



# **THE ASSOCIATION OF CHIEF POLICE OFFICERS GUIDANCE**

## **MANAGEMENT OF EVIDENTIAL MATERIAL**

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## Foreword

The scheme set out in the Criminal Procedure and Investigations Act 1996 (“the CPIA”) as amended by the Criminal Justice Act 2003, the revised Code of Practice issued under it (‘the Code’) and revised Attorney General Guidelines (‘the guidelines’) is designed to ensure there is an adequate system to determine when evidential property can be disposed of or whether it should be retained in case of future investigations.

The instructions contained in this booklet are designed to provide a practical guide to determining whether there is a need for continued retention of evidential property. In producing a practical guide to support this guidance a flow chart has been designed (Appendix A) which show the process which Officers and Investigators should follow in order to comply with legal requirements.

When properly applied, these instructions will reduce demands in terms of space, bureaucracy and costs associated with the storage of evidential (used and unused) material reducing expenditure and solving the issue of securing suitable storage areas.

The Crown Prosecution Service support this guidance as a means to preserve the right to a fair trial and the delivery of justice whilst taking into account the impracticality of preserving large volumes of items.

Our support for this guidance reflects the commitment of the Crown Prosecution Service to working alongside ACPO and other agencies to ensure that suitable procedures and guidance are in place to ensure that retention of evidential property requirements are complied with fairly and properly.

<http://www.cps.gov.uk/publications/docs/rmmversion2.pdf>

## **Executive Summary**

The increasing demands in terms of space, bureaucracy and costs associated with the storage of evidential material, in many cases in relation to investigations that never get anywhere close to a court-room, is having an increasingly adverse effect on not only estate management and revenue expenditure, but also in securing storage areas that are capable of maintaining the evidential value of the items within.

The right to a fair trial is sacrosanct and the responsibility of the prosecution team in terms of gathering, preserving and presenting evidence to a Court must remain uppermost in all our considerations; however to keep pace with the ever increasing volume of items seized as evidence, the need to balance what is reasonable against what is necessary becomes ever more important.

This Guidance aims to provide forces with a legally sound framework within which to review the need for continued retention of evidential material.

It is now a well-established principle that a breach of the Criminal Procedure and Investigations Act (CPIA) 1996 Codes of Practice does not automatically lead to evidence being excluded or a stay in proceedings. Whether or not a court follows such a course will depend upon all of the circumstances of the case – including whether there was any bad faith on the part of the prosecution team (investigators and or prosecution authority) and whether there is any prejudice to the defence that cannot be remedied by the trial process. It is also well-established that the trial process is equipped to deal with the bulk of complaints and that proceedings should only be stayed in exceptional circumstances.

The fact that the destruction of relevant material rarely results in practice in evidence being excluded or in a stay of proceedings does not justify the prosecution authority implementing a policy which encourages the disposal of relevant material and that is not the purpose of this guidance. This guidance provides a framework against which forces can consider if there remains a legal requirement to retain an item of evidence and if so provides those forces with the opportunity to consider retaining a photograph of the item as an alternative to the continued retention of the actual item.

## Core principles

The guidance is designed to assist those forces that wish to reduce those burdens associated with the ever increasing retention of evidential property. The question of when and how this procedure is adopted is a matter for each force to consider given that the status of the investigation should determine the need for continued retention. The procedure has therefore been designed in such a way that where necessary, it can be applied more than once throughout the duration of an investigation.

The procedure suggests that forces consider restricting it to review less serious cases, at least in the first instance. This restriction is advisory and is intended to facilitate the introduction and refinement of local procedures and policies that will be necessary to support it. However, if properly applied the procedure is as relevant to serious and major crime investigations as it is for any other and again it is a matter for individual forces to consider what category of crime is suitable for review.

The revised Attorney General Guidelines (citation required here) make it clear that decisions regarding the potential relevance of material should always be taken erring on the side of caution and therefore the same principle should apply to any decision as to the sufficiency of a copy and where there is doubt, the original exhibit should be retained but considered suitable for further review in the future.

In drawing together this guidance, the advice of Counsel was sought to consider:

- i) Could cases be lost on grounds of abuse of process, or as a result of section 78 P.A.C.E. challenges, if these proposals were implemented?
- ii) Would it be possible to seek leave to bring retrials under Part 10 of the Criminal Justice Act 2003 if these proposals were implemented?

To address these points the appropriate starting point in acceptance of this guidance is to consider the legal framework and the legal steps that need to be gone through in order to answer the fundamental question:

*“When must original material be retained, and when and in what circumstances can material be safely be disposed of?”*

Counsel concluded that there are three basic questions that need to be answered and that if taken in the following order it would be highly unlikely that cases would be lost on the grounds of abuse of process, or as a result of successful section 78 P.A.C.E. applications to exclude evidence. Counsel further concluded that because of the built in safeguards within this guidance, the number of court cases upon which this protocol would in fact ‘bite’ would be comparatively few.

## Guidance

### **Question 1 - Has the item come into police possession in connection with a criminal investigation, or is it related to a criminal investigation?**

This is the starting point when considering whether the retention or disposal of property is capable of having an impact upon a future prosecution, appeal or retrial.

The definition of a criminal investigation contained within paragraph 2.1 of the Code to the C.P.I.A. 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 ...”.*

If the answer to this question is “no”, then clearly the property can not have been acquired in connection with a criminal investigation and it therefore follows that a criminal prosecution in relation to which the disposal of the item of property in question could have an adverse impact upon would not be forthcoming. Therefore, unless there is some other good reason for retaining the material (Police Property Act dispute, potential future forensic value etc), it can be safely destroyed or returned.

If the item was obtained in the course of, or in connection with a criminal investigation, then one must ask the next question.

### **Question 2 - Is the item relevant to a criminal investigation?**

Under the C.P.I.A. Codes of Practice ‘*relevant*’ material is something that is capable of having some bearing on any offence under investigation, or any person being investigated, or on the surrounding circumstances of the case, unless an item is deemed incapable of having any bearing on any issue that might arise. (An investigation includes pre-charge cases, trials, re-trials, appeal proceedings, cases in which there are no suspects and any linked investigations).

The C.P.I.A. Codes of Practice impose a clear and mandatory obligation to retain, schedule and consider all relevant material. Section 5.1 of the Code states:

*“The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation”.*

Furthermore, the C.P.I.A. and the Codes impose very clear duties upon the disclosure officer to schedule and review all relevant material. [Sections 5.9 and 5.10 set out clear statutory time limits for retaining relevant material post conviction.]

The revised Attorney General Guidelines reinforce this principle, and advise that when considering disposal of material that is deemed incapable of impact:

*“..the investigator should err on the side of caution in coming to this conclusion and seek the advice of the prosecutor as appropriate”.*

Where an item fails to meet this very widely defined test for relevance and there are no other compelling reasons of which the officer is aware, there will be no need to retain the material nor will there be any prejudice to a subsequent prosecution if an item is disposed of (without, in fact, the need for any copying at all).

Other compelling reasons might be that there is a linked operation in existence – or that the same ‘other reasons’ detailed above apply.

Where an item is deemed relevant clearly it must be retained however there is no requirement upon the prosecution for this material to be retained *in its original format*. This brings us to the third question that needs to be answered.

**Question 3 - If relevant to a criminal investigation, is the original exhibit required or can the item be retained in a different format?**

Code 5.1 of the C.P.I.A. Codes of Practice specifically states that :

*“Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, if the original is perishable; the original was supplied to the investigator rather than generated by the investigative process and is to be returned to its owner; or the retention of a copy rather than the original is reasonable in all the circumstances”*

In the case of material that is obtained pursuant to a warrant under P.A.C.E., section 22(3) of that Act in fact goes further than the permissive language of the C.P.I.A. and imposes a positive requirement on the prosecution to dispose of property (either by return or destruction) in circumstances in which a photograph or copy would suffice. In other words, in such circumstances, the prosecution are not permitted to retain original material. The relevant sub-section states:

*“Nothing may be retained for either of the purposes in 2(a)(i) and (ii) if a photograph or a copy would be sufficient”*

In taking the two pieces of legislation together, it is clear that the ultimate test is whether or not it is reasonably necessary to retain the original item or if a copy – whether a photograph, video footage, or digital or electronic image – is ‘sufficient’, or ‘just as good’ in every sense. In which case there can be no compelling reason for retaining the original.

The answer to this question will therefore depend upon the nature of the physical exhibit and the circumstances of the case and will vary hugely from case to case. It is almost impossible to set out a definitive list of the circumstances in which a copy will suffice and therefore each case should be considered individually.

## **Procedure**

The flow chart included at Appendix A. and attendant appendices provide factors to assist forces in determining if an item should be retained and if so in what format.

It is the considered view that these proposals are unlikely if not incapable of impacting adversely upon the majority of criminal prosecutions. This is primarily because in cases where there is either a suspect or offender, or the material relates to a criminal charge, the procedure instructs the officer to retain the original material.

Furthermore the inclusion of a six month delay period means that the only instances in which officers would in fact begin to embark upon applying the remainder of the procedure would be in circumstances in which there was still no charge or even a suspect, at least six months after the original event occurred.

Whether applied solely to low level, volume crime or extended to more serious crimes, the number of cases that could potentially be adversely affected by this procedure, (ie where suspects have only come to light after six months has elapsed) must be comparatively very few.

However if in attempting to answer any of the questions within the procedure an officer is unsure and is therefore unable to exclude the potential that an item might have some bearing on any issue that might arise, or that a copy might not suffice, then the exhibit should be retained at the initial review stage and subjected to further review at a later time.



## **Risk assessment**

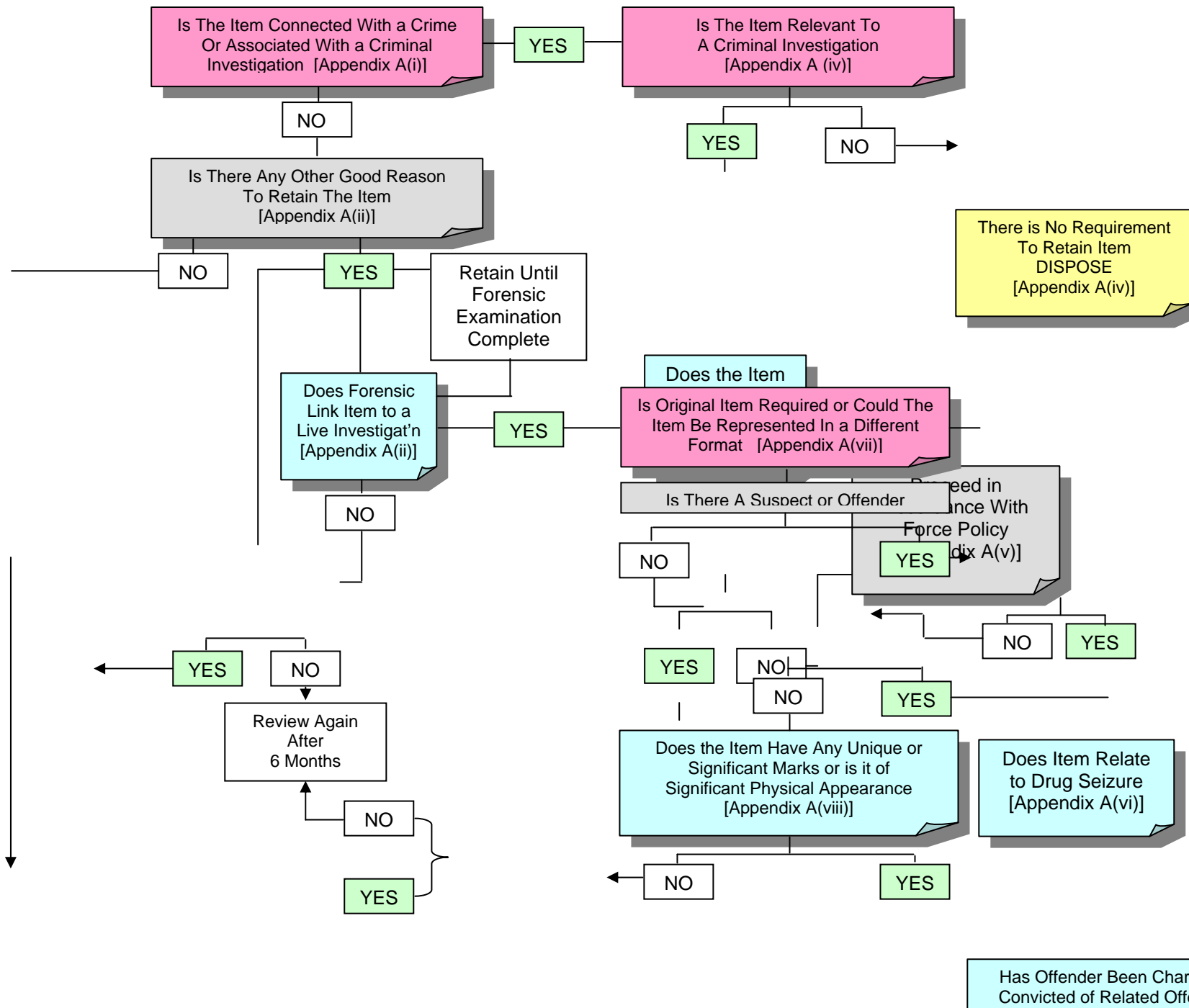
In determining whether it is necessary to retain the original item, regard must be made to the nature of the item, the use to which the prosecution may wish to put the exhibit at any future trial, the likely defence case and that of any co-defendants, any disclosure issues that might arise, and the available format or method of the copy and what that copy can achieve.

In reality, it is the relevance to the defence case and disclosure issues that will give rise to any abuse arguments or applications to exclude evidence under section 78 of P.A.C.E. In this situation the input of the disclosure officer (and disclosure counsel in larger cases) will be essential as they are responsible for considering the potential relevance of material in the light of defence statements and cross-disclosure issues.

Whilst the prosecution are under a continuing duty in relation to disclosure, the fact that at an early stage in proceedings a decision was taken to retain some or all of the original exhibits does not mean that the situation will remain thus throughout. If, for example, items are retained because of the likelihood or possibility that the defence (or co-defendants) may require independent forensic analysis, once the defence analysis has been carried out, the need to retain the original item can be reviewed again. If there are no further suspects and retention of the original is no longer necessary, then it can obviously be disposed of.

The best ways of equipping officers to make the right decisions on relevance and sufficiency, and thus avoid errors of judgement, are through guidance and training. In addition, it is obviously sensible that an officer should consult as widely as is necessary in any situation and include reference to the disclosure officer (if different persons) and the prosecution lawyer particularly in difficult, serious or complex cases.

Because of the complexities of such decision making, which essentially involves determining whether the item is best, real, primary or secondary evidence, it is recommended that where an officer is unsure about the evidential significance, admissibility or consequences of a particular item in relation to a trial, that it is imperative that early advice is sought from the prosecution lawyer prior to any decision being taken.



## Appendix A(i)

The CPIA defines a criminal investigation (Paragraph 2.1 of the Codes) as being: “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 ...”.

If the answer to this question is “no”, then the property was not acquired in connection with any criminal investigation and it follows that there will be no criminal prosecution for the disposal of the item of property in question. Therefore, unless there is some other good reason (Such as a Police Property Act Dispute) for retaining the material, it can be safely destroyed or returned.

## Appendix A(ii)

A good (lawful) reason to retain an item may be to establish an owner, or because there are potentially two or more people who may wish to claim ownership and at this time there exists the potential for an application under the Police Property Act. If an owner has not been established or an application made within 6 months of the property coming into police possession, the item can be disposed of

Another 'good reason' might for example be that the item in question has an (as yet) unidentified forensic value – such as a gun, ammunition or a blood-stained item of clothing. If for example a gun is handed in to a police station anonymously and is not obviously connected with a crime, it is still highly likely that the weapon will be submitted for forensic analysis to see whether the ballistics evidence can link it to any other investigation within the Open Case File Database. If the weapon provides a positive hit then plainly it will be linked-up with that investigation.

If the weapon does not provide a positive hit then those operating the Database will test-fire, photograph and record the gun / ammunition. In such circumstances, there remains the possibility that a case might come to light in the near future in which this weapon was involved. It is inherently unlikely, however, that a new offence will come to light as time progresses – the gun being in police custody from a given date.

Allowing a reasonable period of time such as 6 months to lapse in such circumstances and retaining the forensic analysis coupled with photographs and descriptions is likely to be sufficient. If doubt exists however, the item can be reviewed again at a later date.

## Appendix A(iii)

A minimum retention period provides a safeguard to allow a reasonable or sufficient period of time to have elapsed after the actual incident, for criteria (a)-(d) to have been undertaken.

If for example the item has not been submitted for forensic examination 6 months after it was seized, it must be questionable if an investigation is still live and or the value of any subsequent forensic examination.

This period can be extended on a case-by-case basis if it is felt such an extension is necessary.

- a) Is the item required for forensic examination?
- b) Is the crime report still "live"?
- c) Are enquiries to identified the owner still active?
- d) Is a Police Prop Act dispute still a possibility?

## Appendix A(iv)

Relevant material includes items that appear to the investigator, or officer in the case, or disclosure officer, as material capable of having some bearing on any offence under investigation, or any person being investigated, or on the surrounding circumstances of the case, unless that item is deemed incapable of having any bearing on any issue that might arise.

The term investigation or case includes pre-charge cases, trials, re-trials, appeal proceedings, cases in which there are no suspects and any linked investigations.

Section 5.1- C.P.I.A. Codes of Practice impose a clear and mandatory obligation to retain, schedule and consider all relevant material stating “The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation”.

Furthermore, the C.P.I.A. and the Codes impose very clear duties upon the disclosure officer to schedule and review all relevant material. [Sections 5.9 and 5.10 set out clear statutory time limits for retaining relevant material post conviction.]

The revised Attorney General’s Guidelines reinforce this principle, and advise that when considering disposal of material that is deemed incapable of impact: “the investigator should err on the side of caution in coming to this conclusion and seek the advice of the prosecutor as appropriate”.

Where an item fails to meet this very widely defined test for relevance and there are no other compelling reasons of which the officer is aware, there can be no need to retain the material or any prejudice to a subsequent prosecution if an item is disposed of (without, in fact, the need for any copying at all).

However, where an item is deemed relevant it must be retained.

## Appendix A(v)

Although this process can be extended to include items associated with Serious Crime, there is clearly less risk attached if applied to evidence relating to an offence that is categorized as Volume Crime such as;

*Street Robbery, Burglary (Dwelling & Non-Dwelling), Theft (Incl Shoplifting), Theft of/Theft from Motor Vehicle, Criminal Damage & Drugs*

*(ACPO Investigation of Volume Crime Manual)*

It is recommended that items seized in relation to crimes categorized as major incidents, serious gun crimes, substantial drug cases, serious fraud, any offence not considered as Volume Crime, along with items related to offences that may potentially come under Part 10 of the Criminal Justice Act 2003, continue to be dealt with in accordance with individual force procedures

## Appendix A(vi)

The following process of retaining photographs, wrappings and video evidence of the finding and unpacking of the items, together with the securing of forensic evidence and representative samples of large-scale drug consignments, is a practice routinely adopted by H.M. Revenue and Customs and it is difficult to see how the defence could conceivably be prejudiced by the destruction of the bulk exhibit as there exists very real risks associated with the storage of large quantities of drugs for long periods of time.

It is therefore advised that a policy of destroying such seizures as soon as possible is adopted. In very rare cases this may not be possible such as if the actual bulk is required as an exhibit in court proceedings. In which case, specific authorisation for the continued retention of the bulk is advised.

The Investigating Officer should decide on a case-by-case basis when to apply this procedure, as small scale seizures can be disposed of at the conclusion of the proceedings on the authority of a designated member of the Constabulary.

Should however the Investigating Officer consider that the case is suitable for the use of a Destruction Notice (See Appendix B), the defendant must be notified at the time of charge that the drugs will be destroyed pre-trial unless representation is made within 28 days.



The defendants' legal representative must also receive a copy of the notification which should be included in the details of advanced disclosure/information.

The drugs must then be analysed, photographed, fingerprinted, sampled etc and the prosecuting solicitor advised of the intention to destroy the drugs, again the Destruction Notification can be used for this purpose.

A record of the procedures involved in the destruction of the drugs should be maintained, which itself will act as a control document for;

Destruction of the bulk of the drugs before trial  
Destruction of samples at the end of the case  
and  
Disposal of associated items (wrappings, boxes etc)

Exhibits "produced" in a witness statement for production at a trial are the property of the court. Destruction of such exhibits before trial is contempt of court, however there should not be a problem if reference is made to the bulk of the drugs and the Forensic Science Provider "produces" a representative sample as evidence.

In order to be able to destroy the bulk of the drugs, avoid "producing" the bulk of the drugs as evidence, unless the case solicitor directs otherwise.

## Appendix A(vii)

There is no such thing any more as Best Evidence. The Best Evidence Rule ceased in 1969 when it was ruled that Courts should not be restricted to Best Evidence, but should instead consider all relevant evidence. How good or bad the evidence is should support only its evidential weight, not its admissibility. Best Evidence is not the same as Primary Evidence and the use of photographic evidence as Primary Evidence is already well established in the Justice system.

Whilst there is a positive obligation to obtain, retain and consider all relevant material, there is no requirement upon the prosecution that states that this relevant material must be retained in its original format. If material has come into police possession in the course of, or in connection with a criminal investigation, and it is relevant (in a CPIA sense), then there is a clear requirement for the material to be retained. The key question then, is not whether such material should be retained, but in what form or how the material should be retained.

There exists a sound legislative basis for retaining copies. Code 5.1 of the CPIA Codes specifically state that: "Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original at any time, 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"

Section 22 of PACE which relates to items seized by a police officer and Sec 22(3) relating to material that is obtained via a warrant goes further than the permissive language of the C.P.I.A. and imposes a positive requirement on the prosecution to dispose of property (either by return or destruction) in circumstances in which a photograph or copy would suffice stating.

“In particular, anything which was seized for the purpose of a criminal investigation may be held for use as evidence at the trial, or for forensic examination, or for the investigation of an offence, subject to Sub Section 4”

Sub section 4 states;

“Nothing may be retained for either of the purposes mentioned in subsection (2)(a) if a photograph, or copy would be sufficient for that purpose”

In other words, in such circumstances, the prosecution are not permitted to retain original material.

## Appendix (viii)

In short, in determining whether it is necessary to retain an original exhibit, an officer will need to have regard to the nature of the item, the use to which the prosecution may wish to put the exhibit at any future trial, the likely defense case and that of any co-defendants, any disclosure issues that might arise, and the available format or method of the copy and what that copy can achieve.

In reality, it is the relevance to the defense case and disclosure issues that will give rise to any abuse arguments or applications to exclude evidence under section 78 of P.A.C.E. In this situation the input of the disclosure officer (and disclosure counsel in larger cases) will be essential – as they are responsible for considering the potential relevance of material in the light of defense statements and cross-disclosure issues.

If at an early stage in proceedings decisions are taken to retain original exhibits, this does not mean that the situation will remain thus throughout. If, for example, items are retained because of the likelihood or possibility that the defense (or co-defendants) will require independent forensic analysis, once the defense analysis has been carried out, the need to retain the original item can be reviewed. If there are no further suspects and retention of the originals is no longer necessary, then they can obviously be disposed of.

### Suggested Format of Drug Destruction Notice

Seizure Reference

Date

Controlled drugs have been seized from you on [Enter Date] because they [Enter Details of Relevant Offence].

The drugs, except a small representative sample, will be destroyed on [Enter Date]. Samples of wrappings and packing material will also be retained.

If you or your legal representative have any objections to make concerning the destruction, you should write to the following address in good time so that your representations can be taken into account before destruction takes place.

Signature..... (on behalf of prosecution)

I acknowledge receipt of a copy of this letter.....(Defendant)

Address for reply: [Enter Name and Address]