



Attorney General's Guidance 6/2019

Service of Evidence and Disclosure of Unused Material

Guidelines for Police, Prosecutors and Defence

- 1) These Guidelines are issued by the Attorney General for investigators, prosecutors and defence practitioners and replace the guidelines issued on 1 August 2006. They have been written in anticipation of the coming into force of the Criminal Procedure (Jersey) Law 2018 ("The CPL").
- 2) The purpose of these guidelines is to provide practical as well as legal guidance relating to the active management of cases in furtherance of the overriding objective and to ensure that cases in criminal proceedings are dealt with justly, including the provision of initial details of the prosecution case, the service of evidence and the disclosure of unused material.

The Active Management of criminal proceedings

- 3) Part 3 of the CPL states that the court must further the overriding objective by actively managing cases. This includes, inter alia, the early identification of the key issues; ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way, and encouraging the participants to co-operate in the progression of the case. Each party must actively assist the court in fulfilling its duty including communication between the prosecution and the defence at the first available opportunity, and ongoing communication between the parties and the court until the conclusion of the case (Article 8 CPL).

Initial details of the prosecution case

- 4) Information is provided to the defendant(s) and the Magistrate's Court at or before the first hearing in order that a defendant is able to enter a plea and make representations to the court regarding issues pertaining to bail.
- 5) Article 23 of the CPL provides the procedure for when a defendant first appears before the Magistrate's Court. Article 23(1)(c) provides that the defendant shall be asked to enter a plea, subject to the Magistrate directing that the defendant need not enter a plea (Article 23(3)).
- 6) In order that the case be able to progress to the entering of a plea to the charge(s) by the defendant the prosecution will serve, as soon as practicable and in any event, no later than the beginning of the day of the first hearing, upon the court and the defendant, initial details of the prosecution case. Timely provision of initial details of the prosecution case affords defence representatives the best chance of providing comprehensive

advice to the defendant, thereby avoiding unnecessary adjournments, the defendant reserving plea or the entering of unnecessary holding pleas, all of which may later result in ineffective listings for trial.

The initial details of the prosecution case will include:

- i. a summary of the circumstances of the offence;
- ii. the defendant's antecedent history/criminal record;
- iii. any account given by the defendant in interview, whether contained in the summary or in another document;
- iv. any written witness statement, report or exhibit that the prosecutor then has available and considers necessary for plea, for the allocation of the case for trial, for sentence, or for issues pertaining to bail;
- v. any available statement of the effect of the offence on a victim, a victim's family or others.

Service of the prosecution case – (material upon which the prosecution rely in support of an allegation against the defendant(s)).

- 7) Following the entering of a not guilty plea by the defendant(s), a date will be fixed (by way of (standard) directions / rules) for the service by the prosecution of a copy of the set of documents containing the evidence which forms the basis of the charge, (those being the witness statements, documentary and other exhibits which the prosecution intend to rely upon to prove the case against the defendant(s)). A copy of these documents will be served upon both the court and defendant(s).

Disclosure

- 8) The directions / rules will provide that at the same time as the service of the prosecution case the prosecution must disclose the ***unused material*** in accordance with Article 82 of the CPL.
- 9) Disclosure of unused material is a vital part of the preparation for trial. All parties must be familiar with their obligations under Part 10 of the CPL. The disclosure regime set out in Part 10 of the CPL provides a fair and proportionate system for the disclosure of relevant unused material in criminal proceedings in furtherance of the overriding objective. The intention of the regime is to assist the defence in the timely preparation and presentation of its case, and to enable the court to focus on all the important issues in the trial.
- 10) Article 82 provides, where a matter is contested, that the prosecution shall disclose any material in their possession which does not form part of the prosecution, but which might reasonably be considered capable of undermining the prosecution case, or of assisting the case for the defendant(s). Unused prosecution material will fall to be disclosed if, and only if, it satisfies this test for disclosure.

- 11) Material which neither undermines the prosecution case nor assists the case for the defendant(s) does not meet the test for disclosure and need not be disclosed.
- 12) At the same time, the prosecution must give to the defendant(s) a written statement confirming that all unused material (material which is in the prosecution's possession, and came into its possession in connection with the prosecution) has been disclosed or that there is no material of such a description.
- 13) Prosecutors will only be expected to anticipate what material might undermine their case or strengthen the defence in the light of information available at the time of the disclosure decision.

Defence case statement

- 14) Articles 83 and 84 of the CPL require the defendant to give a defence case statement to the prosecution and the court setting out:
 - i. the nature of the defence, including any particular defences on which the defendant intends to rely;
 - ii. matters of fact with which the defendant takes issue, and why those issues are taken;
 - iii. matters of fact on which the defendant intends to rely;
 - iv. full details of any alibi witnesses;
 - v. matters of law (including any points as to the admissibility of evidence or arguments as to abuse of process) which the defendant wishes to take, together with any authorities relied upon for that purpose;
 - vi. If the defence case statement discloses an alibi, it must include the name, address and date of birth of any alibi witnesses or, (in the cases where this information is not known) any information which might be of material assistance in identifying or finding such witnesses.

Continuing Prosecution review

- 15) Under Article 82(5), the prosecution has a continuing duty to disclose any unused material, which includes the consideration of material relevant to any matters set out in the defendant's defence case statement. This duty lasts until the conclusion of the proceedings.
- 16) A full record of disclosure decisions must be kept and be available to the prosecution team. Prosecutors must be able to see and understand previous disclosure decisions when carrying out their continuing review function.
- 17) Prosecutors and investigators must always be alive to the potential need to reveal and disclose material to the defendant in the interests of justice and fairness in the particular circumstances of any case, after the commencement of proceedings but before their duties of disclosure arise under the CPL.

Investigators and disclosure officers

- 18) A fair investigation involves the pursuit of material following all reasonable lines of enquiry. What is “reasonable” will depend on the context of the case. A fair investigation does not mean an endless investigation: investigators and disclosure officers must give thought to defining, and thereby limiting, the scope of their investigations, seeking guidance from the prosecutor where appropriate.
- 19) Disclosure officers must inspect, view, listen to or search all relevant material that has been retained by the investigator and the disclosure officer must provide a personal declaration to the effect that this task has been undertaken.
- 20) Investigators are reminded of the Attorney General’s “Advice on Communication Evidence” which is attached as an appendix hereto. That advice complements this Guidance.
- 21) Prosecutors only have knowledge of matters which are revealed to them on the CF06C (non-sensitive unused material) & CF06D (sensitive unused material) schedules. These must be completed in a form which not only reveals sufficient information to the prosecutor, but which demonstrates a transparent and considered approach to the disclosure exercise. Descriptions on non-sensitive schedules must be clear and accurate, and must contain sufficient detail to enable the prosecutor to make an informed decision on disclosure.
- 22) Sensitive schedules must contain sufficiently clear descriptions to enable the prosecutor 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.
- 23) It may become apparent to an investigator that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was linked to material that was relevant, is not, in fact, relevant. It is not necessary to retain such material, although the investigator should be mindful of the fact that some investigations continue over some time and that what is relevant may change over time. The advice of the prosecutor should be sought where appropriate.
- 24) Disclosure officers must specifically draw material to the attention of the prosecutor for consideration where they have any doubt as to whether it might reasonably be considered capable of undermining the prosecution case or of assisting the case for the defendant.

Third party material

- 25) Commissioner Sir Christopher Pitchers held in the case of *Syvret v Attorney General* [2011]JRC060A that:

“Investigators are obliged to pursue reasonable lines of enquiry in relation to material held by third parties, and if there is material which might reasonably be considered capable of undermining the prosecution case or assisting the defence case, take reasonable steps to obtain it. Reasonable in those words means both reasonable in

terms of the line of enquiry, that is to say not fanciful, and also reasonable in terms of the logistics of obtaining documents. Accordingly, disclosure is confined to issues that arise in the case.”

- 26) There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example a State department, a hospital, a school, or a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases investigators, disclosure officers and prosecutors should take reasonable steps to identify, secure and consider material held by any third party where it appears to them that (a) such material exists and (b) that it may be relevant to an issue in the case.
- 27) In any case where the defence considers that a third party may be in possession of relevant material, (e.g. relevant child welfare reports or medical records), it is a matter for the defence to request it from the third party, and, if refused, make an application to the court, upon notice to the prosecution and the third party concerned, to seek an order for disclosure. It is then a matter for the court to determine the question of disclosure, considering the material in the light of the issues in the case and for the third party to make any representations it wishes to make.
- 28) If a prosecutor knows of the existence of third party material that undermines the prosecution case or supports the defence case as pleaded, the prosecutor must disclose to the defence its existence.

Prosecutors

- 29) Prosecutors are responsible for ensuring proper disclosure in consultation with the disclosure officer. The duty of disclosure is a continuing one and disclosure should be kept under review. In addition, prosecutors should ensure that advocates in court are properly instructed as to disclosure issues. Prosecutors must also be alert to the need to provide advice to and, where necessary, probe actions taken by, disclosure officers to ensure that disclosure obligations are met. There should be no aspects of an investigation about which prosecutors are unable to ask probing questions.
- 30) Prosecutors must review schedules prepared by disclosure officers thoroughly and must be alert to the possibility that relevant material may exist which has not been revealed to them or that material is included which should not have been. If no schedules have been provided, or there are apparent omissions from the schedules, or documents or other items are inadequately described or are unclear, the prosecutor must at once take action to obtain properly completed schedules. Likewise, schedules should be returned for amendment if irrelevant items are included. If prosecutors remain dissatisfied with the quality or content of the schedules they must raise the matter with a senior investigator to resolve the matter satisfactorily.
- 31) Where prosecutors have reason to believe that the disclosure officer has not discharged the obligation in paragraph 19 of this Guidance to inspect, view, listen to or search relevant material, they must at once raise the matter with the disclosure officer and request that it be done. Where appropriate, the matter should be raised with the officer in the case or a senior investigator.

- 32) Prosecutors should copy the defence case statement to the disclosure officer and investigator as soon as reasonably practicable, and should tell the investigator if, in their view, reasonable and relevant lines of further enquiry should be pursued. If the defence case statement points to other reasonable lines of enquiry, further investigation may be required. Evidence obtained as a result of these enquiries may be used as part of the prosecution case or to rebut the defence.
- 33) It is vital that prosecutors consider defence case statements thoroughly. Prosecutors cannot comment upon, or invite inferences to be drawn from, failures in defence disclosure otherwise than in accordance with Article 86(2) of the CPL. Prosecutors may cross-examine the defendant(s) on differences between the defence case put at trial and that set out in his or her defence case statement.
- 34) Prosecutors will challenge the lack of, or inadequate, defence case statements in writing, copying the document to the court if necessary and seeking directions from the court to require the provision of an adequate statement from the defence.
- 35) Again, if material does not fulfil the disclosure test there is no requirement to disclose it. For this purpose, the parties' respective cases must be analysed to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted.
- 36) Prosecutors should ensure that all material which ought to be disclosed under the CPL is disclosed to the defence. However, prosecutors cannot be expected to disclose material if they are not aware of its existence. As far as is possible, prosecutors must place themselves in a fully informed position to enable them to make decisions on disclosure.

Defence

- 37) Defence engagement must be early and meaningful for the disclosure regime to function as intended. Defence case statements are integral and are intended to help focus the attention of the prosecutor, court and co-defendants on the relevant issues in order to identify any relevant unused material. Defence case statements should be drafted in accordance with the CPL.
- 38) Defence requests for further disclosure should ordinarily only be answered by the prosecution if the request is relevant to and directed towards an issue identified in the defence case statement. A further or amended defence case statement may be provided to the prosecutor. It is not part of the prosecutor's duty to conduct research into general aspects of the defence case by way of consecutive requests made in correspondence. The prosecution is not under a duty to disclose as unused material evidence which only serves to undermine the defence case.
- 39) In cases which involve extensive unused material that is within the knowledge of a defendant, the defence will be expected to provide the prosecution and the court with assistance in identifying material which it is suggested passes the test for disclosure.

- 40) Meaningful defence engagement will help the prosecution to keep disclosure under review. The continuing duty of review for prosecutors is more likely to require the disclosure of further material to the defence if the defence have clarified and articulated their case.

Applications for non-disclosure in the public interest

- 41) Under Article 82(3) of the CPL, prosecutors may apply to the court for an order to withhold material which would otherwise fall to be disclosed. Such an order may only be made if the court is satisfied that disclosure of the material would not be in the public interest. The starting point remains that where material satisfies the disclosure test, full disclosure should be made. It is therefore important that, before making such an application, prosecutors should try 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 defendant need not be disclosed and there is no need to bring it to the attention of the court. Only where the material is otherwise disclosable and the prosecution believe that it is not in the public interest to disclose it should the prosecution seek an order from the court as to whether it should be disclosed.
- 42) Prior to making the application, the prosecutor must examine the material which is the potential subject matter of the application and make any necessary enquiries of the investigator. The investigator must be frank with the prosecutor 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 and why it is not in the public interest to disclose it.
- 43) Paragraph 36 of *R v H & C* [2004] 2 Cr. App. R. 10 [2004] UKHL 3 sets out the test to be applied when considering whether material should be withheld in the public interest. This test should be applied, firstly by the prosecutor, prior to the making of any application, and then by the court, at any subsequent hearing. It is essential that these principles are adhered to, to ensure that the procedure for examination of material in the absence of the defendant is compliant with Article 6 of the European Convention on Human Rights.
- a. What is the material that the prosecution seek to withhold?
 - b. Is the material such that it may weaken the prosecution case or strengthen that of the defence? If no, then it does not fall to be disclosed. If yes, then full disclosure should ordinarily be made, subject to c., d. & e. below.
 - c. 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, then the material ought to be disclosed.
 - d. If answers to b. and c. are Yes, can the defendant's interests be protected without disclosure, or can disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question whilst still affording adequate protection to the interests of the defence?
 - e. Do measures proposed in d. 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

- f. If limited disclosure is ordered pursuant to d. or e., may the effect of such disclosure render the trial process unfair to the defendant? If yes, then fuller disclosure must be ordered, even if this leads to the prosecution discontinuing the case so that disclosure does not take place.
 - g. If the answer to f. is no, does that answer remain the same throughout the trial process?
- 44) If prosecutors conclude that a fair trial cannot take place because material which satisfies the test for disclosure cannot be disclosed in the public interest, and that this cannot be remedied by the above procedure, how the case is presented, or by any other means, they should not continue with the case.

31 October 2019



Attorney General’s Guidance 2019

Advice on communication evidence

- 1) Communications between suspects, complainants or witnesses can be of critical significance whether as evidence in support of the prosecution case or as unused material which either undermines it or assists the defence case. This is particularly so where the complainant and suspect have been in a personal relationship, for example, in cases involving allegations of a sexual nature. This guidance is primarily directed to such cases. Its purpose is to ensure that the significance of communication evidence is understood and assessed at the appropriate time and that it is handled correctly. Serious consequences have occurred and will continue to do so if this is not done. Such evidence includes communications by way of telephone or other electronic device or by social media and is not restricted to communications between the complainant and suspect but may include contact with third parties.
- 2) Investigating officers are required to pursue all reasonable lines of inquiry in accordance with the Attorney General’s guidance in order to identify relevant material. What is reasonable in each case will depend upon the particular circumstances. This will often include the obtaining and analysis of communication evidence, whether it originates from devices belonging to the complainant or the suspect or, in some cases, to third parties. Prosecutors should be alert to the often critical importance of such evidence and, where such lines of inquiry have not been undertaken, should provide appropriate advice to the police to pursue them. This might be advice to obtain devices which have not hitherto been seized or to examine those which have in an appropriate way.
- 3) The examination of communication devices belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all. 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 retain 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.
- 4) Where downloads of telephones or other devices have been obtained, investigators and prosecutors should, in consultation, consider setting assessed parameters for examination of the data that are necessary, proportionate and reasonable in the given circumstances.

This includes all forms of message communication (even if deleted) and photographs / videos if stored. The use of search terms for examination may or may not be an appropriate method. Other techniques may also be feasible.

It is generally not sufficient only to consider communications between the complainant and suspect. Communications between either of them and others may well have an impact on the case, for example, where reference is made by either to the events which are the subject of the allegations.

- 5) If the investigation reveals communication evidence which assists the prosecution case, then this should be provided to the prosecutor to consider when making a charging decision.
- 6) If the investigation reveals communication evidence which might reasonably be considered capable of undermining the prosecution case or assisting the defence case, then it must be treated as unused material. As such:
 - a) The telephone / device and any download deriving from it must be listed on the disclosure schedule.
 - b) The material which might be capable of undermining the prosecution case or assisting the defence case must be identified in the disclosure schedule. This includes provision of the material to the prosecutor, which must be done before a charging decision is made.
- 7) For the avoidance of any doubt, in all bail cases, a charging decision ought not be made until the processes set out above have been complied with. Prosecutors must be in a position properly to assess the impact of communication evidence before the charging decision is made.
- 8) Disclosure is an ongoing process and the impact of communication evidence must be reconsidered as appropriate. Most particularly, after receipt of the defence case statement or any indication as to the nature of the defence, the disclosure officer should re-examine all communication material to ascertain if any of it meets the disclosure test and, if so, bring it immediately to the attention of the prosecutor.
- 9) Should any communications material need to be disclosed then it must be redacted appropriately so as to preserve confidentiality and privacy in respect of any matters which are not relevant.