

Giving Evidence or Information about Suspected Crimes

Guidance for Departments & Investigators

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ANNEX A Pro-Forma Request for Information

1. GENERAL INTRODUCTION

Introduction

1.1 Crown servants who believe that they have information (including documents) which may be germane to the planning or commission of a criminal offence, or to the investigation or prosecution of a criminal offence or to the defence have a general professional duty to draw this fact to the attention of the appropriate authorities. Furthermore, Crown servants have a duty to support the administration of justice by ensuring that investigators and the parties to a prosecution are given full and proper assistance in their search for information about the alleged offence.

1.2 The purpose of this booklet is to summarise the rules and procedures relating to the declaration of information (including documents) which may be germane to a criminal offence in England or Wales, or to the investigation or prosecution of such an offence. It also offers advice on the identification of information in response to requests from investigators, prosecutors or the defence, and on related matters. The booklet is mainly intended for investigators and other members of the prosecution team (when the relevant provisions of the Criminal Procedure and Investigations Act 1996 take effect, the prosecutor) who may need to seek information from Government departments or other Crown bodies, and for those working on "Offence Enquiry Points" within such departments and Crown bodies. However, it may also provide useful background information for others.

The Criminal Procedure and Investigations Act 1996

1.3 This booklet reflects the current law on the disclosure of material, and on the means used to secure the attendance of witnesses or the production of documents, in criminal proceedings. Certain provisions of the Criminal Procedure and Investigations Act 1996 ("the 1996 Act"), which are expected to take effect later this year, change the law in a number of ways. Where the changes affect the procedures set out in this booklet, it provides guidance on the new as well as the current procedures.

Offence Enquiry Points

1.4 In each Government department and in certain other Crown bodies there are designated procedures and a nominated office to handle enquiries relating to alleged or possible criminal offences.

In most departments this office is known as the "Offence Enquiry Point" although some departments have established other channels of communication. For ease of reference, the term "Offence Enquiry Point" will be used in this booklet to cover all departments' arrangements of this nature. The Office Enquiry Point's functions are:

- (a) to give advice and guidance to officers of the department or Crown body who believe that they may have information concerning a possible or alleged criminal offence which should be passed on to an investigating authority, to the prosecution team (when the relevant provisions of the 1996 Act take effect, the prosecutor) or to the defence;
- (b) to provide a single contact point for all external enquiries concerning that department or Crown body which relate to an alleged offence, including all requests for information, documents or interviews;
- (c) to identify the individuals or sections best placed to respond to requests for information, documents or interviews;
- (d) where necessary, or at the request of the individual or section responding, to seek clarification of a request for information or documents or a narrowing of its scope;
- (e) to give advice and guidance to officers of the department or Crown body on their response to requests for information, including advice on the withholding of information which must be protected in the public interest or which it would be otherwise unlawful to disclose;
- (f) to check and forward responses to requests for information and witness statements to the originators of such requests; and
- (g) to co-ordinate and advise on departmental responses or representations, including making all appropriate arrangements with any part of the department which is in contact with the prosecution.

1.5 The aim of the Offence Enquiry Point in carrying out these functions is to facilitate the proper transmission of documents and information, and to assist Crown servants to fulfil their responsibilities described in paragraph 1.1 above. Guidance to assist those working on Offence Enquiry Points is contained in Chapter 3 of this Booklet, and information for departments, investigators and prosecutors on how to use the services of the Offence Enquiry Point is contained in Chapter 2.

"Disclosure" and "Relevance"

1.6 The terms "disclosure" and "relevance" have a particular meaning when used in relation to legal proceedings, and these terms have been avoided in this booklet except where their narrower legal meaning is intended. The duty to disclose material to the defence which is relevant to a prosecution (including "unused material") falls on the prosecutor, not on those who simply supply information to the prosecution team. When the relevant provisions of the 1996 Act take effect, the duty to disclose will be limited to material which is in the possession of the prosecutor or which he has inspected pursuant to the code of practice in criminal investigations, and which either might in his opinion undermine the prosecution case, or might reasonably assist the defence disclosed by the accused in a defence statement given under the Act.

Representations on Disclosure

1.7 Departments and other Crown bodies and individuals working in them may make representations to the prosecutor about the disclosure of information supplied by them or which refers to them - for example, if they believe that disclosure would place them in danger of attack or harassment. Such representation should normally be made by the Offence Enquiry Point on the department's or the individual's behalf. However, individuals must be free to make their own representations on matters which affect them personally if they wish to do so.

The Prosecution Team

1.8 Departments or other Crown bodies which are or have been directly involved in the investigation or prosecution of an alleged offence will invariably form part of the prosecution team for that case. However, others may also form part of the prosecution team. It is beyond the scope of this

booklet to define precisely the circumstances in which this may happen: however, the possibility should be considered if either of the following circumstances apply:

- (a) the department or Crown body has assisted in the preparation of the prosecution case other than by simply making evidence available; or
- (b) the department or Crown body has provided or was instructed to provide expert witnesses. Anyone who provides information or opinion about how other evidence should be interpreted, who provides specialist information to enable others to interpret evidence, or who conducts a specialist examination of persons, materials or data connected with the case may be an expert witness.

1.9 Material gathered or produced by members of the prosecution team in the course of an investigation will be revealed to the prosecutor, who in turn will consider the questions of relevance and disclosure. When the relevant provisions of the 1996 Act take effect, the concept of the Prosecution Team will no longer apply. The Act places certain duties on the prosecutor, defined as any person acting as a prosecutor, and also on persons charged with the duty of conducting a criminal investigation. Other persons who currently form part of the prosecution team will in future be third parties.

Private Prosecutions

1.10 There may be times when a private prosecution is commenced by an ordinary citizen, and requests for information are received by departments, investigators or prosecutors themselves, in relation to that private prosecution. In these circumstances the recipients of the request should establish with their Offence Enquiry Point the correct procedure for dealing with it, as this may differ from the advice contained in this Guidance.

Civil Litigation

1.11 The guidance in this booklet is intended to apply only to the provision of information germane to criminal investigations and prosecutions. Apart from information which is ordinarily available to the public (which should be supplied in the usual way), there is no general duty on a third party to supply (even relevant) information to either party engaged in

civil litigation. Each case must be considered on its merits, bearing in mind that the Crown should be impartial towards civil litigants and material made available to one party **ought** also to be given to the other party, unless the Crown is a party to the civil proceedings, in which case different considerations will apply.

2. PROCEDURES FOR INVESTIGATORS AND PROSECUTORS

Requests for Information, Documents or Interviews

2.1 All requests for information (including documents or interviews) relating to the policies and powers of central Government or the official activities of Crown servants should be addressed to the Offence Enquiry Point in the Government department or Crown body concerned. This applies even where an individual within the department or Crown body has contacted the investigator or prosecutor direct and the request for information is to follow up that approach. If it is not clear which department or Crown body is responsible for the information being sought, full details of the request should be addressed to the Offence Enquiry Point of the Treasury Solicitor who will advise on this issue.

2.2 Requests for information should be as precisely drawn as possible, particularly where specific documents or facts are being sought. Where available and applicable, requests for information should normally include:

- (a) the grounds for believing that the department or other Crown body concerned has documents or other information germane to the investigation or prosecution or the defence;
- (b) the broad subject matter or matters of the request (eg "exports", "imports" "agricultural subsidies", "Social security benefits", "insider dealing" etc);
- (c) the particular matters or issues germane to the request;
- (d) the period covered by the request;
- (e) the names of all persons, companies, organisations or parts of organisations germane to the request;

(f) details of any geographical features or limitations of the request (many departments have different sections to deal with different regions of the UK or different parts of the world);

(g) the case or hypothesis which the information being sought is intended to test and the likely lines of defence against this case or hypothesis; and

(h) time-limits for responding to the request.

2.3 In all cases, requests for information or documents should provide as much information as is reasonably practicable. Where there are any factors in addition to those set out in the above list which may help to identify potentially germane information or to narrow down any searches for information, these should also be noted in the request. Where any details contained in the request are sensitive, the nature and degree of sensitivity should be indicated so that appropriate measures can be taken to protect the request and to limit its circulation. A pro-forma "request for information" which may be used by investigators or prosecutors is attached at Annex A.

Difficulties in Meeting Requests

2.4 Even where all the details described above are supplied, difficulties may still arise in identifying the information required. This may happen, for example, where responsibility for the matters covered by the request is spread between several different sections of the department or Crown Body concerned. In these circumstances, the Offence Enquiry Point will either seek further details or suggest a meeting to try to resolve the problem. However, it may be necessary for a more limited search for information to be carried out than that required by the terms of the request. In this case the parameters of the search and the reasons why a fuller search is not practicable should be explained in writing to the originator by the Offence Enquiry Point.

3. PROCEDURES FOR OFFENCE ENQUIRY POINTS

Enquiries From Officials

3.1 Crown servants who **believe** that they have information (including documents) which may be germane to the planning or commission of a criminal offence, or to the investigation or prosecution of a criminal offence or to the defence have a general professional duty to draw this fact to the attention of the relevant authorities. However, in the first instance, such officers are instructed to seek advice from their Offence Enquiry Points (see the Guidance Booklet for Crown Servants). Offence Enquiry Points should keep a written record of all such enquiries, together with a summary of any advice given and the results of any immediate actions taken in response. A copy of this Enquiry Record should normally be sent to the appropriate investigating or prosecuting authority and to the officer making the enquiry.

3.2 Enquiries are likely to fall into one of three main categories:

- (a) those where an officer suspects¹ that he may have information germane to a criminal investigation or in a criminal case, and seeks further information to enable him to assess whether his suspicion is well founded;

- (b) those where an officer believes (or knows) that he has information which is germane to the broad issues under investigation or in a criminal case and wishes to advise the investigators or prosecutors of the existence of the information in order that they can assess whether it is likely to be germane to the particular circumstances of the case; or

- (c) those where an officer suspects or believes that he has information about a criminal offence (or a planned offence) which is not yet the subject of an investigation or prosecution.

¹ The guidance booklet for Crown Servants draws a distinction between suspicions and beliefs, and proposes different courses of action in response to each. In that guidance, a suspicion is held to be a reasonable but unsubstantiated doubt or concern, a belief is held to be based on some solid grounds or evidence (though not necessarily conclusive grounds or evidence).

3.3 Enquiries under paragraph 3.2 (a) above may be sparked by the mere mention, in connection with a criminal investigation or prosecution, of a person or company with whom the officer has had official dealings, or may relate to official dealings with a person or company which is under suspicion but in a wholly unconnected area. In such cases it may be sufficient for the Offence Enquiry Point to confirm with the investigators or prosecutors whether the person or company is under suspicion and, whether the person or company is under suspicion and, if so, whether the officer's dealings with this person or company are of a kind which may be germane to their investigation. If the answers to these questions are in the negative, the Enquiry Record should be noted accordingly and the officer may be advised that no further action is necessary. Copies of the Enquiry Record should, however, still be sent to the investigators or prosecutors and to the officer concerned.

3.4 Where it is not possible to exclude with reasonable assurance the possibility that the information is germane², or where the officer concerned believes that the information is germane (Paragraph 3.2 (b) above) the investigators or prosecutors must be informed accordingly. The officer concerned should be asked to describe the information he holds and his reasons for believing that it may be germane to the investigation or prosecution. If there are known to be any impediments to allowing access to or disclosure of this information (eg the information cannot lawfully be revealed) this should be noted. The description should be forwarded **by the Offence Enquiry Point** to the investigators or prosecutors, together with a copy of the Enquiry Record, which should also be copied to the officer concerned. Where the description itself raises public interest issues or reveals information protected in law (see Chapter 4) necessary amendments should be agreed with the officer concerned.

3.5 Where an officer voices suspicions that a criminal offence not known to be under investigation has taken place or is planned (paragraph 3.2 (c) above), the appropriate investigating authority should normally be informed straight away and an Enquiry Report completed and copied to the investigating authority and the officer concerned³. However, there are circumstances in which it would be sensible

² Under the test set out in R v Keane, information is material (to a prosecution) if it can be seen on a sensible appraisal to be: (i) relevant or possibly relevant to an issue in a trial; (ii) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or (iii) to hold out a real, as opposed to a fanciful, prospect of providing a lead on evidence which goes to (i) or (ii). Although this test will no longer operate when the relevant provisions on the 1996 Act take effect, analogous criteria may be applied both now and in the future in assessing whether information is germane to an investigation.

³ Where the offence or suspected offence has been committed by a member of the department's own staff in connection

and acceptable to interview the officer concerned or take other preliminary measures before deciding whether an investigating authority need be informed. This will apply where:

- (a) there are substantial doubts whether the commission or intention to commit a criminal offence can reasonably be inferred from the evidence giving rise to the suspicions;
- (b) there are doubts whether the activities which the officer suspects have been engaged in constitute a criminal offence;
- (c) it is apparent that there are innocent explanations of the matters or activities giving rise to the officer's suspicions (as well as ones suggesting guilt), and the applicability of these innocent explanations can readily be established internally;
- (d) the possible (or known) offence is minor, is against a Government department or Crown body, and the department or Crown body concerned decides as a matter of policy that the issue should be investigated internally and, if appropriate, dealt with under the disciplinary arrangements;
- (e) the possible (or known) offence is minor and is against an individual who has made it known that he does not wish to press charges (it may, nevertheless, be appropriate for the Police or other relevant investigating authorities to be informed: for example if there are any grounds for suspecting that the offence was not an isolated incident. The police must be informed where the suspected offence is other than a minor one); or
- (f) wholly exceptional circumstances apply, and the department in consultation with the Law Officers or the relevant prosecuting authority decides that it would be contrary to the public interest to pursue the matter further.

3.6 If, following any interview or other preliminaries, it appears that there are reasonable grounds

with their employment, established departmental procedures should be followed where applicable.

for suspecting a criminal offence (other than one falling within the exceptions noted above) or if doubts on this issue have not been resolved, then the appropriate investigating authority should be informed and an Enquiry Report completed and copied to the officer and the investigating authority. If both the Offence Enquiry Office and the officer are satisfied following an interview that there are no reasonable grounds for suspecting an offence, an Enquiry Report recording this conclusion should be completed and copied to the officer concerned, but need not be copied any further. If the officer disputes a recommendation by the Offence Enquiry Point not to inform an investigating authority, and the matter cannot be explained to his satisfaction, he should be informed of his rights under the Civil Service Code, and of the procedures laid down within his department for reporting such matters, including his right of appeal to the Civil Service Commissioners.

Handling Requests for Information, Documents or Interviews

3.7 Requests for information (including documents or interviews) may be received from investigators, from prosecutors or from the defence and all must be given careful consideration. All such requests should be addressed to the relevant Offence Enquiry Point, and responses to the request should also be returned through them. In addition, Offence Enquiry Points may need to take responsibility for co-ordinating any **departmental responses**, ie those which seek information on the policies of the department rather than on past decisions, deliberations or events.

3.8 The first task for the Offence Enquiry Point is to consider the grounds given by the originator of the request for believing that the department or Crown body has documents or other information germane to the investigation or prosecution. If these are unclear, or appear insubstantial or unreasonable, this issue should be clarified with the originator before any further steps are taken. If the originator is able to show no more than a possibility that the Department or Crown body possesses information falling within the terms of the request, the Offence Enquiry Point need normally only advise the relevant sections or individuals of this possibility and remind them of their responsibility to volunteer any information which they believe to be germane.

3.9 If the request is to be processed, the Offence Enquiry Point should first identify the individuals who are best placed to respond. They should be sent a copy of the request together with appropriate guidance to assist them in making their response. If they require clarification of the request, or further details to enable them to locate documents, the Offence Enquiry Point should obtain this information

on their behalf from the originator of the request. If the individual handling the response to the request advises that it is not practicable to comply with the request in its present form within the timescale set, or at all, the Offence Enquiry Point should either try to get the scope of the request narrowed or, if there is any prospect of this producing a resolution of the problem, arrange a meeting between the individuals handling the request and its originator.

3.10 Possible means of resolving difficulties in complying with the request which may be considered include:

- * allowing the originator of the request access to the files which may contain documents falling within the terms of the request for them to carry out their own search. This will depend on the nature and sensitivity of the files concerned and the level of security clearance held by the originators. Where the originators are not already bound by a duty to preserve the confidentiality of official documents a written undertaking to this effect must always be obtained; or

- * obtaining statements from those who dealt most closely with the matters which are the subject of the request stating the current strength of their present recollection of those matters and whether they recall any documents, meetings or other facts or information germane to the particulars of the request or parts thereof. This would be most applicable where those concerned had a clear recollection of the matters covered by the request and are confident that no documents or other information germane to the particulars of the request (or any parts of it) exist or are able to point to strong evidence that such documents or other information do not exist (for example the absence of any relevant names in lists, indexes or databases).

3.11 In the event that any difficulties cannot be resolved to the satisfaction of both the originator and the individuals responsible for responding to the request, the Offence Enquiry Point will advise as to the terms of the response. In doing so it will have regard to:

- (a) advice from the originator on the seriousness of the alleged or suspected offence and the importance and materiality of the information sought to the outcome of the

investigation or proceedings;

(b) the scale of the task of identifying information which may be germane to the investigation or proceedings and the resources available (or which can reasonably be made available) to identify such information; and

(c) other public interest factors brought to their attention which have a bearing on the case, for example: the actual or potential impact of the investigation or proceedings on the defendant (where this significantly exceeds any penalties which may be applied on conviction); or the existence of factors which make the suspected offence a matter of particular public concern, such as offences by those charged with upholding the law or by the holders of certain offices.

3.12 The originator should be informed in writing if the scope or extent of the search for information is to be less than that set out in the request. The scope of the search which can actually be carried out should be explained, as should the reasons why the fuller search envisaged in the request could not be carried out. The originator should be asked to confirm, if he has not already done so, that he wishes this more limited search to be carried out.

Responding to Requests for Information

3.13 The individuals or sections preparing the formal response to a request for information should be instructed that the response must be returned to the Offence Enquiry Point, not direct to the originator. This is to enable the Offence Enquiry Point to check that the response does not contain information or documents which are protected in law or which may need to be withheld in the public interest (see Chapter 4), and to check the correct first recipient of the information.

3.14 The terms of the request for documents may suggest (or attempt to prescribe) the form which any response should take. Where it is convenient to do so, the response should be prepared in this form. However, whilst departments and other Crown bodies should be as helpful as possible to the originator of the request, there may be good reasons why the response cannot take the form suggested. Possible forms of response include:

- (a) sending copies of all the documents which you have identified as being germane to the request or to the matters under investigation;
- (b) inviting the originator of the request to examine the documents you have identified, if necessary, subject to certain conditions (eg security measures) being satisfied; or
- (c) describing any information and/or documents you have identified so that the originator of the request can assess whether or not it is likely to be germane.

3.15 If it is clear at the outset that the response cannot be provided in the form requested by the originator, those preparing the response should be instructed accordingly: in other cases, they should be advised to discuss the form of the response with their Offence Enquiry Point once the information has been assembled, especially where a large number of documents or potentially sensitive material is involved.

Handling Requests for Information from the Defence

3.16 Much of the information held by Government departments and other Crown bodies is confidential and ought not be given wider circulation, or allowed to be used for purposes other than those for which it was produced or supplied. Except where the information is particularly sensitive or is protected in law (see Chapter 4 below) this confidentiality is overridden by the public interest in justice being done. In general, requests for information from the defence should be handled in the same manner as other requests, as described in the paragraphs above.

3.17 The duty of Government departments and other Crown bodies is to assist in the administration of justice, and this requires that access to information which a defendant reasonably believes would assist his case should not be denied without good cause. Requests which are germane to the defence may be forwarded to an Offence Enquiry Point by the prosecutor, or they may be received direct from the defence.

3.18 Where a request is received direct from the defence, and relates to information or documents which are sensitive, such that the department or Crown body is under an obligation to protect them

from wider disclosure or use, the Offence Enquiry Point should consider paragraphs 4.1 to 4.23 below, and take the appropriate steps.

3.19 Where a direct request from the defence relates to information or documents which are not sensitive (as defined in Chapter 4), and which have not been the subject of prior consideration by the prosecution, the Offence Enquiry Point will need to decide whether to comply with the request. If the Offence Enquiry Point considers that the request is a reasonable one, then it should disclose the material, given the duty to assist the administration of justice referred to in paragraph 3.17. If the Offence Enquiry Point believes that there are good grounds which would justify withholding the requested material, it may wish to consult the prosecution, before communicating its decision to the defence, to see if the prosecutor has any views on the relevance, to the defence, of the material which the Offence Enquiry Point proposes to withhold. Where a defence request relates to non-sensitive material which has, in fact, been considered previously by the prosecution, but not disclosed, the Offence Enquiry Point may find it helpful to ascertain from the prosecution the reasons for their decision, before taking its own decision on disclosure. When an Offence Enquiry Point decides to disclose material to the defence, it should ensure that the disclosed material is copied to the prosecutor at the same time.

3.20 Requests by the defence to interview Crown servants should be considered on their merits. A definite purpose for the interview must be shown by the defence together with an indication of what specific information the defence believes is in the possession of the prospective interviewee. The views of the prospective interviewee should then be obtained on the likelihood of the interview fulfilling the stated purpose. Where a written response is considered more appropriate, the defence should be informed of the reasons for this decision and invited to submit a questionnaire. Interviews which are effectively "trial runs" of a cross examination are not acceptable, so all requests for interviews with Crown servants who have made (or are likely to make) witness statements, or who are likely to appear as prosecution witnesses should be considered with caution and, if appropriate, be refused. In any event the prosecution should be notified of such requests. Where requests for interviews are accepted, a legal adviser should normally be present during the interview. In some cases it may be appropriate to request that the defence submit a list of questions or points which they wish to put to the interviewee, in advance of the interview itself.

Legal Enforcement of Attendance of Witnesses

3.21 **Civil Proceedings** There are two methods by which the attendance of witnesses may be enforced in civil proceedings - subpoena, issued by the High Court, which may be either ad testificandum, or, if the production of documents in the possession or control of the witness is required, duces tecum, and summons, issued by the County Court. Note should be taken of the possibility of applying to set aside a subpoena or summons where it can be demonstrated that the subpoena (or summons) has not been issued bona fide for the purpose of obtaining relevant evidence and that the witness named is in fact unable to give relevant evidence⁴.

3.22 **Criminal Proceedings** There are four methods by which the attendance of witnesses may ordinarily be secured in criminal proceedings - witness summons, witness order, warrant and recognisance. Departments and Offence Enquiry Points should be aware that the 1996 Act abolishes witness orders and alters the procedures for obtaining and contesting witness summons. The relevant procedures should take effect later this year.

3.23 **Service of Process** The rules as to service of the various procedures are technical and legal advice should be sought at the time of receipt or before, if prior notice is given. Attendance in compliance with a subpoena or summons will waive any irregularity in the service thereof. It is sometimes useful to invite service of a subpoena or summons in order to counter any impression that government is voluntarily supporting one party to the litigation against another.

3.24 **Non-compliance** Wilful failure to attend court in compliance with a subpoena or summons or order is a contempt and is punishable by a fine and in some cases imprisonment. However, as indicated above, it may be possible to apply to the court to set aside the subpoena or summons or to make alternative arrangements for the evidence to be given, and for these reasons it is vital that legal advice is sought at as early a stage as possible.

3.25 If a department is obstructive in the face of requests for information the party seeking the information may serve a summons or subpoena as a device to encourage or compel co-operation.

⁴ See RSC Order 38 r 19 for further details.

Departmental Representations

3.26 All Government prosecutors are expected to comply with the principles set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions, and with any other guidance issued by the Attorney General when deciding whether to start or continue a prosecution. Where the evidence justifies a prosecution, the prosecutor must assess whether a prosecution is required in the public interest. If a department or Minister has any reason to doubt the propriety or safety of a prosecution it is quite proper for them to make this known to the prosecutor. These doubts may stem from information within the department concerning the fairness of a prosecution (for example because it reveals mitigating circumstances) or where a departmental interest needs to be taken into account in assessing the overall balance of public interest. All such representations (which are likely to be very rare occurrences) should be properly recorded. However, if a department or Minister has any doubts about making a direct approach to the prosecution, they should not hesitate to raise their concerns directly with the Law Officers. An approach to the Law Officers may be particularly appropriate where a department or Minister has views or is aware of factors which should be taken into account when assessing the public interest aspect of a decision whether to prosecute.

4. WITHHOLDING DOCUMENTS AND OTHER INFORMATION

Introduction

4.1 Crown servants have a general professional duty to reveal to a prosecutor or investigator the existence of any information (including documents) which they believe may be germane to the case and, unless the information is protected in law or will be the subject of a claim for Public Interest Immunity, to supply him with copies of any documents which he determines to be relevant. Crown servants also have a duty to assist the administration of justice by ensuring that the defence is not denied access to information which they (the defence) believe would assist the defendant's case, without good cause (see paragraphs 3.16 to 3.20). Chapter 3 contains advice on the procedures Offence Enquiry Points should use when dealing with information which may be germane to a criminal offence, both in response to requests for information, and when assisting Crown servants who believe they may possess such information. This Chapter offers guidance on how Offence Enquiry Points should approach the question of sensitive information, and the steps which need to be taken when deciding whether to withhold such information. The advice in this Chapter assumes that the information identified as sensitive is germane to the offence in question, and, therefore, falls to be revealed to an investigator, prosecutor or the defence, as appropriate.

Information Protected in Law

4.2 Some official information is protected by statute and such information must not be revealed to anyone who is not authorised to see it, for example, see section 118 of the Medicines Act 1968, or section 38 of the Legal Aid Act 1988. Offence Enquiry Points must ensure that individuals who seek advice on volunteering official information, who are asked to respond to a request for information, who are being interviewed, or who are likely to be called to give evidence in Court are advised about any statutory restrictions which may prevent them from revealing the information they hold. Such individuals should be instructed to seek further specific advice if it appears that they have any

information which would otherwise fall to be revealed which they believe may be protected in law.

4.3 Offence Enquiry Points should also check all responses to requests for information and witness statements before forwarding them to the originator to ensure that no information which is protected by statute is being revealed. In carrying out such checks the possible need to protect information in the public interest should also be considered. This issue is covered in more detail in paragraphs 4.4 - 4.23 below.

4.4 If exceptional circumstances are believed to exist which require that information protected by statute is revealed to a prosecuting authority (or to the courts), the advice of the Law Officers must be sought before revealing such information.

Public Interest Immunity

4.5 Information may need to be withheld in interviews, oral evidence, written statements, or in the supply of documents where it is believed that revealing it would cause real damage to the public interest. Such damage may arise directly and immediately from disclosure, for example, where revealing information will adversely affect national security or international relations; threaten the safety or well-being of an individual; harm the ability of the Government to manage the economy; or assist the commission or hamper the prevention or investigation of a crime, or prejudice a fair trial. In other cases the proposed disclosure may contribute to real damage to the public interest arising indirectly or in the longer term, for example where the information concerns the regulatory process.

4.6 It is impossible to list types or categories of document or information which will cause real damage if revealed, and which, therefore, could attract a public interest immunity claim. Therefore, each case must be appraised on its own merits, and an assessment made of whether disclosure would cause real harm to the public interest⁵.

4.7 A significant proportion of official information is held in confidence for one reason or another,

⁵ For further information on the real harm test see the statement by the Lord Chancellor and Attorney General on public interest immunity dated 18 December 1996 and the accompanying report, which you can obtain through your Departmental Library.

but this alone is not sufficient reason for the information to be withheld from the parties to criminal or civil proceedings. Consideration of whether information must be withheld in the public interest is a three stage process involving Ministers: first, information which it is believed would cause damage if revealed needs to be identified; secondly, the degree of damage and the risk of damage must be assessed (is it real damage to the public interest?); and thirdly, it must be determined whether revealing or withholding the information would do the greater damage to the public interest. Whilst departmental administrators and lawyers (for whom this booklet is intended) will have responsibility for carrying out much of the work involved in these three stages, it should be remembered that Ministers have a duty to exercise in relation to any claim for public interest immunity. Further information on Ministerial responsibilities can be found at paragraphs 4.20 to 4.23 below. The analysis of the three stages which follows concentrates on the role of the Crown servant.

Stage One Procedures

4.8 Individuals who seek advice on volunteering official information, who are asked to respond to a request for information, who are being interviewed, or who are likely to be called to give evidence in Court should be instructed to consider whether any of the information they might be required to reveal may cause damage if it became more widely known. If individuals need guidance on this issue they should be instructed to seek advice through their line management from those with primary responsibility for the information and/or from the relevant security personnel. Such information should not be revealed until an assessment has been carried out of the nature and severity of the damage which would be likely to follow if it became more widely known. However, the fact of the existence of such information, if germane, may be revealed to the investigator or the prosecuting authority before the information has been assessed.

Stage Two Procedures

4.9 Assessment of information which has been identified as potentially damaging if revealed should normally be carried out by officials from the relevant policy divisions in consultation with legal advisers. Two issues need to be resolved:

- (a) whether the sensitivity of the information is so great that it cannot safely be disclosed even to investigators and/or to the prosecuting authority. If this is the case, **which is likely to be very rare**, the advice of the Law Officers should be sought and if the existence of such information has not already been revealed to the investigating or

prosecuting authority, now is the time to do so. Otherwise, the information itself, if germane, should be revealed to the investigators/prosecutor as soon as possible; and

- (b) an assessment of likelihood that damage would in fact follow from revealing the information alongside an assessment of the potential scale of such damage. The test which must always be applied is whether "real harm" will arise from revealing the material. Where the potential scale of damage is assessed to be relatively small, it may be appropriate to take a decision at **this** stage that the information can be disclosed by the prosecutor if it is relevant⁶, especially if the likelihood that such damage will occur is also low. In taking a view at this stage, Ministers will still need to be involved in the final decision.

Stage Three Procedures

4.10 The initial assessment of information which has been identified as potentially requiring protection in the public interest should normally be carried out jointly between officials from the relevant policy divisions and legal advisers. However, the final decision - which will be taken in the light of this initial assessment - rests with the responsible Minister⁷. In advising Ministers, it should be made clear that, wherever possible, Ministers should consider the merits of voluntary disclosure, where the balance of public interest favours disclosure.

4.11 In reaching a view on whether information must be protected by an application for immunity from disclosure, two distinct kinds of damage to the public interest must be weighed against each other: the damage which may arise from revealing the information and the damage to the administration of justice which may arise from withholding the information. The overall public interest will be served by

⁶ It may be justified to withhold information in this category which is germane to civil litigation (although the fact of the existence of such material will generally have to be disclosed), so such information must be subjected to stage three procedures where its disclosure has been sought in connection with civil litigation.

⁷ In certain cases responsibility for a PII certificate, and matters relating to its signature rest with an individual other than a Minister e.g. the Chairman of the Board of Customs signs certificates for HM Customs and Excise. However, for simplicity, this guidance assumes that it will be a Minister who is charged with this duty.

taking the course of action which will do the lesser damage.

4.12 The severity of the damage which may arise from disclosure of the information will have been assessed under stage two, as will the risk that such damage will actually occur. The severity of the damage to the administration of justice which may arise from withholding the information will depend on the nature of the criminal charges involved: the more serious the charges, the more serious the potential damage. Damage may be done either to the defendant, if he is denied access to information which is helpful to his defence, or to the public if the information is helpful to the prosecution case. The likelihood that such damage will occur will depend on:

- (a) how material the information is to the defence or prosecution case; and
- (b) the relative weight of other evidence.

Information which may assist the Defence

4.13 It is clearly unsatisfactory that any defendant should be denied access to information which holds out a realistic prospect, either on its own or in conjunction with other defence evidence, of securing his acquittal on the charge or charges to which the information relates or of mitigating the Defendant's penalty in the event of conviction. If there appears to be a significant risk that any of the information under consideration falls into this category, then such information must fall to be disclosed if the prosecution continues. Where the severity of the damage to the public interest which may arise from disclosure of the information is judged to exceed the severity of the damage to the public interest which would follow from failure to secure the conviction of a person guilty of the relevant offence(s), then it would be appropriate for the responsible Minister to make representations to the prosecuting authority and/or to the Law Officers that the charge(s) should be dropped⁸. (The Law Officers cannot, of course, authorise conduct in advance which would amount to a breach of the law).

4.14 At the other extreme, if it is clear that the information under consideration holds Out no realistic

⁸ It may in some cases be possible to provide sufficient information to the defendant and protect the sensitivity of the material by redacting documents or making a precis of them.

prospect of influencing the outcome of the case in favour of the defendant, then it would be appropriate to recommend that the Minister makes a claim for public interest immunity in respect of such information, provided that the "real damage" test is satisfied in relation to that information.

4.15 Sometimes, there will not be sufficient information about the overall defence case to reach a secure informed judgement about the effect which disclosure of the information would be likely to have on it - or the prospects of the information changing the outcome of the case may be small, but not small enough to be confidently dismissed. In either of these situations it would be appropriate to recommend the responsible Minister to make a formal claim for public interest immunity in respect of the information, but to emphasise to the Court that the Minister has not been in a position to form a view as to the competing public interests and to explain as fully as possible the reason(s) for leading this to the Court.

Information which may assist the Prosecution

4.16 The balancing exercise will usually be more straightforward in relation to information which assists the prosecution but not the defence case. Here, the main balance lies between the severity of the damage to the public interest which may arise from disclosure of the information and the severity of the damage to the public interest which would follow from failure to secure the conviction of a person guilty of the relevant offence(s). Where these two forms of damage are relatively evenly balanced, the risk that such damage will actually occur may be the deciding factor. Since full details of the prosecution case will usually be (or become) available, it should rarely be necessary to refer this balancing exercise to the court.

4.17 The 1996 Act replaces the existing test for prosecution disclosure with narrower test which focus on the effect of material on the prosecution case or on the defence disclosed by the accused. Material which assist the prosecution case will generally fall outside these narrower tests. If it does, it will not need to be disclosed, and, as paragraph 4.21 below states, the issue of public interest immunity will not arise.

Role of the Treasury Solicitor's Department

4.18 In order that there can be proper monitoring of voluntary and court-ordered disclosures of information (including documents) which attract a claim to PII on the basis that disclosure of the information/documents would cause real damage to the public interest, a systematic record of all such

disclosures must be maintained. There should also, wherever practicable, be consultations between departments and agencies holding papers which satisfy this PII damage test before voluntary disclosures are made. This is to ensure that the ability to protect PII material where its disclosure would cause real damage to the public interest is not inadvertently undermined by the level and frequency of disclosures of such material. This function is carried out by the Treasury Solicitor's Department, who must be notified by the holder of the information, as soon as it becomes apparent that material which satisfies the PII damage test may need to be disclosed.

4.19 The contact point in the Treasury Solicitor's Department is the Head of Litigation. The address is Treasury Solicitor, Queen Anne's Chambers, 28 Broadway, London, SW1H 9JS, telephone 020 7210 3090 and fax 020 7210 3066. The Treasury Solicitor will be able to advise departments on the information which he requires.

General Consultations

4.20 In addition to consulting the Treasury Solicitor it will also be necessary to consult with other departments who have a direct interest in the material which is the subject matter of the claim for public interest immunity. The contact point in each case will be the Legal Adviser to the department concerned.

Preparing Recommendations to the Minister

4.21 It is incumbent on the responsible Minister to reach a bona fide view on whether information must be withheld in the public interest or should be disclosed because the interests of justice outweigh other public interest considerations which require its protection. This view must be reached after proper and careful consideration, and must be on a sufficiently informed basis. However, this does not mean that the Minister must read and consider each individual document. It is sufficient for the Minister to reach a view on the basis of advice from his officials, having read a sufficient sample of the documents to crosscheck the advice and to ensure a proper understanding of the documents' character. The official advice must therefore be carefully and thoroughly prepared to enable the Minister to do this.

4.22 The issue of public interest immunity will not arise unless the documents in question are prima facie disclosable under the application of the normal rules applicable to the proceedings in question. Assuming that this threshold test for disclosure applies the Minister will need information and advice on:

- (a) The damage that would result from disclosure of each document, including information on whether the damage arises immediately and directly from disclosure, or whether it is incremental and longer-term damage. This should include an assessment of the gravity of the damage, in order to satisfy the "real harm" test, and so trigger the public interest immunity claim;

- (b) The considerations of public interest that tell in favour of disclosure for the purposes of doing justice in the case. The views of those responsible for the conduct of the proceedings, including Counsel, should generally be sought; in a criminal case it may also be appropriate to make enquiries of the defence. In seeking the views of such persons specific questions should be asked so as to inform the Minister, through his officials, of matters within the knowledge and expertise of those involved in the proceedings and which the Minister wishes to take into account in making his decision. To assist the Minister the information so obtained should be collated and analysed by officers of appropriate seniority within the department; and

- (c) Where the overall public interest may be thought to lie. It is desirable that the Minister should be furnished with advice from his officials as to the arguments and issues relating to his decision together with the recommendation as to the decision that he should take. It is important that he should be so advised particularly as to the merits of the competing arguments for and against disclosure.

4.23 The people responsible for providing this information and advice should also ensure that the Minister has sufficient time to consider the submission, to satisfy himself that real damage will be caused by disclosure, so justifying the PII claim, and to conduct the necessary balancing exercise. One difficulty which may be experienced with PII claims is the number of documents involved. It is not necessary for the Minister to read and consider each individual document in such cases. The documents may be examined by an official who should then swear an affidavit to the effect that he has personally examined all of the documents. Where such an affidavit is filed in support of a Ministerial certificate, it

is preferable that the affidavit should be sworn by an official from within the department rather than by a person outside it. In such cases the Minister should himself read a small sample of the documents by way of cross check and to ensure a proper understanding of their character. In the event that the Minister decides to advance a PII claim to the court, the certificate signed by the Minister should inform the court of how the matter has been approached.

4.24 The three factors identified above on which the Minister will need information and advice are the matters which should be dealt with in the PII certificate. The certificate will need to identify the material involved and inform the court what damage, in the opinion of the Minister, its disclosure would cause. The certificate should also explain why it is that the Minister has concluded that the overall public interest favours non-disclosure, or why he has felt unable to form a view on where the balance lies, as the case may be. The certificate should contain as much detail as possible, without itself damaging the public interest it aims to protect.

Protection of Information which has been Disclosed

4.25 Where information has been disclosed to either litigant in civil cases under the discovery rules or in response to a Court order, the litigant impliedly undertakes to the Court that he will not use it for a collateral or ulterior purpose⁹ without the leave of the Court or the consent of the party providing such information. This implied undertaking ceases after a document has been read or referred to in open Court unless the Court orders that the undertaking should remain in force¹⁰. Application for such an Order should normally be made prior to discovery.

4.26 In criminal proceedings material disclosed by the prosecution in support of its case prior to a

⁹ But note it is not a collateral or ulterior purpose to use information disclosed on discovery for the purposes of adding new causes of action or parties to the action in which the documents have been disclosed: see *Mathews and Malek on Discovery* paragraphs 12.01 and 12.15.

¹⁰ See RSC Order 24 r.14A. Also *Derby v Weldon* (The Times, 20 October 1988) and *The Lubrinol Corporation v Esso Petroleum Company Ltd (No.2)* [1993] FSR 53.

trial on indictment is subject to an implied undertaking that the material will be used solely for the purposes of those criminal proceedings. Material which does not support the prosecution case but which has been disclosed by the prosecution to assist the defence ("unused material") is also subject to this implied undertaking¹¹. In addition, and separate from this implied undertaking, when the relevant provisions of the 1996 Act take effect, subject to certain exceptions, it will be a contempt of court for the accused to use or disclose material which has been disclosed to him under the 1996 Act, without the leave of the court. The exceptions are that he may use or disclose the material in connection with the current criminal proceedings or further criminal proceedings arising from them; and he may use or disclose it to the extent that it has been made known to the public in open court (except in contempt proceedings for a breach of the confidentiality provisions).

¹¹ See McGraith v The Chief Constable of Lancashire 3rd April 1996. Forbes J sitting at the Crown Court at Manchester.

ANNEX A

REQUEST FOR INFORMATION (INCLUDING DOCUMENTS)

REQUEST TO: Name and address of Departmental Offence Enquiry Point	REQUEST FROM: Name, address and telephone number of originator
RESPONSE TO BE RETURNED BY:	
SUBJECT MATTER(S) OF REQUEST: A very brief description of the policy area(s) covered by the request	
PERIOD(S) COVERED BY REQUEST:	
IS THIS REQUEST SENSITIVE: YES/NO If "YES" give details and/or special handling instructions below:	
CLASSIFICATION:	
1. ISSUES UNDER INVESTIGATION: Provide details of the questions/issues in your case/investigation to which the information sought relates. This should include any hypothesis which you are seeking to test with this request. Specific items of information being sought should be listed at Point 6 below.	

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2. PROBABLE LINES OF DEFENCE: Outline anticipated lines of defence to your case/hypothesis
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3. NAMES OF INDIVIDUALS, COMPANIES OR ORGANISATIONS GERMANE TO THE REQUEST: Give full names (including any trading names/aliases) and details of their activities which are of interest

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4. GEOGRAPHICAL FEATURES OR LIMITATIONS OF REQUEST If the suspected offence(s) are believed to have taken place at specific locations or relate to specific regions, give full details
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5. REASON FOR THE REQUEST

Explain why you believe that the recipient of this request is likely to have the information requested

6. PARTICULAR MATIERS OF INTEREST

If there are specific issues or items of information which are of particular interest give details below

7. OTHER INFORMATION CONCERNING THE ALLEGED OFFENCES

If there are any other details you can supply which may help identify/locate germane information give this below
(continue on a separate sheet if necessary)

8. ANY OTHER INFORMATION RELATING TO THE REQUEST