Military Police Investigative Doctrine

Chapter 25 – Disclosure of Unused Material.

The purpose of this policy is to provide guidance on how the Royal Military Police manage issues surrounding the revelation and disclosure of relevant unused material to the Service Prosecution Authority (SPA) and the Commanding Officer (CO) of an accused Service person.

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Introduction

1.1 – Introduction. Under Article 6 of the European Convention on Human Rights every person has a right to a fair trial but a fair trial can only truly be fair if the accused has access to all the relevant material that is in the possession of the prosecution. It is the statutory obligation of all those involved in the investigation and prosecution of criminal cases that all unused material which could strengthen the case for the Defence or weaken the case against the prosecution is disclosed.

1.2 – Conformation to Existing Guidelines. The Attorney Generals Guidelines on disclosure are considered to be the basis for the fair application of the Criminal Procedure and Investigations Act 1996, which state that:

"Disclosure is one of the most important issues in the Criminal Justice System and the application of proper and fair disclosure is a vital component of a fair Criminal Justice System. The golden rule is that fairness requires that full disclosure should be made of all material held by the prosecutor that weakens its case or strengthens that of the defence"

It is essential that all those involved in the disclosure process are fully conversant with these guidelines and operate in a consistent and robust manner when dealing with disclosure issues. The CPIA 96 was introduced to focus the trial process on the matters before the court and to prevent far reaching requests by Defence for disclosure of unused material which did not fall to be disclosed, which ultimately overburdens the trial process.

1.3 – Command Responsibility. The Provost Marshall (Army) is responsible for putting in place arrangements to ensure that in every investigation the identity of the Officer in Charge of the Investigation and the Disclosure Officer is recorded. It is the duty of the PM (A) to ensure that all Disclosure Officers and Deputy Disclosure Officers have sufficient skills and authority, commensurate with the complexity of the investigation to discharge their vital functions effectively. The role of the Disclosure Officer is vitally important; within the RMP all Disclosure Officers will be of the rank of SSgt and above. The Officer in Charge is responsible for ensuring that the details of all Disclosure Officers within their units are recorded on the SPDF 6I – Register of Disclosure Officers. The SPDF 6I must be maintained accurately and reviewed on a quarterly basis by the OIC, inspected by the CO every 12 months and the details of unit Disclosure Officers published routinely on Part 1 Orders.

General Principles

2.1 – Roles and Responsibilities. The Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009 issued by the Secretary of State places a statutory duty on the SP to record and retain all material obtained or generated in a criminal or disciplinary investigation which may be relevant to the investigation. Material may be photographed, video recorded, captured digitally or otherwise in the form of a copy rather than the original, if the original is perishable or retention of a copy rather than the original is reasonable in the circumstances. The Code of Practice also creates the role of Disclosure Officer and the Deputy Disclosure Officer as well as placing certain statutory obligations upon them and the OIC of the investigation.

2.2 – Officer in Charge. The OIC of a Service Police investigation is the person responsible for directing the investigation. They have specific responsibilities to

ensure that the duties imposed under the Order and the Codes are carried out by all those involved in the investigation. Their responsibilities under the Order and the Code are to:

- Account for any general policies followed in the investigation in accordance with Military Police Investigative Doctrine.
- Ensure that all reasonable steps are taken for the purposes of the investigation and in particular that all reasonable lines of enquiry are pursued.
- Ensure that proper procedures are in place for the recording and retention of material obtained in the course of the investigation.
- Appoint the Disclosure Officer, preferably at the commencement of the investigation.
- Ensure that where there is more than one Disclosure Officer, that one is appointed as the lead Disclosure Officer, who is the focus for enquiries and who is responsible for ensuring that the investigators disclosure obligations are complied with.
- Ensure that an individual is not appointed as a Disclosure Officer or allowed to 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 offence. If in any doubt the OIC is to seek advice from SO1 Investigations and Policing.
- Ensure that tasks delegated to civilians employed in support of the SP or others participating in the investigation under arrangements for joint investigations have been carried out in accordance with the requirements of the Code. Where civilians are used for investigative purposes the OIC is to ensure that they are appropriately trained for their role and are aware of their statutory obligations to record and retain all material.
- Ensure that material relevant to the investigation is retained and recorded in a durable and retrievable form.
- Ensure that all material is either made available to the Disclosure Officer, or in exceptional circumstances revealed directly to the prosecutor. Where revelation has been made direct to the prosecutor, the Disclosure Officer must be informed, who must ensure that the schedules include the material and the fact it has already been copied to the prosecutor.
- Ensure that all practicable steps have been taken to recover material that was inspected and not retained, if as a result of developments in the case it later becomes relevant.

2.3 – Disclosure Officer. The Code of Practice creates the distinct roles of Disclosure Officer and Deputy Disclosure Officer, who have specific responsibilities for examining all the material, revealing it to the prosecutor, disclosing it to the accused where appropriate and certifying to the prosecutor that action has been taken in accordance with the Code. The Disclosure Officer is required to create schedules of **relevant** unused material retained during the course of an investigation and submit them to the prosecutor together with certain categories of material. The Disclosure Officer and Deputy Disclosure Officer(s) have a statutory duty to

discharge their responsibilities throughout a criminal investigation. Their statutory obligations are to:

- Examine, inspect, view or listen to all relevant material that has been retained by the investigator and which does not form part of the prosecution case.
- Create schedules that fully describe the material and indicate exactly why the material is relevant to the facts in issue in the case.
- Identify all material that falls to be disclosed and reveal that material to the prosecutor using the SPDF 6E.
- Submit the schedules and copies of material satisfying the disclosure test, together with the categories of material described in article 7.3 of the Code and copies of all documents required to be routinely revealed and which has not previously been revealed to the SPA.
- Consult with and allow the prosecutor to inspect the retained material, by either providing the prosecutor with a copy or if by virtue of its volume to inspect the material within a SP establishment.
- Certify that all retained material has been revealed to prosecutor in accordance with the Code.
- Where the prosecutor requests the Disclosure Officer to disclose any material to the accused give the accused a copy of the material or allow the accused to inspect it.

2.4 – Investigator. An Investigator, Disclosure Officer and OIC of an investigation perform distinct roles. The three roles may be performed by different people or the same person. Only in Service Police Iso Dets should the three roles be performed by one individual. Where the three roles are performed by separate individuals it is essential that close consultation between them is fostered and maintained to ensue compliance with their statutory duties imposed by the Order and the Code. An investigator is any member of the SP or Civilian Support Employee involved in a criminal investigation. All such SP and civilians, including those who may not view themselves as investigators, have a responsibility for carrying out the duties imposed under the Code of Practice. All investigators and Civilian Support Employees have a responsibility to reveal all relevant misconduct relating to them using the SPDF 6H.

Guidance, Procedure and Tactics

3.1 – Relevant Material is defined in the Criminal Procedure and Investigations Act 96 (Application to Armed Forces) Order 2009, (the Order) and the Criminal Procedure and Investigations Act 96 (Codes of Practice) (Armed Forces) Order 2009, (the Code); as **"anything that appears to an investigator, or the Officer in Charge of an investigation or the Disclosure Office to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances unless it is incapable of having any impact on the case".** This is known as the Relevance Test and must be applied to all unused material obtained or generated during the course of an investigation.

3.1.1 – Revelation refers to the Service Police alerting the prosecutor to the existence of relevant material that has been retained in the investigation. Revelation to the prosecutor does not mean automatic disclosure to the Defence.

3.1.2 – Disclosure refers to providing the Defence with copies of, or access to, any material which **"might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not been previously disclosed".** The prosecutor is only under an obligation to disclose unused material which falls to be disclosed, if it is determined to meet the criteria laid out in this Disclosure Test.

3.1.3 – Consequences of Non-Disclosure. Investigators and Disclosure Officers must be fair and objective and must work together with prosecutors to ensure their disclosure obligations are met. A failure by the prosecutor or the Service Police to comply with their respective obligations under the Order and the Code may have the following consequences:

- the accused may raise a successful abuse of process argument at the trial.
- the accused may be released from the duty to make Defence disclosure.
- the court may decide to exclude evidence because of a breach of the Act or Code and the accused may be acquitted as a result.
- the appellate courts may find that a conviction is unsafe on account of a breach of the Order or the Code.
- disciplinary action may be instituted against the prosecutor or a member of the Service Police.

3.2 – First Response. The system created by the CPIA 96 (as amended by the Criminal Justice Act 2003) is designed to ensure that there is fair disclosure of unused material that might be reasonably considered to undermine the prosecution case or assist the Defence. Furthermore, disclosure under CPIA 96 is designed to prevent fishing expeditions on behalf of the Defence, for widespread disclosure of material held by the prosecution team. (SPA/RMP).

3.3 – Initial Actions. It is therefore essential that the duties imposed by the Order and the Code are scrupulously observed, to record and retain all material obtained or generated throughout the life of an investigation and to conduct all reasonable lines of enquiry. If the prosecutor is satisfied that a fair trial cannot take place because of a failure to disclose which cannot be remedied by making formal admissions, amending the charge or presenting the case in a different way so as to ensure fairness or in other ways they cannot continue the case.

3.3.1 – Accused Obligations. The accused has certain obligations under Article 7 of the Order 2009 to provide a Defence Statement usually within 28 days of when the Director has complied with or purported to comply with their initial duties of disclosure under Article 4 of the Order. Any failure to comply with their duties by the defence may result in a loss of entitlement to make an application under Article 14 of the Order 2009 for further disclosure of prosecution material.

3.3.2 – Proper Application of the CPIA 96. The proper application of the provisions of the Order and the Codes by the SPA and the SP will ensure that only

material required to be disclosed (meets the test for disclosure) is disclosed. **There is no place in law or otherwise for 'blanket' disclosure. Such practice leads to inconsistency, uncertainty and unnecessary work.**

3.3.3 – Common Law Disclosure. At times material may be disclosed to the defence by the SP during the course of an investigation and before a charging decision is made after referral to the DSP, such disclosure is known as common law disclosure. These may be instances where a defence legal adviser asks for copies of any custody records during pre interview after caution disclosure or when disclosure is made to the defence during extended custody hearings. In essence common law disclosure is any disclosure of unused material that falls outside of the CPIA 96.

3.3.4 – Preparation of the SPDF 6A. Under the Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009 and Chap 6 Para 120 and Paras 142 – 146 of The Manual of Service Law, the SP must bring to the attention of the accused's Commanding Officer all unused material held, which the CO can then request and divulge to the accused at Summary Hearing. Whilst the statutory disclosure regimes imposed by the Order and the Codes only apply to cases being tried before a Service Court, the principles of the Order and the Code should be applied to cases being referred under Sect 53 and Schedule 1 AFA 06. Therefore, RMP will now only make known to the CO of an accused material determined by the Disclosure Officer to be relevant to the offence(s) referred.

3.3.5 – SPDF 6A. The SPDF 6A is now in two parts. Compilation of the SPDF 6A Pt 1 – List of Relevant Unused Material is the responsibility of the Disclosure Officer, having complied with their statutory obligations to inspect, examine, view and listen to all material in the investigation file or held by third parties, and then assessing all the unused material for relevance. As all members of the Armed Forces have the right to elect for trial at Service Court, the SPDF6C/6D and 6E should be compiled first and held on file for cases referred direct to an accused's CO. The purpose of the SPDF 6A Pt 1 is to inform the CO of an accused of the unused material **relevant** to the offence(s) referred under Sect 53 and Schedule 1 AFA 06. This prevents overburdening the Summary Hearing process with irrelevant material should a CO request the material. The SPDF 6A Pt 2 is to be used for uploading to SPCB all material held in the investigation file, minus material considered purely administrative.

3.3.6 – Distribution of the SPDF 6A. Where a case has been referred direct to the DSP (Schedule 2 or Prescribed Circumstance Offences) there is no requirement to distribute a SPDF 6A Pt 1 to Divisional Legal Branch or the accused's Commanding Officer. Only where the case is referred direct or notification is received that the case has been referred back to the accused's Commanding Officer should the SPDF 6A Pt 1 be distributed to the Commanding Officer and Divisional Legal Branch. The SPDF 6A/6B should never be distributed to the SPA. The suspect(s) CO should only receive SPDF 6A Pt 1 and any subsequent generated SPDF 6A Pt 1 as a result of additional evidence requests if they are to hear the case summarily. Under no circumstance should a SPDF 6B – List of Sensitive Unused Material be distributed to a Commanding Officer or Divisional Legal Branch.

3.3.7 – Furtherance of Enquiry (FOE). On occasions it may be necessary for another SP unit to conduct enquiries on behalf of the investigating SP unit. The receiving unit of a FOE should document all unused material obtained or generated

by them on the SPDF 6F. The Forensic Dept are required to provide investigating SP unit details of all generated unused material, including details of conversations with Forensic Scientists, which can be accomplished utilising the SPDF 6F. Thereby enabling the Disclosure Officer of the investigating unit to fulfil his statutory obligations under the Code of Practice.

3.3.8 – Deputy Disclosure Officer. A Deputy Disclosure Officer can be appointed to examine specific parts of the material and reveal it to the prosecutor. For instance, where a SP investigation has been intelligence led, there may be a Deputy Disclosure Officer appointed to deal with the intelligence material which by its very nature is likely to be sensitive. Where a SP specialist unit (OSU/DSU) is employed in support of an investigation, it is essential that that unit appoints a Deputy Disclosure Officer to deal with issues surrounding the unused material generated by that unit.

Qualified Response

3.4 – Relevance, Recording and Retention. The Code requires that material of any kind, including information and objects, which is obtained in the course of a criminal investigation as defined by the CPIA 96 and which may be relevant to the investigation must be retained. It is not apparent what material will be relevant at the commencement of an investigation therefore investigators should err on the side of caution and retain all material obtained or generated during an investigation. The relevance test in respect of unused material has already been discussed but 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 the investigator, such as interview records. Material also includes information given orally. Where material is not recorded in any way, it must be reduced into a durable form. The issue of relevance is especially important where an investigator is considering whether to throw something away, return it to the owner or not to record the information. As a general rule nothing retained during a criminal investigation should be disposed of unless it has no bearing on the case. All draft hard copies of statements must be retained, regardless of reason. Where a line manager/investigation supervisor has directed that amendments are made to a statement of evidence this must be detailed in the investigation file diary and all copies of statements retained in the investigation file unused material bundle and scheduled if deemed relevant material.

3.4.1 – Criminal Investigation. The Code of Practice expands on the definition of a criminal investigation, which include investigations into crimes that have been committed, investigations whose purpose is to ascertain whether a crime had been committed with a view to the institution of criminal proceedings and those which begin in the belief that a crime may be committed. This means that information and material arising out of operations purely for intelligence purposes might become disclosable (subject to Public Interest Immunity considerations). SP involved in intelligence operations should regularly and actively consider whether the information they hold has a bearing upon any live investigations or prosecutions and if so act quickly to ensure it is brought to the attention of the Disclosure Officer from the investigating unit, his CoC and the prosecutor.

3.4.2 – Communication with SPA. Reports, advice and communications between SPs and the SPA, such as SPA Form 3 guidance will themselves usually be administrative in nature in that they contain professional opinion based on evidential material or material already revealed. Therefore they will usually have no bearing on

the case and thus will not be relevant. If the content of any such documentation is however relevant and not recorded elsewhere then the material should be scheduled accordingly.

3.4.3 – Examining Unused Material. Disclosure Officers or their deputies must inspect, view and listen to all material held on file, including all exhibits in order to make an assessment on the relevance of the unused material. Generally this will mean that such material must be examined in detail but occasionally the extent and manner of the inspecting, viewing and listening will depend on the nature of the material and its form. It might be reasonable to examine digital material by using software search tools or to establish the contents of large volumes of material by dip-sampling. If such material is not examined in detail, it must nonetheless be described on the appropriate schedules accurately and as clearly as possible. The extent and manner of its examination must also be described together with justification for such action on the appropriate SPDF schedule.

3.4.4 – Negative Material. Negative information can sometimes be as significant to an investigation as positive information. It is impossible to define precisely when negative information may be significant as every case is different. Not only must material or information that points towards a fact or an individual be retained, but also that which casts doubt on the suspects guilt or implicates another person. Examples of negative information include:

- A CCTV camera that did not record the crime/location/suspect in a manner which is consistent with the prosecution case. (The fact that the camera did not function will not usually be considered relevant negative information).

- Where a number of people present at a particular location at the particular time that an offence is alleged to have taken place state they saw nothing unusual.

- Where finger mark from a crime scene cannot be identified as belonging to a known suspect.

- Any other failure to match a crime scene sample with one taken from the accused.

3.4.5 – Reasonable Lines of Enquiry and Third Party Disclosure. Duties under the Order and Codes are imposed on two categories of persons only, investigators and prosecutors. All other categories of persons are to be treated as third parties. This would include owners of CCTV material, Social Services Departments, Forensic Experts, FME's, GP's and hospital authorities. Also included are Military Units outside the RMP and Home Office Police Forces. Where a HOPF holds information relevant to a SP investigation their prior permission to reveal that material in accordance with CPIA 96 should be sought.

3.4.6 – Joint Enquiries. There is a duty under the Code for an investigator to pursue all reasonable lines of enquiry, whether these point towards or away from a suspect. What is reasonable will depend upon the circumstances of a particular case. Where police and another investigating agency (such as a HOPF or Foreign Police Force) undertake a joint investigation, material obtained within the remit of that joint investigation should be treated as prosecution material and dealt in accordance with the Order and the Code of Practice. Consideration should be made whether to implement a Memorandum of Understanding (MoU) for a joint investigation or

Disclosure Agreement in order to deal with issues surrounding the revelation or disclosure of unused material held by HOPF or Foreign Police Forces.

3.4.7 – Linked investigations. Investigators, Disclosure Officers and prosecutors must have regard to whether relevant material may exist in relation to other linked investigations or prosecutions. Reasonable enquiries must be carried out to establish whether such material exists and if so, whether it may be relevant to the SP investigation or SPA prosecution. These may be where the same suspect is being investigated by RMP GPD and RMP SIB concurrently and one unit may hold material relevant to the others investigation, such as medical information regarding the mental wellbeing of a suspect.

3.4.8 – Military Units as Third Parties. Reasonable lines of enquiry include enquiries as to the existence of relevant material in the possession of a third party. It is not necessary to make speculative enquires, but frequently the existence of material will be known or can be deduced from the circumstances. For example, were a child witness is in the car of the local authority, the Social Services may have relevant material relating to the allegation under investigation. Generally few problems exist for the SP in obtaining material considered relevant to a SP investigation from within the military; however obtaining material deemed relevant from Special Forces units may create difficulties due to the very nature of the material. The third party disclosure process is an extremely useful way for the investigator, Disclosure Officer and OIC of the investigation to fulfil their statutory obligations under the Code. If problems persist the advice of SO1 Inv & Pol must be sought.

3.4.9 – Third Parties Obligations. Third parties have no obligations under the CPIA 96 to reveal material to the investigator or the prosecutor, nor is there any duty on the third party to retain material which may be relevant to the investigation. In some circumstances, the third party may not be aware of the investigation or prosecution. If the OIC, the investigator or the Disclosure Officer believes that a third party holds material that may be relevant to the investigation, the person or body should be told of the investigation. They should be alerted to the need to preserve relevant material and consideration should be made to inspect or obtain the material by the SP. In the first instance the OIC, investigator or Disclosure Officer should engage in discussion with the third party in order to obtain the material before graduating the request in to written form. All discussions and contact must be recorded and retained in line with the Code. The Disclosure Officer is required to inform the prosecutor in writing of the identity of the third party and the nature of the material the third party is believed to possess.

3.4.10 – Third Party Case Law. In R v Alibhai (2004) *EWCA Crim 681*, the Court of Appeal held that under the Act (CPIA 96) the prosecutor is only under a duty to disclose third party material if that material had come into the prosecutor's possession and the prosecutor was of the opinion that such material satisfied the disclosure test. Before taking steps to obtain third party material, the Court emphasised that it must be shown that there was a suspicion that the third party not only had relevant material and that the material was not merely neutral or damaging to the accused but satisfied the disclosure test.

3.4.11 – Consultation with SPA. The prosecutor in the case should consult with the Disclosure Officer, the investigator or the OIC of the investigation before advising whether to approach a third party. Where a local protocol for Social Service material has been adopted, access and handling the material should be dealt with under the

terms of the local protocol. Where relevant material is inspected but not retained a record of its content must be recorded by the investigator conducting the inspection, and referred to on the appropriate schedules. Where a third part has refused to co-operate with a request from the SP, the investigating unit should consider seeking a production order to obtain the material.

3.4.12 – Public Bodies as Third Parties. Where it appears to an investigator, Disclosure Officer or prosecutor that a Government Department or Crown body has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider the material. Departments in England and Wales should have identified personnel as established Enquiry Points to deal with issues concerning the disclosure of information in criminal proceedings. It should be remembered that investigators, Disclosure Officers and prosecutors cannot be regarded to be in constructive possession of material held by Govt Dept or Crown bodies simply by virtue of the status of the Govt Depts or Crown bodies.

3.4.13 – HOLMES 2 Investigations. Chapter 31 of the ACPO/CPS Disclosure Manual provides specific guidance on disclosure issues concerning Holmes 2 investigations, and should be considered as the formative document which should be utilised by Holmes 2 Disclosure Officers, together with CPIA 96 Code of Practice and this MPID.

3.5 – Regional Variations. There should be no Regional Variations.

Compliance and Qualification

4.1 – Preparation of the Schedules. The Disclosure Officer is responsible for preparing the schedules and submitting them to the prosecutor. The schedules, signed and dated by the Disclosure Officer, should be submitted to the prosecutor with the final case papers. As all members of HM Forces have the right to elect for trial at Service Court, it is a requirement for the Disclosure Officer to compile all necessary schedules of relevant unused material and Disclosure Officers Report at the conclusion of all investigations where a referral has occurred irrespective of whether the case has been referred to SPA or a unit CO. If not done so at the conclusion of the investigation scheduling must take place immediately upon the SP being notified that a case has been referred to SPA in order to prevent delay and to enable the prosecutor to comply with their statutory obligations under the Order. All the relevant unused material must be kept in the investigation file separated from any material deemed irrelevant. Any material considered irrelevant should be retained in a separate folder within the investigation file marked 'irrelevant material'.

4.1.1 – The Non-Sensitive Material Schedule SPDF 6C. All relevant Non Sensitive unused material should be described on the SPDF 6C. This form will be disclosed to the defence. In the description column of every schedule, each item should be individually described and consecutively numbered. Where continuation sheets are used or additional schedules sent in later submissions, item numbering must be consecutive to all items on earlier schedules. Every description in the SPDF 6C – Non-Sensitive Schedules should be detailed, clear and accurate. In order to allow the reviewing lawyer to reach an informed decision on whether the material might reasonably fall to be disclosed to the Defence, the description of the material should include a summary of the item's contents and detail as to why it is relevant to the issues in the case. For example, it is not sufficient merely to refer to a document by way of a form number or function which may be meaningless outside the SP. Disclosure Officers should be prepared to account for their decisions as to why they

assessed the unused material as relevant during court proceedings and explain their strategy in reaching such a decision. Scheduling should therefore be approached, having regard for what they consider to be the issues in the case (*mitigating circumstances, intoxication, self defence etc).* It is best practice to annotate the SPDF 6C, with the Disclosure Officer's strategy/rationale in making the assessment of the relevance of the unused material. This is best served by annotating the SPDF 6C under the offence heading, with the following: ***'In reaching my decision on the relevance of the unused material in this investigation I consider the following to be the issues in the case.....'*** Once the issues in the case have been identified the Disclosure Officer should assess the relevance of the material around those issues. This enables the reviewing lawyer and the Defence to understand the disclosure strategy in any given case. If there is any doubt on identifying issues or determining the relevance or disclosability of material advice should be sought from the prosecutor once known at the earliest opportunity.

4.1.2 – Multiple and Generic Labelling. In cases where there are many items of similar or repetitive nature it is permissible to describe them by quantity and generic title. However, inappropriate use of generic listing is likely to lead to requests from the prosecutor and the Defence to inspect the items. This may result in wasted resources and unnecessary delay. The preparation of properly detailed schedules at this stage will save time and resources throughout the disclosure process and will promote confidence in its integrity. When items are described by generic titles or quantities, the Disclosure Officer must ensure that items which might meet the disclosure test are also described individually on the SPDF 6E. The Disclosure Officer must keep a copy of the schedules that are sent to the prosecutor, in case there are any queries that need to be resolved.

4.1.3 – Editing of Material. At times documents that fall to be disclosed under the Order and the Code because they are material that satisfies the disclosure test may contain a mixture of sensitive and non-sensitive material. For example a prosecution witness's address or personal telephone number may appear on an item otherwise entirely non-sensitive. In these cases there may be no objection to the sensitive part being blacked out on the copy document which is sent to the prosecutor. The original should not be marked in any way. The document should be described on the SPDF 6C (the unedited version should not be described on the SPDF 6D, but made available to the prosecutor for inspection if required). The Disclosure Officer should clearly indicate on the SPDF 6C entry that editing of material has occurred to remove the personal details of witnesses and that the original unedited version can be made available for inspection by prosecutor. The Disclosure Officer should edit out issues of sensitivity wherever material is routinely revealed. The responsibility to edit rests with the SP but advice should be sought from the Subject Lead on CPIA 96 or the prosecutor in the case.

4.1.4 – Unused Exhibits. Before deciding whether to recover material as an exhibit the investigator, Disclosure Officer or OIC of the investigation should determine whether it is likely to be prosecution evidence or relevant unused material. The CPIA 96 Codes of Practice, imposes a statutory duty on the SP to inspect and retain all material which may be relevant to the case. Therefore not all documentary material, need be exhibited by virtue of the fact the SP have retained it. Lord Justice Gross in his 2013 review of Disclosure states "***The scale of the prosecution task on disclosure is directly affected by the amount of material seized. The benefits of an investigation carefully focused from the outset, are readily apparent. If care is taken to seize no more materials than are indeed necessary, the subsequent burden on the prosecution can be reduced***'. Any

unused exhibits which do not form part of the prosecution case should be assessed for relevance and scheduled accordingly. Distributing the schedules together with the final case papers informs the prosecutor of what exhibits are prosecution material and those which have been deemed unused relevant material.

4.1.5 – Previous Convictions of Prosecution Witnesses. It is current policy that the RMP will reveal to the prosecutor **all** previous convictions, cautions and JPA disciplinary records of witnesses and complainants (other than convictions for certain minor road traffic offences, i.e. speeding etc). This MPID defines the test of relevance under the CPIA and provides that all items of material, which may be relevant, must be described on the SPDF 6C or SPDF 6D. Although it is possible that in a few cases, previous convictions and cautions etc might not be relevant, it is very likely that in the vast majority of cases the previous convictions and cautions etc will meet the relevant test. Therefore, to ensure consistency and to avoid any mistakes in the process of revealing previous convictions etc, the Disclosure Officers must indicate the previous convictions, cautions etc on the SPDF 6C. for example; **Item 5 – Previous Convictions/JPA Disciplinary Record of A.N.Other**. The Disclosure Officer should not list the details of the convictions or cautions on the SPDF 6C. The SPDF 6G is an administrative document utilised by the SP to obtain details of the previous convictions or cautions etc from the Criminal Justice Office at SPCB, it is not a disclosure form and should not now be sent to the SPA. The details of the previous convictions, cautions etc should then be annotated onto the SPDF 6E for each individual, and the resultant PNC printouts attached so that the prosecutor can assess whether they meet the disclosure test.

4.1.6 – Sensitive Material Schedule SPDF 6D. This schedule should be used to reveal to the prosecutor the existence of relevant unused material which the Disclosure Officer believes should be withheld from the Defence because it is not in the public interest to disclose it. However, such material must be revealed to the prosecutor. The Disclosure Officer must describe on the SPDF 6D any material the disclosure of which they believe would give rise to a **real risk of serious prejudice to an important public interest** and the reason for that belief. This form will not be disclosed to the Defence. In those cases where there is no sensitive material, the Disclosure Officer should endorse and sign the SPDF 6D to this effect and should submit this together with the SPDF 6C and SPDF 6E. Para 6.11 of the Codes of Practice provides detail of what may be considered Sensitive Material.

- Material relating to National Security.
- Material received from 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 ID or activities of informants, undercover SP Officers, undercover Police Officers and others who may be in danger if their identity were revealed.
- Material relating to the location of any premises used for surveillance or the identity of a person involved in allowing premises to be used for surveillance.

- Material revealing techniques and methods of the police, e.g. covert surveillance techniques.
- Material whose disclosure might facilitate the commission of other offences or hinder the prevention or detection of offences.
- Material upon the strength of which search warrants were obtained.
- Material containing the details of persons taking part in ID parades.
- Material supplied to an investigator which has been generated by an official body concerned with the regulation or supervision of bodes corporate or of a person engaged in financial activities.
- Material supplied to an investigator relating to a child or young person and which has been generated by a local authority Social Service Dept. Child Protection Committee or another person or body.
- Material relating to the private life of a witness.

To assist the Disclosure Officer in considering these examples in the Code under paragraph 6.11, reference should be made to the following associated public interests:

- The ability of the security and intelligence agencies to protect the safety of the UK.
- The willingness of foreign sources to continue to cooperate with UK security and intelligence agencies and law enforcement agencies.
- The willingness of citizens, agencies, commercial institutions, communications service providers etc to give information to the authorities in circumstances where there may be some legitimate expectation of confidentiality (e.g. Crime stoppers material).
- The public confidence that proper measures will be taken to protect witnesses from intimidation, harassment and being suborned.
- The safety of those who comply with their statutory obligation to report suspicious financial activity (whilst they are under a statutory obligation and therefore do not give suspicious activity reports in confidence, their safety is consideration to be taken into account in disclosure decisions).
- National (not individual or company) economic interests.
- The ability of law enforcement agencies to fight crime by use of covert human intelligence sources, undercover operations, covert surveillance etc.
- The protection of secret methods of detecting and fighting crime.
- The freedom of investigators and prosecutors to exchange views frankly about casework.

These lists are not check lists. Other items not listed may be sensitive and not in the public interest to disclose, but equally, items listed may not cause any harm to the public interest if disclosed. The examples are not classes of material. Each item must be considered independently before it is included in the sensitive schedule and before any claim for Public Interest Immunity from disclosure is made.

4.1.7 – Sensitive Schedule descriptions of material. Some items by their very nature will reveal why disclosure should be withheld. Others require more explanation. Careful attention to this element of the schedule will avoid further enquiries and consequent delay. Both '*description of item*' and '*reasons for sensitivity*' sections must contain sufficient information to enable the prosecutor to make an informed decision as to whether or not the material itself should be viewed. Schedules containing insufficient information will be returned by the prosecutor. If there is any doubt about the sensitivity of the material, the Subject Lead on CPIA or the prosecutor should be consulted. In order to make a proper assessment of the material which is said to be sensitive, the prosecutor will need to be fully informed of its contents or inspect the material. In cases where it is not possible to describe the material in sufficient detail to enable the prosecutor to determine whether or not it should be viewed, it will be for the Disclosure Officer to make arrangements with the prosecutor to view the material with an appropriate level of physical and personal security.

4.1.8 – Protective Marking. The SP and SPA must always take care to protect intelligence information and information given to the SP in confidence. That will be so whether or not it is thought likely that the court will order its disclosure. If the investigator is unsure whether information was given in confidence, the position should be clarified with the person who provided the information. When the schedule and any material are sent to the prosecutor, a protective marking should be applied to it consistent with the levels of sensitivity of its contents. This will determine the manner in which the material is conveyed to and stored by the SPA. Reference should be made to the current MOD policy – JSP 440 regarding the detailed categorisation of different types of sensitive material and the material handled in accordance with MOD policy. It may be required, to compile various schedules dependent on the level of material in any given case. In deciding sensitivity it is important to bear in mind that the sensitivity of the schedule and the sensitivity of the information may differ. The security marking will depend on what is being submitted to the prosecutor; if the material itself is to accompany the schedule the content of the material will determine the security marking of the schedule. If the schedule alone is submitted the content of the schedule will determine its security marking. Sensitive unused material and schedules relating to informants, observation posts or undercover operations will normally be treated as at least **official sensitive.**

4.1.9 – Dealing with Sensitive Material that satisfies the Disclosure Test. As the prosecutor has a duty under the Order to consider whether sensitive material satisfies the disclosure test the investigator, Disclosure Officer or OIC of the investigation should provide detailed information regarding the reasons why the material is said to be sensitive, the degree of sensitivity said to attach to the material, essentially, why it is considered that disclosure will create a real risk of serious prejudice to an important public interest. The consequences of revealing to the Defence, the material itself, the category of material and the fact that a Public Interest Immunity application may be made, the apparent significance of the material to the issues in the trial, the involvement of any third parties in bringing the material to the attention of the police. Where the material is likely to be subject of an order for

disclosure what the police view is regarding continuance of the prosecution and whether it is possible to disclose the material without compromising its sensitivity.

4.1.10 – Direct, Indirect, Cumulative and Incremental Harm. To assist in determining the degree of sensitivity consideration should be given to the fact that the public interest may be prejudiced either directly or indirectly through incremental or cumulative harm. Direct harm is considered to be exposure of secret information to enemies of the state, death or injury to an intelligence source through reprisals and revelation of a surveillance post and consequent damage to property or harm to the occupier and exposure to a secret investigative technique. Incremental or cumulative harm regards the exposure of an intelligence source that does not lead to a risk of death or injury or any reprisal but may discourage others from giving information in the future because of a loss of faith in the system. Revelation of a surveillance post leading to a reluctance amongst others to allow their premises to be used, exposure of an investigative technique that makes suspects more aware of procedures and therefore better able to avoid detection, exposure of material given in confidence or for intelligence purposes that may impact on further cooperation in the future from sources of others and an active denial that a source was used leading to an inability to deny it in future cases, thereby impliedly exposing the use of a source. The Crown and if asked the SP should neither confirm nor deny the use of a source. The prosecutor must be satisfied that the risk is real, not fanciful. They must be in a position to explain to a court the grounds upon which it is asserted that there is a real risk of serious prejudice to an important public interest. The examples of material that might attract Public Interest Immunity in the Codes do not define classes of material; they are examples only and whether the disclosure of an individual document would be likely to give rise to a real risk of serious prejudice to an important public interest must be assessed in each case.

4.1.11 – RIPA Authorities. Where material is disclosed having been edited to protect the public interest the original itself should not be marked. It may be possible to separate non-sensitive material parts of the documents and describe them on different schedules. For example if the fact surveillance is obvious from the evidence an authorisation under RIPA might neither be nor contain anything sensitive. It may therefore be scheduled on the SPDF 6C. On the other hand, the application part of the document will invariably contain sensitive material and should be scheduled on the SPDF 6D. This is a particularly useful way in dealing with RIPA authorities.

4.1.12 – Public Interest Immunity. Before an application is made to the court to protect a serious public interest, it is paramount that consultation at senior level between SPA, HQ PM (A) and the OIC of the investigation occurs so that careful examination of the circumstances of the case and nature of the sensitive material can be assessed to determine whether, it may be that the material can be edited, summarised or formally admitted without compromising the public interest issue. For this consultation to be effective the OIC of the investigation should ensure the prosecutor is provided with information necessary to make a proper decision on how the PII application is to be made. This should be in documentary form, unless the sensitivity of the material makes this inappropriate to fully describe in writing.

4.2 – Highly Sensitive and CHIS Material. All sensitive material should be included on the SPDF 6D. Highly sensitive material should be also listed and described on a Highly Sensitive schedule of unused material. The SPDF 6D should be renamed Schedule of Highly Sensitive Relevant Unused Material. Highly sensitive material is that which should it be compromised would lead directly to the

loss of life or directly threaten national security. The small number of cases where this situation may arise would involve Secret or Top Secret material.

4.2.1 – Highly Sensitive and CHIS Material. There may be material that, whilst its compromise would not directly lead to a loss of life or directly threaten national security, relates to a Covert Human Intelligence Source (CHIS) who, or whose family, may be injured, threatened or harassed if the material were compromised. In such cases consideration should be made whether to treat the material in the same way as highly sensitive material. Where exceptionally the SP consider material to be too sensitive even for a reference of its existence to be included on the principal SPDF 6D, or consider it too sensitive to reveal its existence to the Disclosure Officer, the person holding the material should prepare a highly sensitive schedule and make contact with the prosecutor to discuss the material.

4.2.2 – Handling arrangements of Highly Sensitive Schedules. PM (A) or DPM Inv as the authorising officer for RIPA activity and DSP or DDSP should agree handling procedures for highly sensitive material and CHIS material. The arrangements must ensure as a minimum that:

- Where sensitive material is revealed to the prosecutor other than by detailing that material on the principal SPDF 6D, that material must itself be schedules on a separate highly sensitive schedule SPDF 6D.

- The separate highly sensitive schedule must contain the same level of detail as discussed in the MPID as required in relation to any other SPDF 6D.

- The SP submitting this highly separate schedule should also submit a SPDF 6E.

- Only in the most exceptional circumstances will the lead Disclosure Officer not be told of the existence of the additional schedules and should record their existence (but not their content of which they will be unaware) on the principal SPDF 6D.

The material and all schedules, statements of sensitivity and any other documents bearing highly sensitive material will remain at all times under the control of the SP. Where a highly sensitive schedule has been compiled consultation with SPA is paramount to ensure any disclosure issues can be met. Within the CPS a Level E graded lawyer deals with issues regarding Highly Sensitive Schedules, within the SPA it is anticipated that the equivalent would be the DDSP.

4.2.3 – Security of Sensitive Material. During any consultation on sensitive material marked as Secret or above, any copies of the items discussed or notes taken which could identify the material should be kept separate from the investigation file and in secure conditions. Access to the material or notes should be restricted to those prosecuting the case or advising upon in. If the material is taken to court, it must not be left unattended. Where the advice of the prosecution is sought appropriate storage and handling arrangements must be made to ensure the security of the material.

4.3 – Disclosure Officers Report. The Disclosure Officer should use the SPDF 6E to bring to the prosecutor's attention any material that could reasonably be considered capable of undermining the prosecution case against the accused or of

assisting the case for the accused (the Disclosure Test). This also applies to sensitive material. Examples of material which may meet the test for disclosure are:

- Records of previous convictions and cautions etc for prosecution witnesses.
- Any information which casts doubt on the reliability of a prosecution witness or on the accuracy of any prosecuting evidence.
- Any motives for making false allegations by a prosecution witness.
- Any material which may have a bearing on the admissibility of any prosecution evidence.
- The fact a witness has sought, been offered or received a reward.
- Any information which casts doubt on the reliability of a confession. Any item which relates to an accused mental or physical health, his intellectual capacity or any ill treatment which he may have suffered in custody is likely to have the potential for casting doubt on the reliability of a purported confession.
- Information that a person other than the accused was or might have been responsible or which points to another person whether referred or not (including a co-accused) having involvement in the commission of the offence.

The Disclosure Officer should explain on the SPDG 6E (by referring to the relevant item's number on the schedule) why he or she has come to that view. The SPDF 6C itself should not be marked or highlighted in any way, as it will be provided to the Defence. This must include anything that may weaken an essential part of the prosecution case, any material that supports or is consistent with a Defence put forward in interview after caution or which is apparent from the prosecution papers should be supplied to the prosecutor. It also includes anything that points away from the accused, such as information about a possible alibi. If the Disclosure Officer believes material satisfies the disclosure test it should be brought to the attention of the prosecutor even though it may suggest a Defence inconsistent with or alternative to any already advances by the accused. Items of unused material viewed in isolation may not satisfy the test, however, several items together can have that effect.

4.3.1 – DO opinion on accuracy of undermining/assisting material. Such material should be brought to the attention of the prosecutor regardless of any views about the accuracy or truth of the information, although where appropriate the Disclosure Officer may express a reasoned opinion on whether in fact the prosecutor should disclose it. A wide interpretation should be given when identifying material that might satisfy the disclosure test. A thorough and careful check when the duty to reveal arises may save time later on. If the Disclosure Officer is in any doubt whether material falls to be disclosed close consultation with the prosecutor is essential to determine whether the relevant material satisfies the disclosure test.

4.3.2 – Annotating the SPDF 6C regarding Disclosable Material. Any material satisfying the disclosure test must be brought to the attention of the prosecutor on the SPDF 6E and the material attached to the rear of the document. Any entry on the SPDF 6C should indicate that the material is considered material which may undermine the prosecution case or assist the Defence.

4.4 – Revelation of material to the SPA. Revealing relevant material to the prosecutor does not mean automatic disclosure to the Defence. The prosecutor will only disclose material that satisfies the disclosure test set out in the CPIA 96 (Application to the Armed Forces) Order 2009 and the Code of Practice. If sensitive material satisfies the disclosure test the prosecutor will either disclose the material after consultation with the SP, apply to the court for a ruling as to whether a public interest requires disclosure or withdraw the prosecution.

4.4.1 – Routinely Revealed Material. To aid the prosecutor in their case review it is essential that material agreed as routinely revealed material is attached to and distributed with the principal SPDF 6C. Routinely revealed material is agreed as being:

- COPPERS reports (it is essential that COPPERS entries are accurate and contain details of all initial actions and radio messages between investigators and their supervisors). If a HOPF has dealt with an incident before transferring the case to the SP copies of the HOPF Crime Report and log messages must be retained by the SP and revealed to the prosecutor as routinely revealed material, (These are known in different HOPF by different names, for example the Incident Record Report or CAD for the log of messages).

- Military Custody records (including Custody records from the detention facility).

- Material containing the first description of a suspect, however this is recorded, which may be 999 call recordings, investigators notes, ID parade documentation etc.

Copies of COPPERS, crime reports and log of messages should be edited if necessary, to remove the address and phone number of the person providing the information, however if it is impossible to edit any sensitive parts of the material, then it should be listed on the SPDF 6D and sent to the Spa with that schedule.

4.4.2 – Consultation with SPA. In large and complicated cases or in any case where particular difficulties are anticipated, early discussion between the Disclosure Officer, the OIC of the investigation and the prosecutor is beneficial. This will assist as agreement may be reached to inspect the material together before the schedules are prepared. The Disclosure Officer must deal expeditiously with requests by the prosecutor for further information on material which may lead to it being disclosed.

4.4.3 – DO Certifications. The Disclosure Officer is statutory obliged to provide different certifications in accordance with the Code of Practice during the course of the disclosure process. The purpose of certification is to provide assurance to the prosecutor on behalf of the SP investigating team that all relevant material had been identified, considered and revealed.

4.4.4 – Multiple Accused. Where there are multiple accused the unused material relating to each accused must be considered separately. Consideration should be given to revealing relevant unused material to the prosecutor on separate SPDF's, particularly when separate offences are referred to the SPA.

4.4.5 – SPA Endorsement of SPDF 6C. After consideration of the schedule(s), the prosecutor will endorse them with decisions as to whether each item described will be disclosed to the Defence. (D indicates the item is to be disclosed, I, where inspection of the item by the Defence is more appropriate, CND, where the item is Clearly Not Disclosable and ND where the description of the item is inadequate and there is insufficient time to amend the entry before trial). A copy of the endorsed schedule(s) should be sent to the Disclosure Officer. On occasions it may be necessary to amend the schedules as when the schedules are first submitted with the final case papers, the Disclosure Officer may not know exactly what material the prosecutor intends to use as part of the prosecution case. The prosecutor may create unused material by extracting statements or documents from the evidence provided. In which case the prosecutor may disclose material that satisfies the disclosure test directly to the Defence without waiting for the Disclosure Officer to amend the schedules. However where this is done the prosecutor should advise the Disclosure Officer accordingly so that correctly amended schedules and DO Report can be created. If amendments are considered to the SPDF 6C/6D and 6E the prosecutor is required to advise the Disclosure Officer of:

- Items described on the SPDF 6C that should be properly be on the SPDF 6D and vice versa.
- Any apparent omissions or amendments required.
- Insufficient or unclear descriptions of items.
- Or a failure to provide schedules at all.

The Disclosure Officer **must** take all remedial action and provide properly compiled schedules to the prosecutor expeditiously. Failure to do so may result in the matter being raised with the Disclosure Officer's Chain of Command. A prosecutor may ask to inspect the material, or request a copy of the material where one has not been sent. The Disclosure Officer is responsible for arranging this in consultation with the OIC or investigation supervisor. Material should be copied to the prosecutor on request unless it is too sensitive or too bulky, or can only be inspected. This applies to disclosure throughout the life of the case.

4.4.6 – Responsibility for compiling Schedules. The Code of Practice places the responsibility for creating the schedules and keeping them accurate and up to date on the Disclosure Officer. Consequently, the prosecutor should not amend the schedules. In these circumstances the prosecutor should inform the Disclosure Officer of any changes required, and return the schedules for amendment where appropriate. The Disclosure Officer should effect the amendments promptly and return the amended or fresh schedules to the prosecutor as soon as possible with a further SPDF 6E as appropriate.

4.4.7 – Continuing Duty to Disclose. The duties of revelation to the prosecutor and disclosure to the accused are continuing obligations. Any new material coming to light after initial disclosure has been completed should be treated in the same way as earlier material. The new material should be described on a further SPDF 6C, SPDF 6D or a continuation sheet. To avoid confusion, numbering of items submitted at a later stage must be consecutive to those on the previously submitted schedules. A further SPDF 6E should be submitted irrespective of whether or not any of the new material is considered by the Disclosure Officer to satisfy the disclosure test.

4.4.8 – Disclosure process by SPA. Once the Disclosure Officer has complied with their statutory obligations under the Code of Practice by supplying the prosecutor with schedules of unused relevant material and material which satisfies the disclosure test, the prosecutor must review the schedules, annotating the schedules with the appropriate endorsement codes. The duties of the prosecutor are not included in this MPID, however, once the prosecutor had fulfilled his initial duties to disclose to the Defence, he should inform the Disclosure Office that this had been done by sending a copy of the endorsed SPDF 6C, together with a copy of the letter making disclosure to the Defence. This enables the disclosure to anticipate when the Defence will comply with their statutory duties under the Order by providing the prosecution with a Defence Statement.

4.4.9 – Inspection of Unused Material by the Accused. Where the prosecutor has directed that material should be inspected by the accused under article 4 (3) (b) of the Order, the Disclosure Officer may make these arrangements direct with the accused/Defence solicitor, but must inform the prosecutor of these arrangements. The Disclosure Officer must comply with Defence requests for copies of the material unless it is neither practicable (where the material consists of an object which cannot be copied or because the volume of the material is so great) nor desirable (for example because the material is a statement by a child witness in relation to a sexual offence). Where the item to be disclosed has not been copied and sent to the SPA, the usual method of disclosure will be for the Defence to inspect it. The Disclosure Officer will make arrangements for the Defence inspection of the item, and should notify the prosecutor whether and when the inspection takes place. If the Disclosure Officer makes a copy of the item for the accused they should send a copy to the prosecutor. Disclosure Officers must be on guard not to copy or allow to be inspected material which the prosecutor had not indicated can be so copied or inspected.

4.4.10 – Defence Disclosure. In proceedings before a Service Court, where the prosecutor has provided initial disclosure or purported to have done so under article 4 of the Order, the accused must serve a Defence statement on the prosecutor and the court. The Defence statement must be served within the time limits specified under article 8 of the Order. This should usually be 28 days after initial disclosure by the prosecutor has occurred. Article 7 of the Order 2009 places a statutory obligation upon the Defence and the accused to provide a Defence statement after the prosecutor has complied with or purported to comply with their initial duties to disclose. In the Defence statement, the accused **must**:

- set out the nature of the Defence, including any particular defences on which the accused intends to rely.
- indicate the matters of fact on which the accused take issue with the prosecution.
- set out, in the case of each matter, why the accused takes issue with the prosecution.
- indicate any point of law (including any point as to the admissibility of evidence or an abuse of process) which the accused wishes to take, and any authority on which he or she intends to rely for that purpose.

If the Defence statement discloses an alibi the accused must give particulars of the alibi in the statement, including:

- the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given, and

- any information in the accused's possession which might be of material assistance in identifying or finding any such witness if the above details are not known to the accused when the statement is given.

4.4.11 – Evidence to support an alibi. Evidence in support of an alibi is evidence tending to show that by reason of presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

4.4.12 – Receipt of the Defence Statement by SPA. Upon receipt of a Defence Statement the prosecutor should review the statement being alert to the ruling in R v H and C, where the House of Lords deprecated defence statements which make "*general and unspecified allegations and then seek far – reaching disclosure in the hope that material may turn up to make them good*". Upon review of the Defence Statement the prosecutor should immediately send a copy of the Defence Statement to the lead Disclosure Officer, in order that any review of the retained unused material or further enquiries can be conducted without significant delay or imposing disadvantaging timelines to the SP. At the same time, the prosecutor should draw the attention to the Disclosure Officer to any key issues raised in the Defence Statement. Where appropriate, the prosecutor should give advice to the Disclosure Officer in writing as to the sort of material to look for, particularly in relation to legal issues raised by the Defence. Some of these issues may be known to the prosecutor as a result of matters mentioned by the Defence during the progress of the case. For example arguments progressed at PCMH. Advice to the Disclosure Officer may include:

- guidance on what material might have to be disclosed.

- advice on whether any further lines of enquiry need to be followed (e.g. where an alibi has been given).

- suggestions on what to look for when reviewing the unused material.

- the appropriate use of the Defence statement in conducting further enquiries, particularly when this necessitates additional enquiries with prosecution witnesses.

4.5 – Defence Statements, Service Police Actions. The Defence Statement provides a valuable opportunity to confirm or rebut Defence allegations and it is likely to point the prosecution to other lines of enquiry. Upon receipt of a Defence Statement the lead Disclosure Officer should inform any Deputy Disclosure officer and the OIC of the investigation and copy the Defence Statement to them along with any advice provided by the prosecutor, if appropriate. Disclosure Officers must also be alert to Defence Statements which seek far reaching disclosure of unused material and do not fulfil the statutory criteria laid down in the Order and should query such Defence Statements where no advice has been provided by the prosecutor.

4.5.1 – Conducting further enquiries upon receipt of Defence Statement. An investigator should not show a Defence Statement to a non-expert witness. The extent to which detail of a Defence Statement is made known to a witness will depend upon the extent to which it is necessary to clarify the issues disputed by the Defence, assist the prosecutor to identify any further disclosable material and or to identify any further reasonable lines. The Disclosure Officer or OIC of the investigation should seek guidance from the prosecutor if there is any doubt as to how the Defence statement should be used in conducting further enquiries.

4.5.2 – DO responsibilities on receipt of Defence Statement. In any event, following receipt of the Defence Statement the Disclosure Officer should promptly review all the retained material and must draw the attention of the prosecutor to any material that satisfies the disclosure test. Both sensitive and non-sensitive material must be considered. Whenever enquiries are conducted in response to the Defence Statement it is important that any additional evidence and subsequent schedules or unused relevant material are copied to the prosecutor promptly to avoid delay. If no further enquiries are conducted as a result of the Defence Statement then the OIC of the investigation or the Disclosure Officer should explain why in writing to the prosecutor. It there is no material that the Disclosure Officer believes satisfies the test for disclosure, they should endorse the subsequent SPDF 6E in the following terms '**I have considered the Defence Statement and further reviewed all the retained relevant material available to me and there is nothing to the best of my knowledge and belief which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case of the accused**'. The Disclosure Officer should ensure that it is clear that the SPDF 6E has been completed in response to a Defence Statement. The Disclosure Officer and or deputy must sign and date a SPDF 6E. If material was previously referred to on a SPDF 6E, it does not have to be listed again. The prosecutor once reviewed should notify the Disclosure Officer when disclosure again takes place in writing.

4.6 – Scientific and Technical Support Material. All scientific and technical support departments such as the Forensic Department, MEIT and SPCB3C should follow procedures and working practices which ensure compliance with the requirements of the Code of Practice. The Code requires the recording and retention of relevant unused material and information obtained or generated in a criminal investigation. The records generated by support departments within the SP should be made available to the Disclosure Office in the case. This will ensure that the Disclosure Officers can meet their statutory obligations under the Codes of Practice and schedule the material accordingly.

4.6.1 – Finger Print Marks. Crime Scene Investigators should make all finger marks lifted or photographed at the scene of an alleged offence available to the Disclosure Officer. Where an exhibit is examined for fingerprints at the FWO Dept, all relevant finger marks must be recorded and any lifts or photographs retained. Again this information should be made available to the Disclosure Officer. Where a finger mark is eliminated from the enquiry because it is identified as belonging to a person having legitimate access, it must still be retained. A record should be kept of the identity of the person eliminated from the enquiry. Once the elimination process has been completed, the print elimination forms should be disposed of by either returning to the donor or by destruction in line with current policy.

4.6.2 – Forensic Science Material. Forensic Science Providers have a well established procedure for dealing with unused material generated as a result of the

analysis of Forensic submissions. These working practices have been established in agreement between the ACPO and the FSP, in order that compliance with the CPIA 96 and Code of Practice are complied with. For detailed guidance on the established working practices Disclosure Officers should refer to Chapter 23 of the CPS/ACPO Disclosure Manual.

4.7 – Specific Guidance on Disclosure where a CHIS is involved. The guidance in this section mirrors that advocated by HOPF and the CPS, therefore its contents are not to be communicated outside of the SP/SPA. This section deals with when it is appropriate for the prosecutor to be provided with the true identity of the source. Similar principles should be applied to more general requests such as whether a named person is or ever has been a source.

4.7.1 – Use of a CHIS. The tasking of Covert Human Intelligence Source (CHIS) is becoming a common feature in modern service policing in the investigation of serious crime. Where such investigations lead to prosecutions, the Defence will frequently make requests for disclosure of information, which, if provided, may directly or indirectly reveal the identity of the source. It is a well established common law principle that information which reveals the identity of the CHIS should not be disclosed, unless not to do so may lead to a miscarriage of justice by denying the Defence a legitimate opportunity to cast doubt on the prosecution case. This well established principle is designed to protect the identity of intelligence sources from disclosure to the Defence. It does not require that the identify of the source be withheld from the prosecutor, although the circumstances in which the prosecutor needs to know the true identify of a source will be rare. Prosecutors should not routinely seek confirmation of the true identify of a source. Such requests must be based on sound principles and supported reasons.

4.7.2 – Revelation to the Prosecutor. Where a SP investigation resulting in a prosecution has been informed by intelligence from a human source, the SP should always inform the prosecutor without the need for any request to be made. This fact must be revealed as soon as possible. In determining whether they need to know the identify of the source, prosecutors will apply the following principles:

- the fact a human source provided intelligence that led to the SP investigation will almost invariably come within the Code's definition of relevant material. As such it must be scheduled and revealed to the prosecutor. Revelation will be made using the SPDF 6D and in the manner previously discussed. It will be the responsibility of the deputy Disclosure Officer appointed within the Dedicated Source Unit (DSU) to produce the schedules to the prosecutor as well as informing the OIC of the investigation or lead Disclosure Officer of the existence of this highly sensitive material where practicable.

- maintaining the integrity of the intelligence system demands that information as to the true identity of the intelligence source should be revealed only to those who have a genuine need to know such information. The Regulation of Investigatory Powers Act 2000 Sect 29 (5) (e) states:

  '*...that records maintained by the relevant investigating authority that disclose the identity of the source will not be available to persons except to the extent that there is a need for access to them to be made available to those persons*'

- knowledge of the identity of the intelligence source is unlikely to have any impact on the preparation of the prosecution case. Nevertheless, prosecutors

should be advised as to the nature of the intelligence provided so that they can decide whether further information is required before they can fulfil their disclosure obligations.

- revelation of such information to prosecutors does not mean automatic disclosure to the Defence; the prosecutor should consider the information by applying the disclosure test. If prosecutors are of the opinion the disclosure test is satisfied, they should discuss with the DSU controller, OC FIB, HQ PM (A) (DPM Inv) and SO1 Inv & Pol, ways in which the information could be disclosed without revealing the identity of the source or otherwise harming the public interest.

- where this cannot be achieved, a decision must be taken as to whether to abandon the prosecution or to seek from the JAG (trial judge) that the public interest in withholding the information outweighs the public interest in the Defence having access to it.

- where there appears to be nothing surrounding the use and conduct of the source, or the source's true identity, which is capable of satisfying the disclosure test, prosecutors should not routinely request the SP to provide the identity of the source. Where such requests are made, they should be in writing supported by sound reasons. It is not acceptable to request information on the basis that it would be useful or that it might be useful at some time in the future. The request must demonstrate how the information sought would satisfy the disclosure test.

The principles set out above should also be followed where the request is not for the identity of the source to be confirmed but for confirmation (or otherwise) that a named person is, or has at some time been a source, is such records exist.

4.7.3 – Revealing the identity of a CHIS/Source to the Prosecutor. Where a request had been made by the prosecutor, in writing and supported by reasons, to be provided with details of the true identity of a source (or to confirm whether a named person is or has been a source), the following procedures should be adopted:

- the request must be submitted to the senior Officer responsible for the management of sources, OC FIB SPCB, who should be aware that the likely consequence of a refusal to comply with the request will be the abandonment of the prosecution.

- in addition to the written reasons in support of the request, the prosecutor should provide a form of undertaking to the effect that where the answer to the enquiry will reveal, expressly or by implication, the identity of an intelligence source, there will be no further disclosure of that information without the approval of that Officer. The Officer will consult with the senior authorising Officer for the agency handling the source if he or she is not that person.

- where the law enforcement agency conducting the investigation is not the law enforcement agency responsible for managing the source, the prosecutor's request should be supported by the senior Officer responsible for the management of sources within the investigating agency who will forward the request to the senior Officer responsible for the management of sources within the force which holds the source's

authorisation. Again, the investigating agency should be aware that the likely consequence of a refusal to support the request will be abandonment of the case.

4.7.4 – Ex Parte Representations. Frequently the enquiry as to the true identity of the source, or request for confirmation (or otherwise) that a named person is, or has been as some time been a source, comes from the trial judge. The enquiry will usually be made ex parte. Even where the enquiry is raised in the presence of the Defence, the prosecutor will be afforded the opportunity to make representations ex parte. Where the prosecutor believes that the judge's request is justified or where he has failed to persuade the judge that it is not, it will be necessary to provide the information or abandon the prosecution. The prosecutor should consult with the DSP/DDSP and the senior Officer responsible for the management of sources within the SP (DPM Inv/SO1 Inv & Pol, OC FIB). Where the sources is managed by a HOPF, the latter may need to consult with the senior Officer responsible of the management of sources within a force that holds the sources authorisation where the enquiry relates to a named individual or where the judge has enquired as to the true identity of a source.

4.7.5 – Disclosure to the Defence. Where the Defence seek information as to the identity of the source or confirmation (or otherwise) that a named individual is or has been a source, the request should initially be addressed applying the CPIA 96 disclosure principles. Where the prosecutor is satisfied that the ordinary principle of non-revelation applies, the response to the Defence enquiry should be couched in the following terms:

> *"In accordance with well-established principles, we neither confirm nor deny the involvement of a human source in any investigation"*

4.7.6 – Partial or incremental disclosure. There will be instances where the intelligence provided by a source is capable of satisfying the disclosure test but where the identity of the provider is immaterial. In such cases, it may be possible to disclose material to the Defence in a form, which does not reveal the identity or even the existence of a source. In deciding whether disclosure can be made, in an appropriate form, of the intelligence the following principles should be followed:

- each potential disclosure should be considered on a case by case basis. Care should be taken to ensure that the source controller is consulted regarding the provenance of the intelligence i.e. who else knew of the information? When was the information known? Could the information have been obtained by other means? An assessment should be made in each case as to whether disclosing the information itself, in whole or in part, would be the functional equivalent of revealing the identity of the source. In extreme cases, even disclosing the fact that certain information has come to light will serve to expose the source.

- unless it is strictly necessary, the fact that disclosed information emanated from a human source should not be disclosed.

- an incremental approach should be adopted, disclosing only so much information as is necessary to discharge the prosecutor's statutory obligations. The Defence should be required to justify further disclosure with reasoned argument in a Defence Statement or application under article 7 of

the Order 2009. By engaging the Defence in this way, it may be possible to resolve matters without having to involve the judge.

- where disclosure of information is deemed appropriate, or is ordered by the court, consideration should be given to effecting disclosure by way of formal admissions.

4.7.7 – Witnesses as sources. There is no duty on investigators routinely to enquire whether a prosecution witness is or have been sources. Even if such an enquiry were to be made, for the reasons set out above, it may not be possible to provide a categorical answer. Assertions that a named person is not and never has been a source should be made for two reasons. Firstly they cannot be categorically substantiated. Secondly such assertions can contribute to incremental harm being caused to the public interest. However, where it is known to an investigator that a witness is or has been a source and the credibility of that witness is central to the prosecution case, the OIC of the investigation should make enquires to satisfy themselves that there is nothing in the witness' source history which could be used to question credibility.

4.7.8 – Participating sources and undercover operations. Where a participating source or undercover SP has been deployed in an operation and charges follow, there should be early consultation with DSP/DDSP. Whilst there is no formal requirement for investigators to consult with the prosecutor prior to referring charges to SPA, it is best practice to do so in these circumstances. The DSP/DDSP will be in a position to advise on whether, having regard to the circumstances of the proposed deployment, it will be possible to conduct a prosecution whilst maintaining the anonymity of the intelligence source.

4.7.9 – Revealing the true identity of an Under Cover Officer (UCO). The true identity of a UCO should never be revealed to a court; therefore care should be taken when compiling the appropriate schedules of unused relevant material not to inadvertently do so. An UCO is not required to as a matter of routine to provide a SPDF 6H, if the court required further evidence of the good character of the UCO, then the duty would fall to OC FIB/OSU to attest to this before the court. Where adverse disciplinary findings or criminal convictions are recording a UCO, the SPDF 6H must be compiled in a format which would not reveal their true identity.

4.7.10 – Multiple Disclosure Officers. During the course of some investigations material of such sensitivity that it cannot be shown to the lead Disclosure Officer may be generated. As discussed in Para 4.1.9 – 4.2.2. In such cases a Deputy Disclosure Officer will be appointed to schedule this material and reveal it to the prosecutor. This may be an investigation which was initially intelligence led, in which case the DDO may be from the investigating unit or investigations which have utilised specialist assets, such as DSU and OSU. No matter how many Disclosure Officers there are in an investigation, one Disclosure Officer should be regarded as the lead Disclosure Officer and as such is the single point of contact for the SPA. The lead Disclosure Officer has an important co-ordinating role in such circumstances. The lead Disclosure Officer should be made aware of any other disclosure schedules being submitted by other Disclosure Officers and should reveal the existence of those other schedules by recording them on the primary schedules they submit.

4.7.11 – OIC Responsibility where there is more than one Disclosure Officer. Where there are more than one Disclosure Officer, the risk that certain relevant material will not be revealed to the prosecutor will inevitably increase. It is

important therefore that the OIC of the investigation performs an oversight role in relation to the unused material. The following points should also be observed:

- the lead Disclosure Officer must be informed as to which person(s) or agencies hold relevant material that they cannot copy to the Disclosure Officer. Only in truly exceptional circumstances would it be appropriate for the Deputy Disclosure Officers to withhold the fact that they hold relevant material from the lead Disclosure Officer. The authority of the OIC of the investigation must be obtained to withhold the existence of relevant material from the lead Disclosure Officer. In those cases, the OIC of the investigation will be responsible for ensuring that the Deputy Disclosure Officer alerts the prosecutor to the existence of the material.

- unless such exceptional circumstances apply, the lead Disclosure Officer should be informed, if only in broad terms of the nature of the material that is being schedules separately. Wherever possible, the lead disclosure Officer, as the person with the most knowledge of the unused material, should be involved in the revelation process.

- the most appropriate person to liaise with the prosecutor concerning disclosure of material relating to intelligence sources is the DSU controller. They should involve the lead Disclosure Officer in the revelation process as far as possible.

4.8 – Specific Guidance when Dealing with Surveillance Authorisation. In these circumstances the Service Police will ordinarily have obtained authorisation for surveillance. In some instances, the authorisation will have required the prior written approval of a Surveillance Commissioner before it could take effect. Applications for authorisation of surveillance and for prior approval may generate a considerable body of relevant unused documentation and questions will arise as to the extent to which this documentation falls to be disclosed. All such documentation will have to be considered whether it is non-sensitive, sensitive or highly sensitive.

4.8.1 – Disclosure Officers knowledge of RIPA Authorisations. There are various methods of surveillance (interference with property, intrusive surveillance, and directed surveillance), whichever method has been deployed, the authorising Officer and where appropriate a Surveillance Commissioner, will have had to have been satisfied that certain statutory criteria had been met. The application itself and supporting documentation will set out how the OIC of the investigation, seeking the authorisation contends that the criteria are met. Disclosure Officers and Deputy Disclosure Officers must have regard to the terms of the authorisation and supporting documentation and relate this to the subsequent police activity when considering whether there is any material that satisfies the disclosure test.

4.8.2 – Review. Whatever the method of surveillance used there is a duty on the prosecutor to review the authorisation and all supporting documentation. Any material that satisfies the disclosure test will be disclosed subject to any claim for PII. Where no disclosable material is identified *R v GS and others* [2005] EWCA 887, makes it clear that the prosecutors duty to disclose will be satisfied, in the case of property inference or intrusive surveillance, by providing the trial judge with a copy of the Surveillance Commissioners prior approval.

4.8.3 – Revealing RIPA Authorisation. Where the prosecution are to rely upon surveillance evidence obtained following such authorisation, it will usually be

appropriate for the 'authorisation' to be described on the SPDF 6C in accordance with this MPID.

4.8.4 – Intercept Product. The main piece of legislation regulating the interception of communications is the Regulation of Investigatory Powers Act 2000 (RIPA). Usually interception comprises the monitoring of communications in the course of their transmission (this includes post as well as digitally and telephony). The communications may be recorded in their original format (voice or email data) or notes may be made regarding the communications by those monitoring them. The interception of Communications Code of Practice (ICC Code) refers to 'intercepted material and all copies, extracts and summaries of it'. Where the SP are involved in the warranted interception of communications the strict statutory obligations under RIPA and the ICC Code regarding retention and destruction of the intercept product must be observed. An intercept product will invariably be destroyed before any case is prosecuted, however monitors and their supervisors must remain vigilant to ensure that any material that may fulfil the disclosure test is retained. There exist special provisions for handling material gathered under Part 1 Chapter 1 of the Regulation of Investigatory Powers Act 2000 (Interception of Communications) and no reference to the authorities for and the product of communications intercepts should be made in any unused material schedule.

4.9 – Digital Media Material. The principles of disclosure apply to computer and digital based electronic evidence in the same way as any other material obtained in the course of an investigation. It is a matter the OIC of the investigation and investigator to determine which material on the computer it is reasonable to enquire into and in what manner; this may require consultation with SPA at an early stage of the investigation. The extent of the enquiries should be detailed in a Data Examination Strategy.

4.9.1 – Extent of the examination of digitally stored material. This type of material contained on computer or digital media is likely to be extensive. For instance 27 gigabytes of data if printed would create a stack of A4 paper 920 metres high. In dealing with digital media the Attorney Generals Guidelines on Disclosure 2013 Annex A[1] should be followed.

The Guidelines state:

> *'Generally this will mean that such material must be examined in detail by the Disclosure Officer or the deputy, but exceptionally the extent and manner of the inspecting, viewing or listening will depend on the nature of the material and its form. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip sampling. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The extend and manner of its examination must also be described together with justification for such action'*

4.9.2 – Responsibility of the Officer in Charge of the Investigation. It is the responsibility of the OIC of the investigation to ensure that the Disclosure Officer's duty to inspect, view and listen to all relevant material in the investigation is properly discharged. It is essential that the OIC of the investigation appoints a

[1] They are not operational guidelines but set out an approach in line with best practice based on the ACPO: Good Practice Guide for Computer Based Electronic Evidence Version 0.1.4.

Disclosure Officer who has the skills to liaise with SPCB3C. Under the CPIA 96 (Application to the Armed Forces) Order 2009 and the Code of Practice the statutory obligation placed on the OIC of the investigation, the Disclosure Officer, investigator and prosecutor is to follow pursue all reasonable lines of enquiry, whether they point towards or away form the suspect. Lines of enquiry should be pursued only if they are reasonable and proportionate in the context of the individual case. The obligation does not mean that the 'prosecution' should examine every word or byte of computer material in case it falls to be disclosed. The SPA will only have to disclose material which might reasonably be considered capable of fulfilling the disclosure test which they are aware of or had been drawn to their attention.

4.9.3 – Process of identifying relevant unused material. The investigator or Disclosure Officer in some cases, during an Early Case Assessment of the recovered media/computer may be able to achieve their obligations by manually sifting through the contents of the media from its directory and determining which files are evidence or relevant unused material. In cases where this is not feasible, due to the sheet volume of material held on the computer files, the investigator or Disclosure Office may conduct searches based on keywords or other search tools or techniques to identify relevant phrases, identifiers or passages. Advice from SPCB3C WOIC should be able to assist once the material has been identified. All Disclosure Officers, investigators and OIC of investigations should apply the procedures highlighted in Para 2 Annex H of the CPS/ACPO – Disclosure Manual when dealing with issues surrounding identifying relevant unused material held on digital media devices and computers.

4.10 – Qualification. Intentionally Blank.

4.11 – Recusal. Policy and Guidance for Recusal, when a conflict of interest is identified is contained within MPID Ch 9 - Recording and Reporting of Offences Art 5.3

Subject Matter Experts

5.1 – Subject Matter Expert. The Subject Lead for CPIA 96 is WO2 [redacted] SIB Regt RMP.

Linked documents

6.1 – Guide to Material to be included on Service Police Disclosure Forms.

6.2 – Flow Chart – CPIA

6.3 – Forms

6A Pt 1– List of Relevant Unused Material – Non-Sensitive
6A Pt 2 – List of Unused Non-Sensitive Material – For Uploading purposes only
6B – List of Unused Material – Sensitive
6C – Schedule of Relevant Unused Material – Non-Sensitive
6D – Schedule of Relevant Unused Material – Sensitive
6E – Disclosure Officers Report
6F – Furtherance of Enquiry Index of Material
6G – Non SP Witness Antecedents
6H – SP Officer Disciplinary Record
6I – Register of Authorised Disclosure Officers

Letter for Third Party Disclosure

6.4 – Reference – Legal. The following are legal references contained within this chapter:

a. JSP 830 – Manual of Service Law.

b. The Criminal Procedure and Investigations Act 1996 (Application to the Armed Forces) Order 2009.

c. The Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2009.

d. Armed Forces (Summary Hearing and Activation of Suspended Sentences of Service Detention) Rules 2009.

e. Prosecution Team Disclosure Manual (CPS/ACPO)

f. Attorney Generals Guidelines on Disclosure 2013.

Training

7.1 – Formalised training. [redacted] SIB Regt RMP is available to provide advice and conduct unit level Disclosure Officer training.

Financial

8.1 – Financial Authority. Engagement with any external agencies or Subject Matte Experts that may incur financial cost are to be cleared and authorised via SO2B, Inv & Pol, HQ PM (A).

Review Process

9.1 - Stakeholder Review. This document will next be reviewed in Jan 16 and on an annual thereafter. All amendments and comments should be submitted to SO1 Inv and Pol, HQ PM (A)

9.2 - Legacy Audit Trail. The following updates and amendments have been made to this chapter and previously published versions retained for audit purposes:

Date of re-publication:	Paragraphs amended:	Actioned by:
28 Jan 15	3.3.4 and 3.3.5 – amend the process of revealing material to a unit CO. 4.1.4 – Unused Exhibits. New Forms SPDF 6A Part 1 and SPDF 6A Part 2	WO2, 37 Sect, 3 Inv Coy, SIB Regt RMP

Lessons Learnt

10.1 – Abridged Learning Account. In line with MoD policy, there may be an occasion for units to produce Learning Accounts to be submitted to HQ PM(A). All considerations relevant to investigations and policing practice will be collated by way

of an Abridged Learning Account, maintained by [redacted] within HQ PM(A) Inv and PoI. Those which have a specific bearing on this MPID chapter can be found below.