
Notice of Publication of Code of Practice

In accordance with section 11 of the Criminal Procedure (Disclosure) Ordinance 2007(a), the Code of Practice prepared by the Administrator under section 9 of that Ordinance is published below:

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CRIMINAL PROCEDURE (DISCLOSURE) ORDINANCE 2007

CODE OF PRACTICE UNDER SECTION 11

Preamble

This code of practice is published under Section 11 of the Criminal Procedure (Disclosure) Ordinance 2007 ('the Ordinance'). It prescribes the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters.

Introduction

1.1 This code of practice applies in respect of criminal investigations conducted by police officers, beginning on or after the day on which this code is published in the Gazette. Persons other than police officers who are charged with the duty of conducting an investigation as defined in the Ordinance are to have regard to the relevant provisions of the code, and should take these into account in applying their own operating procedures.

1.2 This code does not apply to persons who are not charged with the duty of conducting an investigation.

Definitions

2.1 In this code:

- a *criminal investigation* is an investigation conducted by police officers with a view to it being ascertained whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it. This will include:

- investigations into crimes that have been committed;

- investigations whose purpose is to ascertain whether a crime has been committed, with a view to the possible commencement of criminal proceedings; and

- investigations which begin in the belief that a crime may be committed, for example when the police keep premises or individuals under observation for a period of time, with a view to the possible commencement of criminal proceedings;

- *charging a person with an offence* includes prosecution by way of summons;

- an investigator is any police officer involved in the conduct of a criminal investigation. All investigators have a responsibility for carrying out the duties imposed on them under this code, including in particular recording information, and retaining records of information and other material;

- the *officer in charge of an investigation* is the police officer responsible for directing a criminal investigation. He is also responsible for ensuring that proper procedures are in place for recording information, and retaining records of information and other material generated or obtained in the course of the investigation;

- the *disclosure officer* is the person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor;

- the *prosecutor* is the authority responsible for the conduct, on behalf of the Crown, of criminal proceedings resulting from a specific criminal investigation;

- *material* is material of any kind, including information and objects, which is obtained in the course of a criminal investigation and which may be relevant to the investigation. This includes not only material coming into the possession of the investigator (such as documents seized in the course of searching premises) but also material generated by him (such as interview records);

- material may be *relevant to an investigation* if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case;

- *sensitive material* is material, the disclosure of which, the disclosure officer believes would give rise to a real risk of serious prejudice to an important public interest;

- references to *prosecution disclosure* are to the duty of the prosecutor under section 4 of the Ordinance to disclose material which is in his possession or which he has inspected in pursuance of this code, and which might reasonably be considered capable of undermining the case against the accused, or of assisting the case for the accused;
- references to the *disclosure of material* to a person accused of an offence include references to the disclosure of material to his legal representative.

General responsibilities

3.1 The functions of the investigator, the officer in charge of an investigation and the disclosure officer are separate. Whether they are undertaken by one, two or more persons will depend on the complexity of the case and the administrative arrangements within each police force. Where they are undertaken by more than one person, close consultation between them is essential to the effective performance of the duties imposed by this code.

3.2 In any criminal investigation, one or more deputy disclosure officers may be appointed to assist the disclosure officer, and a deputy disclosure officer may perform any function of a disclosure officer as defined in paragraph 2.1.

3.3 The Divisional Commander for each area is responsible for putting in place arrangements to ensure that in every investigation the identity of the officer in charge of an investigation and the disclosure officer is recorded. The Divisional Commander must ensure that disclosure officers and deputy disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively. An individual must not be appointed as disclosure officer, or continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged crime which is the subject of the investigation. The advice of a more senior officer must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as disclosure officer. If thereafter the doubt remains, the advice of a prosecutor should be sought.

3.4 The officer in charge of an investigation may delegate tasks to another investigator, to civilians employed by the police force, or to other persons participating in the investigation under arrangements for joint investigations, but he remains responsible for ensuring that these have been carried out. In particular, it is an essential part of his duties to ensure that all material which may be relevant to an investigation is retained, and either made available to the disclosure officer or (in exceptional circumstances) revealed directly to the prosecutor.

3.5 In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from any suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner.

3.6 If the officer in charge of an investigation believes that any other persons may be in possession of material that may be relevant to the investigation, and if this has not been obtained under paragraph 3.5 above, he should ask the disclosure officer to inform them of the existence of the investigation and to invite him or them to retain the material, in case they receive a request for its disclosure. The disclosure officer should inform the prosecutor that they may have such material. However, the officer in charge of an investigation is not required to make speculative enquiries of other persons; there must be some reason to believe that they may have relevant material. That reason may come from information provided to the police by the accused or from other inquiries made or from some other source.

3.7 If during a criminal investigation, the officer in charge of an investigation or disclosure officer for any reason no longer has responsibility for the functions falling to him, either his supervisor or the police officer in charge of criminal investigations for the Divisional area concerned must assign someone else to assume that responsibility. That person's identity must be recorded.

Recording of information

4.1 If material which may be relevant to the investigation contains information which is not recorded in any form, the officer in charge of the investigation must ensure that it is recorded in a durable or retrievable form (including in writing, on video or audio tape, or on computer disk).

4.2 Where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, the officer in charge of the investigation must ensure that its contents are transferred as a true record to a durable and more easily-stored form before that happens.

4.3 Negative information is often relevant to an investigation. If the officer in charge of the investigation considers it may be relevant, it must be recorded. An example might be a number of people present in a particular place at a particular time who state that they saw nothing unusual.

4.4 Where information which may be relevant is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time. This includes, for example, information obtained in house-to-house enquiries, although the requirement to record information promptly does not require an investigator to take a statement from a potential witness where it would not otherwise be taken.

Retention of material

(a) Duty to retain material

5.1 The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation. If:

- the original is perishable,
- the original was supplied to the investigator rather than generated by him and is to be returned to its owner; or
- the retention of a copy rather than the original is reasonable in all the circumstances,

material may be retained in the form of a copy (such as photograph, video recording or digital capture) rather than the original.

5.2 If the officer in charge of an investigation becomes aware as a result of developments in the case that material previously examined but not retained (because it was not thought to be relevant) may now be relevant to the investigation, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required.

5.3 The duty to retain material includes in particular the duty to retain material falling into the following categories, where it may be relevant to the investigation:

- crime reports (including crime report forms, relevant parts of incident report books or police officer's notebooks);
- custody records;
- records which are derived from tapes of telephone calls (for example, calls to emergency services) containing descriptions of an alleged offence or offender;
- final versions of witness statements (and draft versions where their content differs from the final version), including any exhibits mentioned (unless these have been returned to their owner on the understanding that they will be produced in court if required);
- interview records (written records, or audio or video tapes of interviews with actual or potential witnesses or suspects);
- communications between the police and experts such as forensic scientists, reports of work carried out by experts, and schedules of scientific material prepared by the expert for the investigator, for the purposes of criminal proceedings;
- records of the first description of a suspect by each potential witness who purports to identify or describe the suspect, whether or not the description differs from that of subsequent descriptions by that or other witnesses;
- any material casting doubt on the reliability of a witness.

5.4 The duty to retain material falling into these categories does not extend to items which are purely ancillary to such material and possess no independent significance (for example, duplicate copies of records or reports).

(b) Length of time for which material is to be retained.

5.5 All material which may be relevant to the investigation must be retained until a decision is taken whether to commence proceedings against a person in relation to an offence.

5.6 If a criminal investigation results in proceedings being commenced, all material which may be relevant must be retained at least until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case.

5.7 Where the accused is convicted, all material which may be relevant must be retained at least until:

- the convicted person is released from custody, or discharged from hospital, in cases where the court imposes a custodial sentence or a hospital order;
- six months from the date of conviction, in all other cases.

If the court imposes a custodial sentence or hospital order and the convicted person is released from custody or discharged from hospital earlier than six months from the date of conviction, all material which may be relevant must be retained at least until six months from the date of conviction.

5.8 If an appeal against conviction is in progress when the release or discharge occurs, or at the end of the period of six months specified in paragraph 5.9, all material which may be relevant must be retained until the appeal is determined.

Preparation of material for prosecutor

(a) Introduction

6.1 The officer in charge of the investigation, the disclosure officer or an investigator may seek advice from the prosecutor about whether any particular item of material may be relevant to the investigation.

6.2 Material which may be relevant to an investigation, which has been retained in accordance with this code, and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule.

6.3 Material which the disclosure officer does not believe is sensitive must be listed on a schedule of non-sensitive material. The schedule must include a statement that the disclosure officer does not believe the material is sensitive.

6.4 Any material which is believed to be sensitive must be either listed on a schedule of sensitive material or, in exceptional circumstances, revealed to the prosecutor separately. If there is no sensitive material, the disclosure officer must record this fact on a schedule of sensitive material.

6.5 Paragraphs 6.6 to 6.11 below apply to both sensitive and non-sensitive material. Paragraphs 6.9 to 6.11 apply to sensitive material only.

(b) Manner in which material is to be listed on schedule

6.6 The disclosure officer should ensure that each item of material is listed separately on the schedule, and is numbered consecutively. The description of each item should make clear the nature of the item.

6.7 In some enquiries it may not be practicable to list each item of material separately. For example, there may be many items of a similar or repetitive nature. These may be listed in a block and described by quantity and generic title.

6.8 Even if some material is listed in a block, the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually.

(c) Treatment of sensitive material

6.9 Subject to paragraph 6.12 below, the disclosure officer must list on a schedule of sensitive material any material, the disclosure of which he believes would give rise to a real risk of serious prejudice to the public interest, and the reason for that belief. The schedule must include a statement that the disclosure officer believes the material is sensitive. Depending on the circumstances, examples of such material may include the following among others:

- material relating to domestic or international security;
- material received from the intelligence and security agencies;
- material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods;
- material given in confidence;
- material relating to the identity or activities of informants, or undercover police officers, or witnesses, or other persons supplying information to the police who may be in danger if their identities are revealed;
- material revealing the location of any premises or other place used for police surveillance, or the identity of any person allowing a police officer to use them for surveillance;
- material revealing, either directly or indirectly, techniques and methods relied upon by a police officer in the course of a criminal investigation, for example covert surveillance techniques, or other methods of detecting crime;
- material whose disclosure might facilitate the commission of other offences or hinder the prevention and detection of crime;
- material upon the strength of which search warrants were obtained;

- material containing details of persons taking part in identification parades;
- material supplied to an investigator during a criminal investigation which has been generated by an official of a body concerned with the regulation or supervision of bodies corporate or of persons engaged in financial activities, or which has been generated by a person retained by such a body;
- material supplied to an investigator during a criminal investigation which relates to a child or young person and which has been generated by any person or body concerned with the welfare of such persons or other party contacted by an investigator during the investigation;
- material relating to the private life of a witness.

6.10 In exceptional circumstances, where an investigator considers that material is so sensitive that its revelation to the prosecutor by means of an entry on the schedule of sensitive material is inappropriate, the existence of the material must be revealed to the prosecutor separately. This will apply only where compromising the material would be likely to lead directly to the loss of life, or directly threaten domestic or international security.

6.11 In such circumstances, the responsibility for informing the prosecutor lies with the investigator who knows the detail of the sensitive material. The investigator should act as soon as is reasonably practicable after the file containing the prosecution case is sent to the prosecutor. The investigator must also ensure that the prosecutor is able to inspect the material so that he can assess whether it can appropriately be disclosed and, if so, whether it needs to be brought before a court for a ruling on disclosure.

Revelation of material to prosecutor

7.1 The disclosure officer must give the schedules to the prosecutor. Wherever practicable this should be at the same time as he gives him the file containing the material for the prosecution case.

7.2 If the prosecutor asks to inspect material which has not already been copied to him, the disclosure officer must allow him to inspect it. If the prosecutor asks for a copy of material which has not already been copied to him, the disclosure officer must give him a copy. However, this does not apply where the disclosure officer believes, having consulted the officer in charge of the investigation, that the material is too sensitive to be copied and can only be inspected.

7.3 If material consists of information which is recorded other than in writing, it is a matter for agreement between the disclosure officer and the prosecutor whether it should be given to the prosecutor in its original form as a whole, or by way of relevant extracts recorded in the same form, or in the form of a transcript,

Subsequent action by disclosure officer

8.1 At the time a schedule of non-sensitive material is prepared, the disclosure officer might not know exactly what material will form the case against the accused, and the prosecutor might not have given advice about the likely relevance of particular items of material. Once these matters have been determined, the disclosure officer must give the prosecutor, where necessary, an amended schedule listing any additional material which is not already listed in the schedule and which:

- he believes is not sensitive,
- may be relevant to the investigation, and
- does not form part of the case against the accused;

unless he is informed in writing by the prosecutor that the prosecutor intends to disclose the material to the defence.

8.2 Section 4 of the Ordinance imposes a continuing duty on the prosecutor, for the duration of criminal proceedings against the accused, to disclose material which satisfies the test for disclosure (subject to public interest considerations). To enable him to do this, any new material coming to light should be treated in the same way as the earlier material.

Certification by disclosure officer

9.1 The disclosure officer must certify to the prosecutor that to the best of his knowledge and belief, all relevant material which has been retained and made available to him has been revealed to the prosecutor in accordance with this code. He must sign and date the certificate. It will be necessary to certify not only at the time when the schedule and accompanying material is submitted to the prosecutor, but also whenever a schedule is otherwise given or material is otherwise revealed to the prosecutor.

Disclosure of material to the accused

10.1 If material has been copied to the prosecutor, and it is to be disclosed, whether it is disclosed by the prosecutor or the disclosure officer is a matter of agreement between the two of them.

10.2 The disclosure officer must disclose material to the accused either by giving him a copy or by allowing him to inspect it. If the accused asks for a copy of any material which he has been allowed to inspect, the disclosure officer must give it to him, unless in the opinion of the disclosure officer that is either not practicable (for example because the material consists of an object which cannot be copied, or because the volume of material is disproportionately great) or not desirable (for example because the material is a statement by a child witness in relation to a sexual offence).

10.3 If material which the accused has been allowed to inspect consists of information which is recorded other than in writing, whether it should be given to the accused in its original form or in the form of a transcript is matter for the discretion of the disclosure officer. If the material is transcribed, the disclosure officer must ensure that the transcript is certified to the accused as a true record of the material which has been transcribed.

10.4 If a court concludes in relation to an item of sensitive material that the interests of the defence outweigh the public interest in withholding disclosure, it will be necessary to disclose the material if the case is to proceed. This does not mean that sensitive documents must always be disclosed in their original form for example, the court may agree that sensitive details still requiring protection should be blocked out, or that documents may be summarised, or that the prosecutor may make an admission about the substance of the material.

