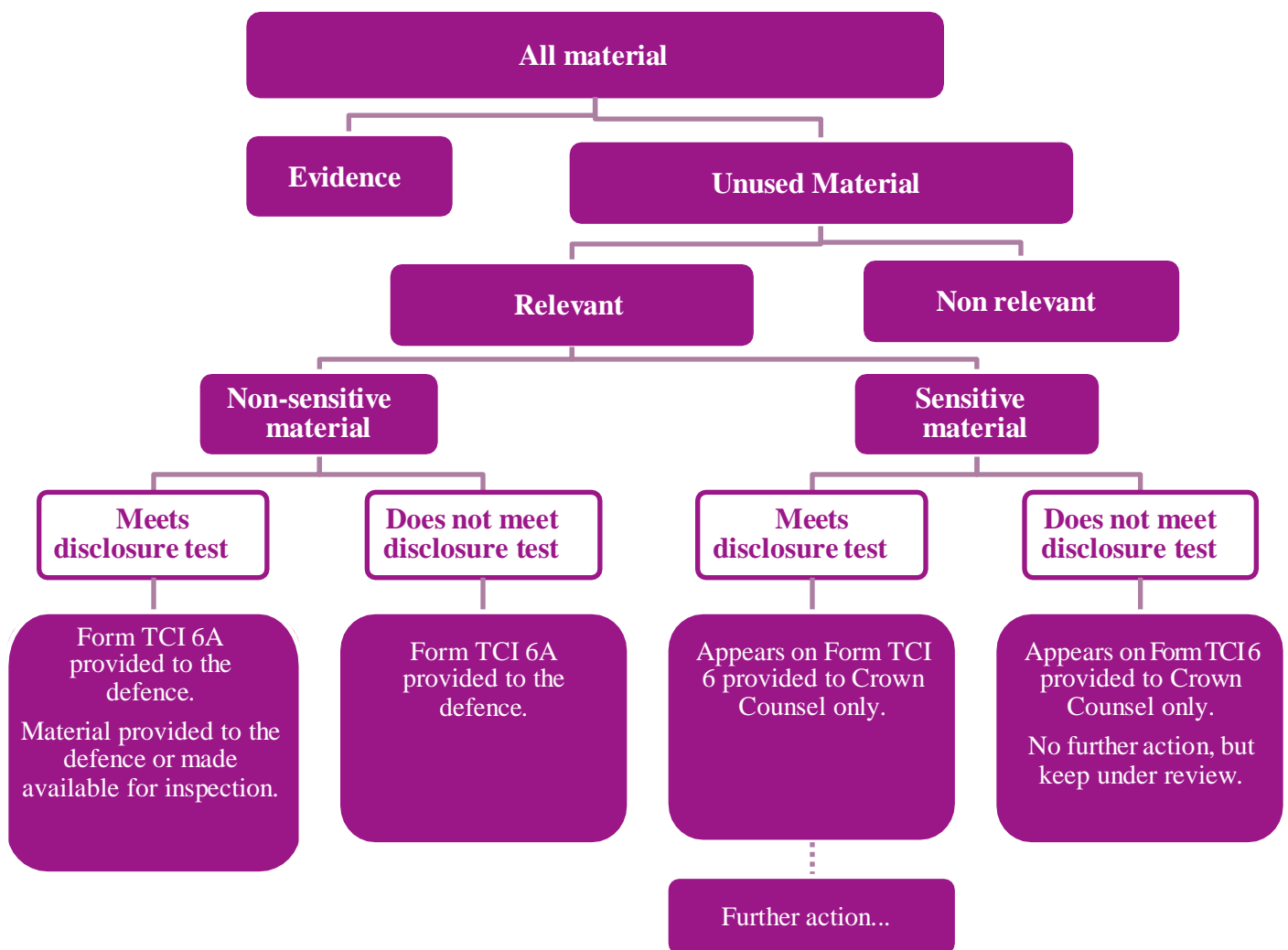
7.9 It may become apparent to an Investigating Officer that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was inextricably linked to material that was relevant, is in fact incapable of impacting on the case. It is not necessary to retain such material. However, the Investigating Officer should also exercise considerable caution in reaching that conclusion. The Investigating Officer should be particularly mindful of the fact that some investigations continue over some 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. The advice of the supervisor or a Prosecuting Counsel may be sought where necessary. Ultimately, however, the decision on whether to retain material is one for the Investigating Officer, preferably after consultation with his supervisor or the Prosecuting Counsel. Such decision 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.

7.10. Prosecuting Counsel must be alert to the need to provide advice to and, where necessary, probe actions taken by the Investigating Officer to ensure that disclosure obligations

are capable of being met. This should include advice on potential further reasonable lines of inquiry. There should be no aspects of an investigation about which Prosecuting Counsel is unable to ask probing questions.

7.11. In some investigations it may be appropriate for the Investigating Officer to seek engagement with the defence at the pre-charge stage. 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 pointing towards or away from the suspect.

7.12 The following diagram below illustrates how material that forms part of an investigation may be categorised and consequently treated.



8.0 Third Party Material

8.1. Third party material is material held by a person, organisation, or government department other than the Investigating Officer and Prosecuting Counsel, either within the Islands or outside.

Principles for accessing third party material

Step 1: Establishing a Reasonable Line of Inquiry

8.2. There is an obligation on the Investigating Officer to pursue all reasonable lines of inquiry whether they point towards or away from the suspect. These include material held by third parties within and outside the Islands. In the discharge of this obligation, as in other aspects of investigation, the Investigating Officer should consult or discuss with his supervisor or Prosecuting Counsel as appropriate.

Step 2: Establishing Relevance and Recording of Decision

8.3 Third party material should only be requested in an individual case if it has been identified as relevant to an issue in the case. This will depend on the circumstances of the individual case, including any potential defence, and any other information informing the direction of the case. Access to third party material should never occur as a matter of course. It should never be assumed that because of the nature of an offence that is being investigated those particular types of material will need to be accessed. There will be cases where no investigation of third-party material is necessary at all, and others where detailed scrutiny is needed. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation.

8.4 A written record should be made of any decision to access third party material. This record must also detail the underlying basis or rationale for the decision to access third party material. This will assist in demonstrating to the defence and court the steps that have or have not been taken and why.

8.5 Investigating Officer and Prosecuting Counsel, when deciding whether third party material should be requested in an individual case, should consider the following, although this list is not exhaustive, and the considerations will vary depending on the circumstances of the case:

- i. What relevant information is the material believed to contain?
- ii. Why is it believed that the material contains that relevant information? If it is likely that no relevant information will be contained within the material, a request should not be made.

- iii. Will the request for the material intrude on a complainant's, victim's or witness's privacy?
- iv. If the material requested does amount to an invasion of privacy, is it a proportionate and justifiable request to make in the circumstances of the individual case and any known issues? Consider vi. below or whether the information which may result in access amounting to an invasion of privacy can be redacted to remove anything that does not meet the disclosure test.
- v. Depending on the stage of the case, does the material need to be obtained or would a request to preserve the material suffice until more information is known?
- vi. Is there an alternative way of readily accessing the information such as open-source searches, searches of material obtained from the suspect, or speaking directly to a witness, that does not require a request to a third party?
- vii. Consider the scope of the material required, for example, is the entirety of an individual's medical records required or would a particular month or year be sufficient? Ensure the request is focused so that only relevant information is being sought.
- viii. The process of disclosure and its role in the justice system should be clearly and understandably expressed to the third party. They must be kept apprised of any ongoing disclosure decisions that are made with regard to their material.

Step 3: Balancing Rights

8.6 If as a result of the duty to pursue all reasonable lines of inquiry, the Investigating Officer obtains or receives material from a third party, then it must be dealt with in accordance with the disclosure regime and in particular r.45 of the CPR, (i.e. the prosecution must disclose material only if it meets the disclosure test, subject to any public interest claim and ruling by the court). The person who has an interest in the material (the third party) may be able to make representations to the Magistrate or Judge concerning public interest criteria (see rule 45(2) and (3) CPR).

8.7 In some cases, third party material may reveal intimate, personal or delicate information. Prosecuting Counsel should give close scrutiny to such material and only disclose it where absolutely necessary. Investigating Officers and Prosecuting Counsel must also comply with any applicable data protection regime in place when accessing third party material which contains personal information; they must consider closely how to balance the right to fair trial and right to privacy as set out at section 3.

9. Material held by Government Departments

9.1 During an investigation or prosecution, it may become apparent that a Government Department has material that may be relevant to an issue in the case. Investigating Officers should seek access to this material if and only if they have met the principles for accessing third party material as set out above. Any access must be in accordance with those principles.

9.2 The Investigating Officer should inform the Government Department 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 in understanding what may be relevant in the context of the case in question.

9.3 Public officers 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 Investigating Officer 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.

9.4 If access is denied to relevant material, the Investigating Officer should consider the reasons given by the Government Department and what, if any, further steps might be taken to obtain the material. The final decision on further steps rests with the Investigating Officer usually in consultation with his superiors and or a Prosecuting Counsel

9.5 Investigating Officers and Prosecuting Counsel cannot be regarded to be in constructive possession of material held by Government Departments simply by virtue of their status as being within Government Departments.

9.6 The steps taken to identify and obtain relevant material held by a Government Department should be recorded by the Investigating Officer. Where appropriate, the defence should be informed of the steps taken to obtain material and the results of the line of inquiry.

10. Other Domestic Bodies

10.1 If an Investigating Officer considers a third party (for example a hospital, doctor, school, or CCTV operator) has material or information that is relevant to an issue in the case, they should seek access to this material if and only if they have met the principles for accessing third party material as set out above. There is generally an expectation that, as part of their civic responsibility, a third party will, to the best of their endeavours, assist law enforcement efforts and in the preservation of law and order. However, a third party has no obligation under

r.45 CPR to reveal material to Investigating Officers or Prosecuting Counsel. 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.

10.2 If access to the material is refused and, despite the reasons given for refusal of access, it is still believed that it is reasonable to seek production of the material or information and that the requirements of a witness summons are satisfied (or any other relevant power), then Prosecuting Counsel or Investigating Officer should apply for the summons causing a representative of the third party to produce the material to court. A witness summons is only available once a charge is preferred. If the material is sought pre-charge, Investigating Officers should request that the third party preserve the material. This request should be documented.

10.3 When the third-party material in question is personal data, Investigating Officers must refer to Section 3 of this Guidance to ensure that there is no unjust intrusion of privacy.

10.4 The defence may be informed of what steps have been taken to obtain material and what the results of the inquiry have been.

11. International Enquiries

11.1 The obligation to pursue all reasonable lines of inquiry apply to material held overseas.

11.2 Where it appears that there is material relevant to an issue in the case held overseas, the Investigating Officer should seek access to this material if and only if they have met the principles for accessing third party material as set out above. If this standard is met, they must take reasonable steps to obtain it while acting in accordance with the principles.

11.3 Investigating Officers or Prosecuting Counsel must consult with the DPP whenever circumstances may arise that require mutual legal assistance. In suitable cases, the DPP will in turn request the Attorney General's Chambers to facilitate the assistance for making the necessary applications to the foreign authorities.

11.4 There may be cases where a foreign state or court refuses to make the material available to the Investigating Officer. There may be other cases where the foreign state, though willing to show the material to Investigating Officers, will not allow the material to be copied or otherwise made available and the courts of the foreign state will not order its provision.

11.5 It is for these reasons that there is no absolute duty on the prosecution to disclose relevant material held overseas by entities not subject to the jurisdiction of the courts in the Islands. However, consideration should be given to whether the type of material believed to be held can be provided to the defence.

11.6 The obligation on the Investigating Officer is to take reasonable steps. Where Investigating Officers are allowed to examine the files of a foreign state but are not allowed to take copies, take notes or list the documents held, there is no breach by the prosecution in its

duty of disclosure by reason of its failure to obtain such material, provided reasonable steps have been taken to try and obtain it. Prosecuting Counsel have a margin of consideration as to what steps are appropriate in the particular case, but Prosecuting Counsel must be alive to their duties and there may be some circumstances where these duties cannot be met. Whether or not Prosecuting Counsel has taken reasonable steps, in conjunction with the Attorney General's Chambers, is for the court to determine in each case if the matter is raised.

11.7 It is important that the position taken in relation to any material held overseas is clearly set out in suitable documentation so that the court and the defence know what the position is.

11.8 In suitable documentation, the Investigating Officer should record and explain the situation and set out, insofar as they are permitted by the foreign state, such information as they can and the steps they have taken to obtain it.

11.9 The defence should be informed of what steps have been taken to obtain material and what the results of the enquiry have been.

12.0 Electronic Material

12.1 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, Investigating Officers should apply the principles contained within this section.

12.2 Where investigations involve a large quantity of digital material it may be impossible for Investigating Officers to examine every item of such material individually. Therefore, there should be no expectation that this should happen. Investigating Officers will need to decide how best to pursue a reasonable line of inquiry in relation to the relevant digital material, and ensure that the extent and manner of the examination are appropriate to the issues in the case. In reaching any such decisions, Investigating Officers must bear in mind the overriding obligation to ensure a fair trial of any suspect who is charged and the requirement to provide disclosure in the trial process.

12.3 Investigating Officers must ensure that any line of inquiry pursued in relation to the digital devices of victims and witnesses are reasonable in the context of the likely issues in the case. Digital devices should not be obtained as a matter of course and the decision to obtain and examine a digital device will be a fact-specific decision to be made in each and every case. Investigating Officers must be conscious of the fact that digital devices, for example, phones and computers and similar equipment, are invariably repository of very diverse, intimate and personal information of the persons, not just the owners of such devices but other persons who may not be concerned or connected with subject of inquiry. Steps taken to obtain digital devices of this nature, including search warrants, should be underpinned by this reality so as to avoid or minimize intrusion to privacy. Where digital devices are obtained, if it becomes apparent that they do not contain relevant material they should be returned at the earliest opportunity.

12.4 Prosecuting Counsel should be consulted, where appropriate, to agree a strategy for dealing with digital material. This strategy should be shared with the defence at the appropriate time.

12.5 The following e-communication guidelines should also be observed:

- a. Prosecuting Counsel should inform their teams and advise relevant Investigative Officers that electronic communications are written records and depending on the circumstances, they may be disclosed to the Defence.
- b. Prosecuting Counsel should exercise the same standard of care and due diligence in producing electronic communications, so that they can stand up to scrutiny at court and to the public.
- c. Electronic communications should be professionally written, adopting at all time, professional writing style, tone and presentation. Accuracy, clarity and completeness are critical.
- d. Electronic communications should be saved and stored in their original forms and formats, even though they can be backed up otherwise.
- e. If electronic information contains sensitive information, Prosecuting Counsel should get the input and / or approval from his/her supervisor to; for example, make redactions or summary before disclosing.

13. Revelation of Material to Prosecuting Counsel

13.1 Prosecuting Counsel only have knowledge of the matters which are revealed to them by Investigating Officers. The Forms TCI 6 and TCI 6A are the means by which that revelation takes place. Therefore, it is crucial that these forms detail all of the relevant material and that the material is adequately described. This process will also enable defence practitioners to become apprised of relevant material at the appropriate stage of the investigation.

13.2 Forms TCI 6 and TCI 6A must be completed in a way which not only reveals sufficient information to Prosecuting Counsel, but which demonstrates a transparent and thinking approach to the disclosure exercise. The speed with which the forms are produced should not reduce the quality of the material contained therein.

13.3 Descriptions on the forms must be clear and accurate and must contain sufficient detail to enable Prosecuting Counsel to make an informed decision on disclosure. Abbreviations and acronyms should be avoided as they risk significant material being overlooked.

13.4 Investigating Officers must ensure that material which is presumed to meet the test for disclosure, as set out in section 6 of this Guidance and r.45 CPR, is placed on Form TCI6A. The requirement to schedule this material is in addition to the requirement to schedule all other relevant unused material.

13.5 Where relevant unused material has been omitted from Form TCI 6A or where material is not described sufficiently, and Prosecuting Counsel asks the Investigating Officer to rectify the form, the Investigating Officer must comply with this request in a timely manner.

13.6 Investigating Officers must bring to Prosecuting Counsel's attention any material which is potentially capable of meeting the test for disclosure. This material should be provided to Prosecuting Counsel along with the reasons why it is thought to meet the test.

13.7 Investigating Officers must also draw material to the attention of Prosecuting Counsel for consideration where they have doubt as to whether it might reasonably be considered capable of materially weakening the prosecution case or of assisting the case for the accused.

14. Revelation of Sensitive Material

What is sensitive material and how is it dealt with for disclosure purposes

14.1 Sensitive material is material that, if disclosed, would give rise to a real risk of serious prejudice to an important public interest. Investigating Officers must ensure that all relevant unused sensitive material is retained, reviewed and revealed to Prosecuting Counsel. Sensitive material should be revealed to Prosecuting Counsel on Form TCI 6.

14.2 The Investigating Officer must ensure that Form TCI 6 includes the reasons why it is asserted that items on the Form are considered sensitive.

14.3 Where a document contains a mix of sensitive and non-sensitive material, the sensitive material must be redacted, with a copy of the redacted document listed on Form TCI 6A and the original listed on TCI 6.

14.4 Investigating Officers must ensure that the descriptions of sensitive unused material are sufficiently clear to enable Prosecuting Counsel to make an informed decision as to whether or not the material itself should be viewed, to the extent possible without compromising the confidentiality of the information.

14.5 Prosecuting Counsel must carefully review Form TCI 6 in order to be satisfied that there are no omissions; that the items have been correctly identified as sensitive, and that the items are adequately described. If Prosecuting Counsel identifies that the contents of the form are inadequate, the Investigating Officer must provide an updated Form TCI 6 as soon as possible. This may involve items being moved from Form TCI 6A to Form TCI 6.

Timing of revelation

14.6 In order to support Prosecuting Counsel's assessment of the impact of unused material on any proposed prosecution, it is essential that Prosecuting Counsel is provided with Forms TCI 6 and TCI 6A at an early stage, as well as any material which the Investigating Officer considers potentially capable of meeting the test for disclosure. This will allow time for a thorough review of the case and enable Prosecuting Counsel to consider what the disclosure strategy should be.

14.7 The timing of revelation of material should be in accordance with the RTCIPF- ODPP Preparation of Case File Policy 2021. The point at which the case file is submitted to the Office of the DPP (ODPP) will depend on the circumstances of the charging decision and on the anticipated plea:

- a. Where the police have referred the matter to the ODPP for advice and it is anticipated that the suspect will plead not guilty, Forms TCI 6 and 6A should be provided to Prosecuting Counsel by the Investigating Officer at the same time as seeking this advice.
- b. Where the police have charged a suspect on the Full Policy Test under the arrangements contained in the ODPP Prosecution Policy and either a guilty or a not guilty plea is anticipated, then Forms TCI 6 and 6A should be provided to Prosecuting Counsel at the point at which the case file is submitted to the ODPP.

14.8 There may be instances where an Investigating Officer is seeking advice from the ODPP and anticipating a not guilty plea, but where it is not feasible to provide Forms TCI 6 and 6A to Prosecuting Counsel at the same time as seeking advice. This may be the case where an arrest is not planned.

14.9 For large and complex investigations, it is recognised that the preparation of Forms TCI 6 and 6A continues beyond the point of charge due to the quantity and complexity of data to be analysed, and that it may not be feasible or necessary to provide the completed Forms at the same time that advice is sought.

14.10 Investigating Officers should apply the criteria contained in the Prosecution Policy when making a decision about a suspect's likely plea and must follow any additional guidance provided by Prosecuting Counsel.

15.0 Assessment by the Investigating Officer

15.1 Before any unused material is provided to Prosecuting Counsel, Investigating Officers should apply the disclosure test to the material to ascertain if in fact it is disclosable. When providing the material to Prosecuting Counsel the Investigating Officer should highlight the material they consider is disclosable and why.

16.0 Assessment by Prosecuting Counsel

16.1 Once the material has been provided to Prosecuting Counsel, it is likely to contain information which meets the test for disclosure. Accordingly, Prosecuting Counsel should start their review of the material with a presumption that this material should be disclosed to the defence. However, in every instance the disclosure test should be applied in a thinking manner.

16.2 After applying the disclosure test, Prosecuting Counsel should record on Forms TCI6 and 6A whether each item of this material does or does not meet the test for disclosure and the reason for that decision.

16.3 This list of material is not intended to cause automatic disclosure – Investigating Officers and Prosecuting Counsel should always apply the disclosure test and consider each list of material carefully in the context of the case in question. Defence should not expect to be provided with this material as of right in every case. The material is always subject to the disclosure test first before any material is provided.

16.4 Prosecuting Counsel must keep in mind the dates fixed by the court pursuant to r.45(1)(b) and (c) CPR, and ensure that:

- a. all material in possession of the prosecution, including material that is not intended to be used at trial, which materially weakens the prosecution case or assists the accused, has been served on the accused by the date fixed pursuant to r.45(1)(b) CPR,
- b. the prosecution has confirmed to the court that the material described in subparagraph a. has been served on the accused by the date fixed pursuant to r.45(1)(c) CPR, and
- c. there is otherwise compliance with all requirements set out in r.79 CPR.

17.0 Applications for non-disclosure in the public interest

17.1 R.45(2) CPR allows Prosecuting Counsel to apply to the court for an order to withhold material which would otherwise be required to be disclosed if disclosure would give rise to a real risk of serious prejudice to an important public interest. Before making such an application, Prosecuting Counsel should aim to disclose as much of the material as they properly can (for example, by giving the defence redacted or edited copies or summaries). Neutral material or material damaging to the accused should not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases, or where otherwise required or envisaged by the law, should the prosecution seek a judicial ruling on whether material in its possession should be disclosed;

17.2 Any application made pursuant to r.45(2) CPR should be made before the date fixed by the court under r.45(1)(b), unless the existence of the sensitive material concerned was revealed after that date or the prevailing circumstances are such that it would not have been practicable to make the application earlier. In these circumstances, the application should be made as soon as reasonably practicable after the revelation of that material, or as soon as the prevailing circumstances abate.

17.3 Prior to making an application pursuant to r.45 CPR, Prosecuting Counsel must examine all material which is the subject matter of the application and make any necessary enquiries of the Investigating Officer. Prosecuting Counsel may either make the application with notice to the accused or, if the sensitivity of the material is such that Prosecuting Counsel is of the view that the accused should not be aware that the application is being made, then without such notice being given (r.45(3)).

17.4 If the application is made pursuant to r.45(3) without notice to the accused, there is an additional duty of candour and frankness on the Prosecuting Counsel at this hearing, given the accused will not be present. In order to assist the court, it is best practice for the Prosecuting Counsel to prepare a note that is either written in conjunction, or agreed with, the Investigating Officer.

17.5 The investigating Officer must also be open and frank with Prosecuting Counsel about the full extent of the sensitive material. Prior to, or at the hearing, the court must be provided with full and accurate information about the material.

17.6 Prosecuting Counsel, and ideally, the Investigating Officer should attend such applications. A person claiming to have an interest in the sensitive material may also apply to the court for the opportunity to be heard at the application.

17.7 Prosecuting Counsel should carefully consider the learning in **R v H and others** [2004] UKHL 3 and cases cited therein. In particular, Prosecuting Counsel should consider and ask the series of questions contained in paragraph 36 in *R v H and others*. These are the questions that the court may address before it makes a decision to withhold material. It is essential that any principles set by the court are scrupulously adhered to. This will ensure that the procedure for examination of material in the absence of the accused is consistent with section 6 of the Constitution.

17.8 If Prosecuting Counsel concludes that a fair trial cannot take place because material which satisfies the test for disclosure cannot be disclosed and that this cannot be remedied by an application for non-disclosure in the public interest, through altering the presentation of the case or by any other means, then they should not continue with the case. Prosecuting Counsel must consult with the DPP in these circumstances before any decision is taken not to continue with the prosecution.

18.0 Material relevant to sentence

18.1. At sentence, Prosecuting Counsel should disclose any material which might reasonably be considered capable of ensuring fairness in the sentencing process. This material could include information which might mitigate the seriousness of the offence or the level of the accused's involvement.

19.0 Post-conviction

19.1. Where, at any stage after the conclusion of the proceedings, material comes to light which might reasonably be considered capable of casting doubt upon the safety of the conviction, Prosecuting Counsel should disclose such material.

THE END