WITN10510105

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010 (Section 164)

CODE OF PRACTICE

DISCLOSURE OF EVIDENCE IN CRIMINAL PROCEEDINGS

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This is the Code of Practice made under Section 164 of the Criminal Justice and Licensing (Scotland) Act 2010.

It comes into force on 6 June 2011.

It is hereby laid before the Scottish Parliament in terms of section 164 (4) of that Act.

Signed

Elish Angiolini

Lord Advocate

Date

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Preamble

This Code of Practice is issued under Part VI of the Criminal Justice and Licensing (Scotland) Act 2010 ("the Act") and provides guidance in relation to the disclosure of evidence in criminal proceedings. Under section 164 of the 2010 Act, police forces, prosecutors and other investigating agencies, as prescribed by regulations, must have regard to the code in carrying out their functions in relation to the investigation, reporting and prosecution of crime and sudden deaths.

Introduction

This Code of Practice applies in respect of all criminal investigations conducted by police officers, which begin on or after the day on which this Code comes into force.

This Code of Practice also applies to any other persons who engage (to any extent) in the investigation of crime or sudden deaths and submit reports relating to those investigations to the Procurator Fiscal and have been prescribed by regulations Disclosure (Persons engaged in the Investigation and Reporting of Crime and Sudden Deaths) (Scotland) Regulations 2011 to have regard to the code.

Nothing in this code applies to information intercepted under warrant issued under section 2 of the Interception of Communications Act 1985, or section 5 of the Regulation of Investigatory Powers Act 2000, or to any copy of that information as defined in section 10 of the 1985 Act, or section 15 of the 2000 Act.

Any references to police forces or police officers in this Code include references to other investigating agencies (as prescribed by Disclosure (Persons engaged in the Investigation and Reporting of Crime and Sudden Deaths) (Scotland) Regulations 2011) and officers of those other agencies.

Any references to the 1995 Act are references to the Criminal Procedure (Scotland) Act 1995.

Any references to the 2010 Act are references to the Criminal Justice and Licensing (Scotland) Act 2010.

Details of the definitions of the terminology used in this code are included in Annex A to this Code.

A failure to comply with this code may result in a breach of Article 6 of the European Convention on Human Rights and may constitute a miscarriage of justice

This code extends to Scotland.

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THE 6 CORE PRINCIPLES OF REVELATION

1. **The Police are obliged to reveal[1] to COPFS all information that may be relevant to the issue of whether the accused is innocent or guilty.**

2. **"Relevant" means any information that appears to an investigator to have some bearing on the offence or offences, under investigation or any person being investigated or on the surrounding circumstances, unless it is incapable of having any impact on the case.**

3. **This obligation persists in perpetuity. This means that the duty exists during any appeal process and even where there is no live appeal, for example where such information comes to the attention of the police after conviction, or after an appeal has been refused.**

4. **Compliance with the duty requires the Police to provide COPFS with all witness statements obtained, including statements from defence witnesses.**

5. **Compliance with the duty also requires the Police to reveal to COPFS the existence of criminal history records (previous convictions and outstanding charges) for all witnesses for whom statements are provided[2].**

6. **Failure to properly and timeously reveal all potentially relevant information to COPFS could lead to a failure to disclose material information to the accused which could result in a miscarriage of justice.**

[1] As defined in Annex A

[2] In particular, this will be required for all witnesses listed on the indictment, including section 67 notices (under the Criminal Procedure (Scotland) Act 1995 for the late lodging of witnesses and productions) and defence lists of witnesses in solemn cases all witnesses that the Crown intends to call at trial in summary cases.

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THE 6 CORE PRINCIPLES OF DISCLOSURE

1. **The Crown is obliged to disclose *all material information for or against the accused* (subject to any public interest considerations). This relates to statements but it also relates to *all* information of which the Crown is aware.**

2. **"Material" means information which is likely to be of real importance to any undermining of the Crown case, or the casting of reasonable doubt on it and of positive assistance to the accused.**

3. **This legal duty persists in perpetuity. This means that the duty exists during the appeal process and even where there is no live appeal, for example where such information comes to the attention of the Crown after conviction, or after an appeal has been refused.**

4. **Compliance with the duty requires the Crown in all solemn proceedings to disclose all statements (as opposed to precognitions) of all witnesses on the Crown *and defence* lists, including section 67 notices.**

5. **Compliance with the duty requires the Crown, *without having to be requested to do so*, to disclose all material previous convictions and outstanding charges for all witnesses on the Crown lists, including section 67 notices.**

6. **Failure to disclose material information risks a miscarriage of justice. Disclosure carried out properly and timeously ensures that justice is done and prevents unnecessary trials and delay.**

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PART A: THE PRINCIPLES OF REVELATION AND DISCLOSURE OF EVIDENCE

1. The First Principle of Revelation

1.1. The police (or other investigating agency[3]) must reveal and where appropriate, provide to the Crown all information[4] which may be relevant and has been obtained or generated during an investigation[5]. Information may be relevant[6] to the investigation if it appears to an investigator to have some bearing on the offence under investigation, or on any person being investigated, or on the surrounding circumstances unless it is incapable of having an impact on the case. In addition any information derived from another investigation or enquiry that may be relevant and of which an investigator is aware, must be revealed and where appropriate provided.

1.2. If the reporting or reviewing officer[7] is in doubt as to the relevancy of an item of information, then it should be treated as if it were relevant and revealed and where appropriate submitted to the Crown for consideration.

1.3. Although an initial assessment of the relevance of an item of information may be undertaken, this duty must be informed by an assessment of what may be relevant after all necessary investigation by the police.

2. The First Principle of Disclosure

2.1. The Crown must disclose all information on which the Crown is aware that meets the materiality test[8] set down in section 121 of the 2010 Act.

2.2. If the Crown is in doubt as to the materiality of an item of information, then it should be treated as if it were material[9] and disclosed to the defence, unless a public interest issue arises.

2.3. Where information has been assessed as being material, either by the Crown or the Court following an application by the accused under section 128 of the 2010 Act, the Crown must also consider whether there is any reason in the public interest why that information should not be disclosed to the defence and if appropriate, make an application to the Court under sections 141-149 of the 2010 Act.

2.4. In addition, the Crown must consider whether the material information relates to a public interest of which the UK Government is the holder/ protector of that particular public interest. In such circumstances, the Crown, under direction of the Deputy Crown Agent, must liaise with the Office of the Solicitor to the Advocate General for Scotland (OSAG) in order that they can consider with the appropriate UK Department, whether disclosure of the item of information would result in the real risk of substantial harm or damage to the public

[3] A definition of an investigation agency is contained in Annex A to this Code
[4] As defined in Annex A
[5] As defined in Annex A
[6] As defined in Annex A
[7] Definitions of both the reporting and reviewing officers are contained in Annex A
[8] The materiality test is defined in Annex A
[9] As defined in Annex A

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interest of which that department are the holders/protectors and where appropriate, for OSAG acting on behalf of that department to make an application to the Court under sections 146-149 of the 2010 Act.

2.5. Procedures for liaising with OSAG in relation to disclosure of information relating to a public interest of which the UK Government is the holder/ protector of that particular public interest are contained in Protocol between COPFS and OSAG.

3. The Second Principle of Revelation

3.1. Information may be relevant if it appears to an investigator to have some bearing on the offence, or offences, under investigation or any person being investigated or on the surrounding circumstances unless it is incapable of having an impact on the case.

3.2. Relevant information can include information derived from another enquiry, for example a related police investigation into the conduct of police officers involved in an ongoing investigation/prosecution; an enquiry by an Area Procurator Fiscal into criminal allegations made by the accused (or another party) against a police officer who is a witness in an ongoing prosecution; a parallel deaths investigation; an investigation into a counter allegation; or a cross force/agency investigation.

3.3. Information that may be relevant will encompass:

i) All witness statements, regardless of whether the witness will be cited by the Crown;
ii) Criminal history information for witnesses;
iii) Information relating to any findings of misconduct under the Police (Conduct) (Scotland) Regulations 1996, the British Transport Police (Conduct) Regulations 2008 or the Ministry of Defence Police (Conduct) Regulations 2009;
iv) The results of any forensic analysis, including negative findings and mixed findings;
v) All information obtained in relation to identification of an accused, including information obtained as a result of an identification procedure; and
vi) Information which tends to suggest that a witness may have provided inaccurate or false information.

The above list is not exhaustive and merely illustrates the type of information that may be relevant.

3.4. There is a presumption that a finding admitted or proved at a Misconduct Hearing under the Police (Conduct) (Scotland) Regulations 1996, the British Transport Police (Conduct) Regulations 2008, or the Ministry of Defence Police (Conduct) Regulations 2009 will always be relevant.

3.5. Relevant information can be received and/or held in many forms and may include, for example,

i) The content of phone calls or other conversations;
ii) Information in text messages;

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iii) E-mails, letters or faxes;
iv) Notes made in note books or other forms
v) Surveillance reports/logs; and
vi) Intelligence reports

4. The Second Principle of Disclosure

4.1. As set down in section 121 of the 2010 Act information is material if it:

i) Would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused;
ii) Would materially strengthen the accused's case; or
iii) Is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

4.2. There are 6 principal categories of information which should be regarded as exculpatory and thus material:

i) Information which may point to the conclusion that no crime has been committed or that no crime has been committed on the date or at the place libelled;
ii) Information which may contradict evidence (real or oral) on which the Crown case will rely;
iii) Information which may cast doubt on the credibility or reliability of the Crown witnesses;
iv) Information which may be inconsistent with scientific or other expert evidence on which the Crown will rely or with inferences which may be drawn from such evidence;
v) Information which may point towards another person as the perpetrator; and
vi) Information which may reduce the degree of seriousness of the offence.

4.3. Without prejudice to any specific duties to disclose certain classifications of documents e.g. witness statements, each item of information provided by the police must be individually assessed on its own merits by the Crown to determine whether it has potential exculpatory value as opposed to reaching a decision based purely on the classification of the information.

4.4. Information that is material may encompass:

i) Criminal history information;
ii) Information relating to any findings of misconduct under the Police (Conduct) (Scotland) Regulations 1996, the British Transport Police (Conduct) Regulations 2008 or the Ministry of Defence Police (Conduct) Regulations 2009; Negative findings derived from any expert witness;
iii) Information elicited at precognition which demonstrates a material discrepancy between the content of a statement and the witness's position at precognition;
iv) Additional material information elicited at precognition;
v) Failures, or difficulties, in identifying at identification parade or other procedures;

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vi) Information which tends to suggest that a witness may have provided inaccurate or false information.

4.5. There is a presumption that a negative finding may tend to weaken the prosecution case or strengthen the accused's case. Accordingly, any negative findings must be disclosed to the defence, unless a public interest issue arises and an order is granted under sections 145 or 146 of the 2010 Act preventing the disclosure of the information.

4.6. The Crown must disclose any information which meets the materiality test. Such information may be received and/or held in various forms and may include for example:

i) The content of phone calls or other conversations;
ii) Information in text messages;
iii) File Notes, E-mails, letters or faxes;
iv) Subject reports, prosecution reports and notes written on them;
v) Surveillance reports/logs; and
vi) Intelligence reports

5. The Third Principle of Revelation

5.1. The investigating agency's revelation duty extends:

i) Throughout the investigation and any criminal proceedings;
ii) To all information obtained or generated in the course of the investigation and any criminal proceedings;
iii) To the conclusion of any trial and any subsequent appeal proceedings and even after the final disposal of a case.

5.2. In order to ensure compliance with this principle, the police must record and retain all information obtained or generated during the course of an investigation in order that the relevancy of that information can be kept under review.

5.3. Where new information is obtained or generated the police must:

i) Assess the relevancy of this new information and where it may be relevant, provide this information to the Crown; and
ii) Review all information already held and consider whether there is information which was not previously considered relevant which should now be provided to the Crown in light of this new information.

5.4. Where the Crown advises of a new line, or a change in the line of defence, the police must review all information held and consider whether there is information which was not previously considered relevant which should now be revealed and where required submitted to the Crown in light of this line of defence.

6. The Third Principle of Disclosure

6.1. The Crown's disclosure duty extends:

i) Throughout the investigation and any criminal proceedings;

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ii) To all information received and known to the Crown in the course of the investigation and any criminal proceedings;
iii) To the conclusion of any trial and any subsequent appeal proceedings and even after the final disposal of a case.

6.2. The Crown must consider whether there is information which was not previously considered disclosable which should be disclosed in light of the new line of defence where:

i) The police submit or reveal any additional information obtained or generated during the investigation; or
ii) A new line or a change in the line of defence is intimated, either through the lodging of a defence statement or by any other means.

6.3. As set down in section 123 of the 2010 Act, the Crown must proactively keep disclosure under review until the conclusion of proceedings[10], this being where:

i) A plea of guilty is recorded against the accused;
ii) The accused is acquitted;
iii) The proceedings against the accused are deserted simpliciter;
iv) The accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal;
v) The accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal;
vi) The proceedings are deserted pro loco et tempore for any reason and no further trial diet is appointed; or
vii) The indictment or the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

6.4. As set down in sections 136 and 137 of the 2010 Act, after proceedings are concluded and no appeal has been lodged or the conviction is otherwise upheld on appeal, the Crown must review any disclosure decisions where the accused has been convicted and:

i) The Crown becomes aware of new information which is material and if it had been available prior to the conclusion of proceedings, it would have been disclosed on the basis that the information met the materiality test; or
ii) The Crown becomes aware of information that was available prior to the conclusion of proceedings and should have been disclosed in terms of section 121(2)(b) of the 2010 Act but was not disclosed.

6.5. In such circumstances however, there is no obligation on the Crown to carry out a review of all of the information obtained or generated in relation to the proceedings.

6.6. As set down in section 133 of the 2010 Act, where there are active appeal proceedings[11], the Crown is not obliged to review the entire case material, re-

[10] Subsection (5) of section 120 and subsection (6) of section 123 of the 2010 Act set out when proceedings against an accused are taken to be concluded
[11] This obligation is restricted to certain types of active appellate proceedings, e.g. it does not extend to bail appeals or appeals against sentence which do not bring under review an

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investigate the case or review the history of disclosure. The obligation, in such circumstances, is to review all relevant information which relates to the grounds of appeal in the appellate proceedings and proactively disclose:

i) Any new information received by the Crown that is material to the existing grounds of appeal;
ii) Any information which comes to light during preparation of the appeal that should have been disclosed at an earlier stage;
iii) Any information which was not previously considered to be disclosable but has become disclosable in light of developments in the appeal; and
iv) Any information that would have been disclosable which has only come to the attention of the Crown since the trial.

6.7. Thereafter, while the appeal remains active, the Crown must keep under review all information of which the prosecutor is aware that relates to the grounds of appeal and disclose any information that falls within the 4 categories listed at section 6.6. above, as set down in section 134 of the 2010 Act.

6.8. Where an accused is acquitted but the Crown appeals against that acquittal, the Crown must, under section 138 of the 2010 Act, disclose any information it becomes aware of that relates to the appeal which:

i) Is new information received by the Crown that is material to the existing grounds of appeal;
ii) Comes to light during preparation of the appeal that should have been disclosed at an earlier stage;
iii) Was not previously considered to be disclosable but has become disclosable in light of developments in the appeal; and
iv) Would have been disclosable which has only come to the attention of the Crown since the trial.

6.9. In satisfying this obligation, there is no requirement on the Crown to proactively review all of the information of which it is aware, as set down in section 138(5)

7. The Fourth Principle of Revelation

7.1. In terms of the 4th principle of revelation, the police must submit witness statements for all witnesses (or potential witnesses) obtained or generated during the course of the investigation or any related investigation, of which the investigator is aware.

7.2. A statement will include pro-forma forms or questionnaires obtained from witnesses. Where such a pro-forma or questionnaire is taken from a person from whom a further witness statement is obtained or that person is likely to be a witness in the trial, then the pro-forma or questionnaire must always be submitted to the Crown for consideration. Where a pro-forma or questionnaire is taken from a person not likely to be a witness and it does not contain any relevant information, then the Reviewing Officer should discuss with the Crown whether it is necessary to submit the pro-forma or questionnaire.

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alleged miscarriage of justice. A full list of those types of appeals to which section 133 applies is contained in Annex A and in section 132 of the 2010 Act.

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7.3. Authenticated[12] typescript versions of the statements should be prepared and submitted to the Crown in the National Standard Statement format. The police must ensure the consistency and accuracy of the typescript version of each statement submitted against the manuscript[13] version.

8. The Fourth Principle of Disclosure

8.1. Under section 160(6) and (7) of the 2010 Act and as enshrined in the 4th principle of disclosure, where the accused is being prosecuted under solemn proceedings the Crown must proactively disclose witness statements (excluding victim impact statements obtained under section 14 of the Criminal Justice (Scotland) Act 2003) for all witnesses that are on either the Crown or defence lists, including those listed under section 67 of the 1995 Act. This obligation will be satisfied by disclosing a typescript version of the manuscript witness statement.

8.2. Where multiple statements have been taken from such a witness, then each of the statements must be disclosed, including any pro forma forms or questionnaires obtained from the witness.

8.3. Under section 160(3) of the 2010 Act, provision of a copy of a witness statement can be satisfied by enabling the accused to inspect the statement at a reasonable time and place.

8.4. It should further be noted that there is no obligation on the Crown to require the creation of witness statements for this purpose. Accordingly, if the Crown (or defence) leads a witness at trial and no statement has been obtained from them, there is no obligation to obtain or create one purely in order to disclose it.

8.5. Any statements obtained from persons who are not listed on the Crown or defence lists for trial may contain material information which must be disclosed. Although the obligation is only to disclose that material information and not the statement itself, the usual practice of the Crown will be to disclose the statement.

8.6. Prior to the disclosure of any witness statement to the defence, the Crown must ensure that any personal or sensitive information is redacted, as permissible under section 161 of the 2010 Act. Such redaction must be visible on the face of the statement.

8.7. Where a witness statement falls to be disclosed under section 160 of the 2010 Act or has otherwise been assessed as being material, the Crown must also consider whether there is any reason in the public interest why that information should not be disclosed to the defence and if appropriate, make an application to the Court under section 145 of the 2010 Act e.g. where the information is covered by public interest immunity, or which raise Convention rights issues such as where there is a threat to the life or limb of a witness or other persons. Similarly if disclosure might impact on a public interest of which the UK Government is the holder/protector of that particular public interest, then the Crown should liaise with OSAG prior to any disclosure taking place, in terms of the Protocol between COPFS and OSAG in order

[12] As defined in Annex A
[13] As defined in Annex A

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that OSAG acting on behalf of the relevant department can consider whether an application should be made under section 146 of the 2010 Act.

8.8. In summary proceedings, where a witness statement from a witness who appears on either the Crown or defence lists exists and contains material information, there is no obligation to disclose a copy of the witness statement, provided that the material information contained therein is disclosed e.g. through a summary of evidence[14].

8.9. Notwithstanding the fact that there is no obligation to disclose witness statements in summary proceedings, the usual Crown practice will be to obtain and disclose the witness statements of any civilian witnesses.

9. The Fifth Principle of Revelation

9.1. The police must routinely provide the Crown with the criminal history record information for all witnesses who the Crown intends to lead at trial. This obligation does not extend to criminal history information held in other jurisdictions.

9.2. In summary cases, this information will usually be provided in the form of the witness's unique reference number on the Criminal History Database. The Crown will then be able to access the information directly from the database. Where, for any reason, the Crown is not able to access the database directly, the police should provide a copy of the actual criminal history record.

9.3. In solemn cases, this information will usually be provided in the form of copies of the actual criminal history records.

9.4. Where there is a reasonable belief that criminal history information of a witness may be relevant and that it is held in other jurisdictions, the police should take steps to obtain and provide this information to the Crown.

9.5. Where a case is proceeding by way of petition procedure, the police must provide criminal history information for all potential witnesses.

9.6. Where a defence witness is intimated to the Crown, the police should provide the criminal history record for this witness to the Crown on request.

10. The Fifth Principle of Disclosure

10.1. The Crown must proactively disclose any material criminal history information relating to a witness on the Crown's list of witnesses.

10.2. This obligation extends to any Crown witness whose evidence is being introduced under section 259 of the 1995 Act.

10.3. This obligation also extends to any criminal history records obtained by the Crown in respect of defence witnesses

[14] As set down in subsection (5) of section 160 of the 2010 Act

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10.4. Where criminal history information is obtained from any other jurisdiction, e.g. England and Wales, then any material information contained therein must be disclosed.

11. The Sixth Principle of Revelation

11.1. A failure on the part of the police to submit information which may be relevant may result in a corresponding failure by the Crown to disclose material information. It is essential therefore, that all information which may be relevant is appropriately identified, revealed and where required submitted to the Crown at the earliest opportunity.

12. The Sixth Principle of Disclosure

12.1. A failure to disclose material information may result in a breach of Article 6 of the European Convention on Human Rights and may constitute a miscarriage of justice.

12.2. Where a failure to disclose material information is identified prior to a determination of guilt, the court can adjourn proceedings in order that the information can be disclosed. Where it considers it appropriate however, the court can desert the case pro loco et tempore or even simpliciter, where it considers such an action to be in the interests of justice.

12.3. Where a failure to disclose material information is identified after conviction then, subject to an appeal being lodged, the court can overturn that conviction on the grounds that there has been a miscarriage of justice.

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PART B: CORE DUTIES AND RESPONSIBILITIES OF THE POLICE AND OTHER INVESTIGATING AGENCIES

13. Introduction

13.1. In order to ensure compliance with the statutory disclosure obligations and the 6 Core Principles of Revelation the police have a number of core duties and responsibilities relating to:

i) Recording retaining and reviewing information;
ii) Conducting reasonable lines of enquiry, identifying and investigating exculpatory information;
iii) Revealing and, where appropriate, providing information to the Crown;
iv) The submission of accurate Standard Prosecution Reports (SPRs); and
v) The taking and submission of witness statements.

13.2. This part of this Code provides more detailed guidance in relation to each of these core duties and responsibilities.

14. Recording & Retention of Information

14.1. In order to ensure compliance with the obligation under sections 117 and 119 of the 2010 Act to provide the Crown with all information obtained or generated during an investigation that may be relevant and thereafter to keep decisions regarding relevancy under review, it is essential that all information obtained or generated during an investigation is accurately recorded and retained.

14.2. By necessity, this obligation will extend to information that has been assessed as manifestly irrelevant, as that decision must be kept under review throughout the life of the case. There must be an accurate record of this information.

15. Reasonable Lines of Enquiry & Exculpatory Information

15.1. An essential element underpinning the duty of disclosure is the obligation on the police to pursue all reasonable lines of enquiry, including any line of enquiry that might point away from the accused as the perpetrator of the offence.

15.2. A reasonable line of enquiry will include any line of enquiry that might:

i) Exculpate or point away from the accused as the perpetrator of the offence; and/or
ii) Mitigates the offence(s)

15.3. The Crown has an obligation to ensure that all reasonable lines of enquiry are pursued and accordingly, may instruct the police to carry out particular lines of enquiry where this has not already been identified.

15.4. Guidance on what might form exculpatory information is contained in section 4 of this Code.

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15.5. As part of this process, any decisions taken in respect of a particular line of enquiry in any investigation including decisions not to pursue a particular line, must be accurately recorded and retained. Reasons for such decisions must also be recorded and retained.

15.6. Details of witnesses who speak in support of the accused's position should be recorded, retained, revealed and where appropriate, provided to the Crown in the same way as is done for witnesses who speak in support of the prosecution case.

15.7. The Reporting Officer or, where appointed, the Senior Investigating Officer has responsibility for ensuring that all potentially exculpatory information is identified, revealed and provided to the Crown.

16. Revealing and Providing Information to the Crown

16.1. The police have an obligation to record, retain, review, reveal and, where appropriate, provide all information which **may** be relevant to the Crown.

16.2. All police officers have a responsibility for ensuring that information which may be relevant to an investigation is identified, recorded and retained and brought to the attention of the Reporting Officer, or where appointed, a Senior Investigating Officer. The person with overall responsibility for ensuring that all information obtained or generated during the course of the investigation is reviewed and assessed and thereafter provided to the Crown is the Reviewing Officer or, where appointed, the Senior Investigating Officer[15].

16.3. Every case reported for consideration of prosecution to the Crown will have a nominated reviewing officer. This officer on the majority of occasions will be the Reporting Officer however where appointed, the Senior Investigating Officer must determine whether a dedicated officer or officers should be appointed to take responsibility for reviewing, assessing and revealing information to the Crown i.e. a Reviewing Officer.

17. Role of the Reviewing Officer

17.1. It is the responsibility of each investigating agency to ensure that all officers undertaking the role of a reviewing officer has been appropriately trained on the obligations of revelation and disclosure, with particular emphasis on the obligations in relation to solemn proceedings. Officers should not be appointed as reviewing officers without having received this training.

17.2. Once appointed it will be the responsibility of the Reviewing Officer to:

i) Ensure that there is a record of all information obtained or generated during the investigation;
ii) Review and assess all such information to determine whether it may be relevant and if so, assess whether it is sensitive and whether it is information likely to materially weaken or undermine the prosecution case, or materially strengthen the defence case;

[15] As defined in Annex A

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iii) Conduct early liaison with the Crown in complex or large volume cases;
iv) Where the reviewing officer is also the reporting officer, ensure that the SPR is accurately and comprehensively completed and contains the information set down in section 19 of this Code;
v) Provide details of all information which may be relevant to the Crown using the procedure set down in section 20 of this Code; and
vi) Keep a record of all decisions in relation to the relevancy of information as required by 118 and 120 of the 2010 Act and the 3rd principle of revelation.

17.3. Depending on the scale and complexity of the case, the Senior Investigating Officer can choose to appoint more than one Reviewing Officer. In such cases, a principal Reviewing Officer must be appointed to oversee the process and retain overall responsibility.

17.4. Details of the Reviewing Officer or Officers must be provided to the Crown as soon as reasonably practicable after they have been appointed.

18. Standard Prosecution Report

18.1. In addition to providing the Crown with information necessary to determine whether proceedings are appropriate and if so, in which forum, the Standard Prosecution Report (SPR) plays a fundamental role in ensuring that the Crown complies with its disclosure obligations, particularly in relation to summary proceedings. It is fundamental, therefore, that it is accurate and comprehensive in its terms.

18.2. In every case proceeding summarily, a summary of evidence against the accused will be served along with a copy of the complaint.

18.3. The summary of evidence section of the SPR submitted by the police must include:

i) An accurate narrative of events based on all relevant information obtained or generated during the investigation, including any information obtained from witnesses;
ii) Details of any medical, dental or forensic evidence (including presumptive testing) obtained;
iii) Details of any visual or audio recordings obtained, including details of whether the accused can be identified and if so, by whom;
iv) Whether any productions have been seized and whether they have been forwarded to the SPSA or other analytical agencies for analysis;
v) In drugs cases, the presumed weight and physical make up of the drugs (e.g. resin, liquid, powder etc);
vi) The basis upon which any search was conducted;
vii) Details of any information that would tend to exculpate the accused whether by materially weakening the prosecution case or materially strengthening the defence case;
viii) Details of all witness statements or notes taken including details of where the statement/note is recorded; and
ix) Details of any other relevant entries within notebooks.

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18.4. Where any of the above information is identified as being sensitive, this should be included in the remarks section of the SPR.

18.5. Where an associated report has been submitted to the Crown e.g. death report, CAP report, related prosecution report etc, details of this report, including reference numbers, should be provided in the SPR.

19. Revelation in Solemn Proceedings

19.1. Where a case has been identified as one that will be prosecuted under solemn procedure, in order to satisfy their obligation under sections 117(2) and 118(2) of the 2010 Act to provide the Crown with details of all information that may be relevant, the police must prepare and complete schedules listing all the information obtained or generated during the investigation that may be relevant.

19.2. Each item of information must be categorised and listed in one of 3 categories of schedule:

i) Non-sensitive;
ii) Sensitive[16]; or
iii) Highly sensitive[17]

19.3. Under section 122(4) of the 2010 Act, information is sensitive if, were it disclosed, there would be a risk of:

i) Causing serious injury or death to any person,
ii) Obstructing or preventing the prevention, detection, investigation or prosecution of crime, or
iii) Causing serious prejudice to the public interest

19.4. The 2010 Act does not provide a definition of highly sensitive. However, for the purposes of providing information to the Crown, information is highly sensitive where if the information were disclosed, there would be a risk of:

i) Loss of life as a direct result of the disclosure;
ii) National security being threatened;
iii) The identity of a CHIS being exposed

Information may also be considered as highly sensitive if the GPMS marking of the information is such that the information can only be viewed by persons within COPFS who have been vetted with SC Security Clearance or above.

19.5. Where it is unclear whether an item of information may be relevant or not, it should be treated as if it might be and accordingly, should be listed in the appropriate schedule.

19.6. Schedules should be submitted within 21 days after committal for further examination unless the scale of the case renders this impractical and thereafter additional schedules (containing any information obtained or generated thereafter) should be submitted at the following stages of proceedings:

[16] As defined in Annex A
[17] As defined in Annex A

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i) 14 days before the case is reported to Crown Office;
ii) 14 days before the preliminary hearing or first diet;
iii) 14 days before the trial diet or sitting; and
iv) As soon as reasonably practicable thereafter where additional information is identified after that date.

19.7. Further, at each of these key stages, the police should also submit an undertaking confirming that to the best of the knowledge and belief of the Reviewing Officer all relevant information of which s/he is aware of at the date of the undertaking, has been listed in one of the schedules submitted to the Crown.

19.8. If outwith the periods specified above, the defence lodge a defence statement under section 70A of the Criminal Procedure (Scotland) Act 1995, then the Crown should advise the police of the terms of the defence statement, in order that the police can carry out a review of all information held by them previously assessed as irrelevant. If any information is now deemed relevant in light of any information contained within the defence statement, then the police should submit a schedule or schedules detailing this additional information. This should be done as soon as reasonably practicable after receipt of the defence statement.

20. Submission of Information to the Crown

20.1. The submission of schedules to the Crown is not a substitute for the provision of the actual information obtained or generated during the investigation. As provided by sections 117(3) and 118(3) of the 2010 Act, the police must provide the Crown with the actual information listed on the schedules when requested so to do.

20.2. As part of this obligation, all statements, criminal history information and productions should always be submitted to the Crown along with any other information that is likely to be material and therefore disclosable.

20.3. Where the police consider that an item of information might be exculpatory, the information should always be submitted to the Crown for consideration.

20.4. Information should be submitted to the Crown in accordance with agreed timescales. Any information obtained or generated after these timescales should be submitted to the Crown as soon as is reasonably practicable.

21. Keeping Revelation under Review

21.1. As stated in the 3rd Core Principle of Revelation, all decisions regarding the relevancy of an item of information must be kept under review. Further guidance on this obligation is contained in section 5 of this Code.

22. Taking of Witness Statements

22.1. All statements obtained from a witness must be recorded within a police notebook, National Standard Statement Form, HSE Statement Form or any other SRA accredited form, Personal Digital Assistant, or on an official

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recording system with the original manuscript being retained and able to be produced if requested.

22.2. Statements should be taken from a witness as near the time of the incident which forms the subject of the witness statement as is reasonably practicable.

22.3. Any witness statement obtained, or generated, during an investigation must accurately and comprehensively reflect the evidence provided by the witness, setting out their full involvement in the incident or incidents under investigation. As far as possible, the witness statement must contain the actual words of the witness and should include everything elicited from or said by the witness that may be relevant to the incident including everything that may be exculpatory or mitigatory in nature.

22.4. Where statements are taken from a number of witnesses to the same incident, these should be taken individually, outwith the presence of other witnesses, to prevent the evidence of the witness being influenced and potentially contaminated.

22.5. Full detailed witness statements from civilian witnesses should generally be obtained in all investigations. There may be occasions when for sound operational reason it is impractical to obtain a full detailed witness statement at that time and in such instances a statement in bullet point form should be obtained. In such cases it will be incumbent on the investigating officer to obtain a full witness statement at the earliest opportunity if this is deemed to be appropriate.

22.6. At the end of every statement, whether it is a full statement or, where it has not been reasonably practical to obtain a full statement, a note of the salient evidence. The officer taking the statement should insert the following sentence at the end of the statement: *"I confirm that this statement is a true and accurate record"*. The witness should then be invited to read the statement and sign underneath this sentence. If the witness wishes to make any amendments to the statement prior to signing, the officer should make these amendments and the officer and witness initial beside them.

22.7. If a witness is unable to read, then the statement should be read back to them and the witness should be asked to confirm that it is accurate. The officer should then note at the end of the statement that this has been done and note the response of the witness as to the accuracy of the statement.

22.8. If a witness refuses to sign his/her statement this should be clearly recorded at the end of the witness statement, along with any reason given by the witness for refusing to sign.

22.9. If a witness is physically unable to sign the witness statement, this should also be clearly recorded at the end of the statement.

22.10. Where prepared, statements setting out the involvement of an officer in the investigation must be authenticated by the officer prior to submission to confirm that this is that officer's statement.

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23. Submission of Witness Statements

23.1 All witness statements should be submitted electronically in the National Standard Statement format, except where the content of the statement requires a GPMS Marking of "confidential' or higher, or in other exceptional circumstances. Typescript versions of all manuscript statements should be prepared and submitted to the Crown. Sensitive and non-relevant information obtained as part of the witness statement should be recorded in the non-disclosable section of the NSS.

23.1 As stated in section 7.3 of this Code, typescript versions of the statements should be obtained and submitted to the Crown in the National Standard Statement format. The police must ensure that the consistency and accuracy of the typescript version of each statement being submitted against the manuscript version.

23.2 Where a statement has been self-prepared by a civilian witness, the original version of the statement should be retained as a production and the contents should be converted into NSS format for submission to the Crown.

23.3 The electronic typed statement should be a transposed record of the manuscript witness statement, whether that record is in the form of a full statement or a note of the salient evidence, except insofar as the statement contains sensitive information which should be recorded in the non-disclosable section of the statement. Where the manuscript statement is a note of the salient evidence, the officer preparing the statement should not insert any additional words to give the statement a narrative flow.

23.4 The officer submitting the statement should insert explanations of local vernacular to assist the Crown and the defence but it must be obvious on the face of the typed statement that this information has been added by the officer and is not part of the witness's account e.g. through the use of square brackets.

23.5 The typed statement submitted must confirm whether the witness has read and signed the statement and if not, the reasons given by the witness for refusing to sign or being unable to sign the statement.

23.6 As stated in paragraph 22.10 of this Code, any statement setting out the involvement of an officer in the investigation must be prepared and authenticated by that officer prior to submission.

23.7 Statements should be submitted to the Crown in accordance with agreed timescales. Any statements obtained or generated after these timescales should be submitted to the Crown as soon as is reasonably practicable.

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PART C: CORE DUTIES AND RESPONSIBILITIES OF THE CROWN

24 Assessing All Relevant Information

24.1 Although the police will identify in the SPR, or through the additional submission of subject reports or schedules in solemn cases, all information that may be exculpatory, it remains the duty of the Crown to assess all information that the police consider may be relevant to determine whether it meets the disclosure test set down in section 121 of the 2010 Act and section 4 of this Code.

24.2 On receipt of information from the police, the Crown must consider each item of information on its own merits to determine whether it should be disclosed. In doing so, the Crown must determine:

i) Whether the information is disclosable;

And if so,

ii) Whether there are any reasons in the public interest why that information should not be disclosed to the defence;
iii) Whether the information may impact upon any public interest of which the Secretary of State is the holder/ protector of that particular public interest, having regard to Protocol between COPFS and OSAG
iv) Whether there is any information contained within the item of information that is non-disclosable and therefore subject to consideration of redaction[18], under section 161 of the 2010 Act; and
v) Whether it is reasonable and practicable to provide the defence with a copy of the information (either electronically or by provision of a physical copy), or whether disclosure should be by facilitating access to the information.

24.3 As stated in section 2.2 of this Code, if the Crown is in doubt as to the materiality of a piece of information, then it should be treated as if it were material and disclosed to the defence, subject to there being reasons in the public interest why the information should not be disclosed.

24.4 Any information that forms part of the prosecution case must be disclosed to the defence in terms of section 121(3)(c) of the 2010 Act. This obligation extends to all such information, whether it is exculpatory, inculpatory (incriminatory) or neutral information. However there is no obligation to disclose inculpatory or neutral information beyond that information that forms the prosecution case.

24.5 Where an item of information could be both inculpatory and exculpatory, it should be considered as material information which falls to be disclosed under section 121 of the 2010 Act.

24.6 Where inculpatory information does not form part of the prosecution case but is assessed as being exculpatory information in respect of a co-accused, then the information should be considered as material information which falls to be disclosed under section 121 of the 2010 Act.

[18] As defined in Annex A

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24.7 Section 159 of the 2010 Act expressly states that the Crown's obligations to disclose information under Part 6 of the 2010 Act does not extend to information, the disclosure of which is prohibited under section 17 of the Regulation of Investigatory Powers Act 2000.

24.8 All material information should be disclosed in accordance with agreed timescales. Any information assessed as material outwith these timescales should be disclosed to the defence as soon as is reasonably practicable.

25 Further Assessment in Solemn Proceedings

25.1 Where a case is being prosecuted under solemn procedures and the police have submitted schedules listing all information obtained, or generated, during the investigation that may be relevant, the Crown must:

i) Confirm that all information on the schedule purporting to have been submitted to the Crown has in fact been received by them;
ii) In addition to assessing any information submitted by the police, consider any information listed in the schedules that has not been submitted; and
iii) Consider each item of information listed and determine whether the item of information has been listed on the correct schedule having regard to the definitions of sensitive and highly sensitive listed in Annex A of this Code.

25.2 Highly sensitive schedules and information listed within highly sensitive schedules must only be viewed by Crown staff with the appropriate level of security clearance.

25.3 Where information listed in a schedule has not been submitted but the Crown considers that, from the description provided by the police, it may be material information, the Crown should instruct the submission of the information as soon as reasonably practicable, in order that the Crown can properly assess the item of information.

25.4 Where the Crown is satisfied, based on the description contained within the schedule, that an item of information that has not been submitted is not material information, that falls to be disclosed under section 121 of the 2010 Act, there is no requirement to have the police submit the item of information.

25.5 Where the Crown disagrees with the classification of an item of information as being non-sensitive, sensitive, or highly sensitive, the Crown should discuss this with the Reviewing Officer. As the final classification of an item of information will impact on whether the existence of that information is disclosed to the defence (where the information itself has been identified as not being material) and will therefore be critical to ensuring that the Crown has met its disclosure obligations, the final decision regarding classification must be taken by the Crown.

25.6 Once the Crown has assessed each item of information, the schedule(s) should be updated to record the result of the assessment; i.e. disclosable or non-disclosable.

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25.7 Where additional schedules are submitted in accordance with paragraphs 19.6 and 19.8 of this Code, the Crown must carry out the process detailed above in respect of the new schedules. In addition, all information listed in previous schedules which was previously assessed as being immaterial must be reassessed in light of the new information, to determine whether that information is now material and therefore disclosable.

26 Disclosing Information to the Defence

26.1 There is no obligation on the Crown to require the police to obtain or prepare statements for the purposes of disclosure where no statement otherwise exists.

26.2 The obligation under section 121 of the 2010 Act is to disclose the material information to the defence, not the form or document in which that information is held, except where the information is contained within a witness statement obtained from a witness to be called by either the Crown or defence at trial[19].

26.3 It may be more practicable to disclose the form or document in which the material information is held but this is not a requirement and the Crown can extract the information from the form or document prior to disclosing it, e.g. if the material information is contained within a precognition or a victim impact statement under section 14 of the Criminal Justice (Scotland) Act 2003 then it can be extracted from the precognition or statement and disclosed to the defence by other means.

26.4 As stated in section 160 of the 2010 Act, the Crown can disclose information by any means. Accordingly, the Crown will satisfy its obligations under section 121 of the 2010 Act by:

i) Providing the defence with a copy of the information (either electronically or by provision of a physical copy); or
ii) Facilitating access to the information.

26.5 The Crown, in common with other data providers, must comply with the 8 principles of data protection set down in the Data Protection Act 1988. Accordingly, to adequately protect against accidental loss or destruction of personal data, the Crown will provide electronic copies of information except where it is impracticable to do so.

26.6 Where it is not practicable, or desirable, to provide an electronic or physical copy of an item of information, the Crown will facilitate access to the information.

26.7 Although it is an offence under section 163 of the 2010 Act to misuse disclosed information, it may by more appropriate to disclose information by facilitating access to information where the accused in unrepresented or the information is particularly sensitive in nature.

26.8 Where information is assessed as being material, copies should not be provided to the defence where the information is of a personal and highly

[19] As stated in section 160(6) and (7) of the 2010 Act

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sensitive nature and disclosure of copies (electronically or otherwise) may be extremely distressing to any individual or where the information consists of:

i) Indecent images of children or other images of extreme pornography;
ii) Visual (including audio) recordings of child or other vulnerable witnesses being interviewed; and
iii) DVDs of VIPER parades.

Instead arrangements should be made for the defence to view the recording at the relevant Procurator Fiscal's Office or Police Office.

26.9 Where the defence, or an unrepresented accused, is to be provided access to information this access will usually be facilitated by the Reviewing or Reporting Officer at the local police station, unless it is considered appropriate for this to be done at the relevant Procurator Fiscal's Office. The defence agent or accused should sign an acknowledgement form confirming what information s/he has been given access to and on what date. The Reviewing or Reporting Officer should then return this form to the Crown along with a subject report confirming when the access was provided and which officers were present. Where the accused (or defence agent) refuses to sign the acknowledgement, a subject report to this effect should be provided specifying any reasons given for said refusal.

26.10 Section 127 of the 2010 Act expressly provides that there is no obligation on the Crown to disclose any information that it has already disclosed to the defence in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment, complaint or otherwise). Where the Crown has previously disclosed information to the defence, repeat disclosure of the same information to the same agents will only be carried out in exceptional circumstances.

26.11 Section 131 of the 2010 Act provides that where the Crown has assessed information as being material under section 121, on the basis that it is information that would be likely to form part of the evidence to be led by the prosecutor against the accused but before it is disclosed, a plea of guilty is recorded against the accused, then the Crown need no longer disclose this information to the accused. The obligation to disclose will, however, be reinstated if the accused withdraws the plea of guilty.

27 Disclosure in Solemn Proceedings

27.1 Where a case is being prosecuted under solemn proceedings, the following information should be disclosed to the defence, subject to there being any reason in the public interest why the information should not be disclosed:

i) List of Witnesses;
ii) Information that forms the prosecution case;
iii) Witness statements for all witnesses that the Crown lists on the indictment;
iv) All other witness statements containing material information;
v) Witness statements obtained by the police from defence witnesses where the defence have intimated an intention to lead that witness in evidence;

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vi) Material criminal history record information for witnesses that the Crown lists on the indictment or add by section 67 notice;
vii) Any other information that meets the materiality test set down in section 121 of the 2010 Act; and
viii) Copies of any completed non-sensitive schedules.

27.2 Section 122 of the 2010 Act places an additional obligation on the Crown in solemn proceedings to provide the accused with details of any information which the prosecutor is not required to disclose under s121 of the 2010 Act, i.e. does not meet the materiality test, but which is otherwise relevant information. In order to satisfy this obligation, copies of all non-sensitive schedules prepared by either the police or the Crown[20], will be provided to the defence.

27.3 This obligation does not extend to details of relevant sensitive information that does meet the materiality test set down in section 121 of the 2010 Act[21]. Only copies of non-sensitive schedules will be provided to the defence. The sensitive and highly sensitive schedules must not be disclosed. Accordingly, it is essential that information is correctly classified as sensitive or highly sensitive, having regard to the definitions contained in Annex A of this Code.

27.4. Information that falls under any of the categories listed above at paragraph 27.1 should be disclosed as soon as reasonably practicable having regard to the agreed timescales.

28 Disclosure in Summary Proceedings

28.1 Where a case is proceeding on summary complaint, a summary of the evidence against the accused should be served along with the complaint. Subject to any public interest immunity considerations, this summary of evidence should include:

i) An accurate narrative of events based on all relevant information obtained or generated during the investigation, including any information obtained from witnesses;
ii) Details of any medical, dental or forensic evidence (including presumptive testing) obtained;
iii) Details of any CCTV evidence obtained, including details of whether the accused can be identified and, if so, by whom;
iv) Whether any productions have been seized and thereafter forwarded to the SPSA or other analytic agency for analysis;
v) In drugs cases, the presumed weight and physical make up of the drugs (e.g. resin, liquid, powder etc);
vi) The basis upon which any search was conducted;
vii) Details of any information that would tend to exculpate the accused whether by materially weakening the prosecution case or materially strengthening the defence case;
viii) Details of all witness statements or notes taken including details of where the statement/note is recorded; and
ix) Details of any other relevant entries within notebooks.

[20] In relation to information obtained directly by the Crown and which has not been obtained through the police, e.g. complainer's photographs of injuries
[21] As stated in section 122(3) of the 2010 Act

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28.2 Thereafter, if the accused pleads not guilty the following additional information should be disclosed, where it relates to the charge(s) to which the accused has pled not guilty:

i) A list of witnesses;
ii) A provisional list of productions;
iii) Copies of witness statements and any information in notes where these exist;
iv) Material criminal history record information for witnesses that the Crown intends to call at trial; and
v) Any other information which meets the materiality test set down in section 121 of the 2010 Act where that information is not otherwise contained within the summary of evidence.

29 Non-Disclosure of Information in the Public Interest

29.1 Where information meets the materiality test set down in section 121 of the 2010 Act, the Crown must determine whether there are any reasons in the public interest why that information should not be disclosed to the defence.

29.2 If the Crown is satisfied that such reasons exist, then the Crown should not disclose the information meantime and apply to the Court for an order under s145 of the 2010 Act to prevent or restrict disclosure.

29.3 Depending on the nature of the information that the Crown is seeking to withhold, the following orders should be sought:

i) Where disclosure of the nature or type of information that the Crown is seeking to withhold would not compromise the public interest that the Crown is seeking to protect under the non-disclosure order, then only a non-disclosure order under section 145 of the 2010 Act should be sought;
ii) Where disclosure of the nature of information that the Crown is seeking to withhold is likely to cause a real risk of substantial harm or damage to the public interest that the Crown is seeking to protect, the a non-disclosure order under section 145 and an exclusion order under section 142 of the 2010 Act should be sought; and
iii) Where even the disclosure of the fact that the Crown is seeking to withhold information is likely to cause a real risk of substantial harm or damage to the public interest that the Crown is seeking to protect, then a non-disclosure order under section 145, an exclusion order under section 142 and a non-notification order also under section 142 of the 2010 Act should be sought.

29.4 Applications under section 145-149 can also be made where the Crown is obliged to disclose the information after conclusion of proceedings, under sections 133-138 of the 2010 Act.

29.5 When considering an application under section 142 of the 2010 Act, the court must consider whether it is possible to disclose, or partly disclose, the information in such a way that the public interest remains protected and the disclosure would still enable the accused to receive a fair trial (or where proceedings have concluded, would have enabled the accused to have

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received a fair trial). Ways in which an item of information can be disclosed or partly disclosed include:

i) Providing the information after (whether by redaction or otherwise) removing or obscuring parts of it;
ii) Providing extracts or summaries of the information or part of it.

29.6 Where an application to withhold information is refused, or part refused, the Crown must either disclose the information concerned or discontinue proceedings in respect of the charge or charges to which that item of information relates. It is however also open to the Crown to appeal against the refusal or part refusal of the application and the refusal of an exclusion or non-notification order[22]. Pending the outcome of any such appeal, the Crown must not disclose the item of information to which the appeal relates[23].

29.7 Under section 158 of the 2010 Act, the judge who hears the application(s) in respect of the s142 order should also preside over the trial in order that s/he can keep the fairness of the non-disclosure under review throughout the trial. If the presiding judge determines that the accused can no longer receive a fair trial without the disclosure or part disclosure of the withheld information, the Crown must either disclose the information concerned or discontinue proceedings in respect of the charge or charges to which that item of information relates.

29.8 Section 155 of the 2010 Act allows for the accused, Special Counsel, or the Crown, to seek a review of an order under section 145, where further information comes to light that was unavailable to the court at the time the order was made and which may have reasonably impacted upon the decision of the court. In addition, the court must keep the order under review to ensure that the order concerned continues to be appropriate[24].

29.9. The accused, or Special Counsel[25], appointed under section 150 of the 2010 Act can appeal against the decision by the Court to grant or part-grant a non-disclosure order and Special Counsel can also appeal against the granting of a non-notification and/or exclusion order[26]. Where such an appeal is successful, the Crown must either disclose the information concerned or discontinue proceedings in respect of the charge or charges to which that item of information relates.

30 Non Disclosure of Information: Applications by the Secretary of State

30.1 Under the 2010 Act, the relevant Secretary of State on behalf of the UK Government may also apply to the court for an order to prevent or restrict the disclosure of information by the Crown.

30.2 Under section 146 of the Act, the relevant Secretary of State can make such application where either of the following conditions apply:

[22] As specified in section 153 of the 2010 Act
[23] As specified in section 154(2) of the 2010 Act
[24] As specified in section 157 of the 2010 Act
[25] As defined in Annex A
[26] As specified in section 153 of the 2010 Act

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i) The Crown is obliged to the disclose the information under Part 6 of the 2010 Act, i.e. the information is material; or
ii) The Crown is not obliged to disclose the information under Part 6 of the 2010 Act but has decided, notwithstanding this, to disclose the information.

30.3 Applications under section 146 of the 2010 Act will only be granted where the Court is satisfied that disclosure of the information would result in a real risk of substantial harm or prejudice to the public interest and the withholding of the information would be consistent with the accused receiving a fair trial.

30.4 Similar to the Crown, the relevant Secretary of State can apply for ancillary orders in addition to the order under section 146. In particular, under section 147 of the 2010 Act, he can apply for:

i) A restricted notification order and a non-attendance order – such orders will only be granted where the disclosure of the making of the application for a section 146 order would be likely to cause a real risk of substantial harm or damage to the public interest and the making of the restricted notification order would be consistent with the accused receiving a fair trial; or
ii) A non-attendance order – such an order will only be granted where the disclosure of the nature of the information to which the application for the section 146 order would be likely to cause a real risk of substantial harm or damage to the public interest and the making of the non-attendance order would be consistent with the accused receiving a fair trial

30.5 Restricted notification orders can only be sought where the application under section 146 relates to solemn proceedings.

30.6 Where, therefore, the relevant Secretary of State has an interest in information that the Crown intends to disclose, the Crown must not disclose the information meantime and should liaise with OSAG to determine whether the relevant Secretary of State intends to make an application for a section 146 order.

30.7 It is essential, therefore, that the police clearly highlight all sensitive information in which the relevant Secretary of State might have an interest, as set down in the [INSERT DETAILS OF MOU OR PROTOCOL].

30.8 Where the relevant Secretary of State makes an application under section 146, the Court must also give the Crown an opportunity to be heard on the merits of the application.

30.9 Similarly, the Crown has a right to be heard in relation to any ancillary applications made by the relevant Secretary of State under section 147 of the 2010 Act.

30.10 Section 156 of the 2010 Act allows for the accused, Special Counsel, the relevant Secretary of State or the Crown to seek a review of an order under section 146 where further information comes to light that was unavailable to the court at the time the order was made and which may have reasonably impacted upon the decision of the court. In addition, the court must keep the

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order under review to ensure that the order concerned continues to be appropriate[27].

30.11 Section 153 of the 2010 Act permits the Crown to appeal against the making of an order under section 146 and/or against the making of any ancillary order under section 147. Only the relevant Secretary of State can appeal against the refusal of an application under section 146 or section 147. Pending the outcome of any such appeal, the Crown must not disclose the item of information to which the appeal relates[28].

31 The Role of Special Counsel

31.1 The Court may appoint Special Counsel to represent the interests of the accused in relation to the determination of any application, review or appeal under sections 145-149, where the Court considers that the appointment of special counsel is necessary to ensure that the accused receives a fair trial[29].

31.2 Where Special Counsel is appointed, section 152 of the 2010 Act provides that the person so appointed is entitled to see the confidential information to which the section 145 application applies but is expressly prohibited from disclosing any of the confidential information to the accused or the accused's representative.

31.3 Similarly, where the appointment is in relation to an application which includes an ancillary application for a non-notification order, or a restricted notification order, Special Counsel is expressly prohibited from disclosing to the accused or the accused's representative the existence of the applications (or any associated appeals), nor can the Special Counsel communicate in any way with the accused or the accused's representative in relation to the applications.

31.4 Where the application does not include an ancillary application for a non-notification order, or a restricted notification order, Special Counsel may only communicate with the accused or the accused's representative about the relevant application or appeal with the express permission of the court and such communication must only be in accordance with any conditions imposed by the court[30].

31.5 The protection of all information disclosed to Special Counsel will be the responsibility of the individual Special Counsel appointed in a case. This will include the secure transmission, storage and destruction of such information in accordance with the Government Protective Marking Scheme (GPMS) marking applied to the information.

32 Disclosure in Appeals Proceedings & SCCRC Referrals

32.1 As stated in paragraph 6.5 of this Code, where there are active appeal proceedings, the Crown is not obliged to review the entire case material, re-investigate the case or review the history of disclosure. The obligation, in such circumstances, is to proactively disclose:

[27] As specified in section 157 of the 2010 Act
[28] As specified in section 154(2) of the 2010 Act
[29] As specified in section 150(3) of the 2010 Act
[30] As specified in section 150(4) of the 2010 Act

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i) Any new information received by the Crown that is material to the existing grounds of appeal;
ii) Any information which comes to light during preparation of the appeal that should have been disclosed at an earlier stage;
iii) Any information which was not previously considered to be disclosable but has become disclosable as a result of the grounds of appeal
iv) Any information that would have been disclosable which has only come to the attention of the Crown since the trial.

32.2. Where the SCCRC has made a referral to the High Court, the Crown's obligations in relation to disclosure of information is the same as for all other appeals proceedings as set out above and will be based on the information material to the grounds of appeal and not the referral.

33 Duty to Keep Disclosure under Review

33.1 As stated in the 3rd Core Principle of Disclosure, all disclosure decisions must be kept under review throughout proceedings, any appeals proceedings and even after the final disposal of the case.

33.2 Accordingly, the Crown must consider whether there is information which was not previously considered disclosable which should be disclosed where:

i) The police submit or reveal any additional information obtained or generated during the investigation; or
ii) A new line or a change in the line of defence is intimated, either through the lodging of a defence statement or by any other means.

33.3 In all cases being prosecuted on indictment, the defence must submit a defence statement under section 70A of the 1995 Act setting out:

i) The nature of the defence, including any particular (special) defences on which the accused intends to rely,
ii) Any matters of fact on which the accused takes issue with the prosecution and the reason for doing so;
iii) Particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence;
iv) Any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose; and, if applicable
v) By reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose; and
vi) The reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

33.4 The accused must lodge the defence statement at least 14 days before the first diet or preliminary hearing.

33.5 On receipt of the defence statement, the Crown should provide details of the defence statement to the Reporting or Reviewing Officer in order that s/he can review all decisions relating to the relevancy of items of information to determine whether any information not previously considered to be relevant

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now may be relevant in light of any of the information contained within the defence statement.

33.6 The Crown must also review all relevant information not previously disclosed to the defence, including any new information provided by the police in consequence of the information contained within the defence statement, to determine whether any information previously considered not to be material is now material, in light of any of the information contained within the defence statement[31].

33.7 In particular, if the defence statement sets out details of any information that the defence are specifically requesting be disclosed, the Crown must consider the reasons that the defence consider the information to be material and determine whether such reasons are sufficient to justify disclosure under section 121 of the 2010 Act.

33.8 If the Crown still considers the information to be immaterial and the defence insist that the information is material, then the accused must lodge an application to the Court requesting a ruling on the materiality of the information.

33.9 Under section 70A (4) of the 1995 Act as amended, the accused must at least 7 days before the trial either:

i) Lodge a new defence statement which must be done where there has been a material change in circumstances in relation to the defence since the last defence statement was lodged; or
ii) Lodge a statement confirming that there has been no such material change in circumstance.

33.10 Where a new defence statement is lodged the same process specified at paragraphs 33.5 to 33.8 must be followed.

33.11. Where a defence statement is not lodged, the Crown should raise this at the preliminary hearing or first diet. A further preliminary hearing or continued first diet should be requested to ensure that the defence lodge the defence statement.

33.12. There is no requirement under the 2010 Act for the accused to lodge a defence statement in summary proceedings. However where a defence statement is lodged section 125 of the 2010 Act sets out that it must contain the information specified at paragraph 32.3 above. Further it must be lodged at least 14 days before the trial diet.

33.13. Similarly, on receipt of a defence statement in summary proceedings, the Crown must follow the same processes as in solemn proceedings, as specified above at paragraphs 32.5 – 35.8[32].

33.14. Although there is no obligation to lodge a defence statement in summary proceedings, where the accused does lodge one and does so at least 14

[31] As set down in subsection (2) of section 124 of the 2010 Act
[32] The duty to review all relevant information on receipt of a defence statement in summary proceedings is contained in subsection (4) of section 125 of the 2010 Act

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days before the trial diet, there is then an obligation under section 126 of the 2010 Act to, at least 7 days before the trial diet:

i) Lodge a new defence statement which must be done where there has been a material change in circumstances in relation to the defence since the last defence statement was lodged; or
ii) Lodge a statement confirming that there has been no such material change in circumstance.

33.15. Thereafter, if there is any further material change in said circumstances, then the accused must lodge a fresh defence statement.

33.16. It should be noted, that notwithstanding the time limits set out above, the accused may lodge a defence statement at any time before or during the trial diet if the court allows it on cause shown.

33.17. Where there are active appellate proceedings, at any point after the Crown has reviewed all the information of which it is aware that relates to the grounds of appeal and have disclosed any information of which it is obliged to disclose, the appellant can lodge a further disclosure request setting out:

i) By reference to the grounds of appeal, the nature of the information that the appellant wishes the Crown to disclose; and
ii) The reasons why the appellant considers that disclosure of the information is necessary.

33.18. Where the appellant lodges such a disclosure request, the Crown must review the information to which the request relates[33] and disclose any information that, having regard to the accused's reasons for seeking the information, the Crown now considers falls within section 133(3), namely:

i) Any new information received by the Crown that is material to the existing grounds of appeal;
ii) Any information which comes to light during preparation of the appeal that should have been disclosed at an earlier stage;
iii) Any information which was not previously considered to be disclosable but has become disclosable in light of developments in the appeal; and
iv) Any information that would have been disclosable which has only come to the attention of the Crown since the trial.

34 Applications by an accused for ruling on materiality

34.1 Where the Crown consider that an item of information is not material having regard to the test set out in section 121 of the 2010 Act, then the accused may lodge an application to the court seeking a ruling on whether section 121(3) of the 2010 Act applies, i.e. whether the information meets the materiality test.

34.2 In such circumstances, the accused can only make such an application where he has first lodged a defence statement seeking the additional information from the Crown, setting out the nature of the information that the defence

[33] As specified in section 135(3) of the 2010 Act

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consider that the Crown is required to disclose and specifying the reasons why the accused considers that the disclosure of the information is necessary.

34.3 Applications under section 128 of the 2010 Act must be in writing and must set out:

i) The charge or charges to which the application relates (this is not required where the indictment or complaint only contains one charge);
ii) A description of the information being sought; and
iii) The accused's grounds for considering the information to be material in terms of section 121(3) of the 2010 Act[34].

34.4 As far as possible, the application will be heard by the justice of the peace, sheriff or judge who is presiding or is to preside at the accused's trial[35].

34.5 After hearing arguments from both the accused and the Crown, the court must make a ruling on whether section 121(3) applies to the information or any part of it and where the accused is charged with more than one offence, the court must also specify the charge or charges to which the ruling relates[36].

34.6 It is important to note that a ruling under section 128 of the 2010 Act to the effect that section 121(3) applies is not an order requiring the Crown to disclose the information. Where the court rules that the information meets the materiality test, the Crown can then:

i) Disclose the information;
ii) Seek an order under section 145 of the 2010 Act to prevent or restrict disclosure of the information; or
iii) Discontinue proceedings in respect of the charge or charges to which the section 128 ruling applies.

34.7 Where the information is sensitive and relates to a public interest in which the UK Government is the holder or protector of that particular public interest then the Crown should not disclose the information and should instead liaise with OSAG to determine whether the relevant Secretary of State intends to lodge an application under section 146 of the 2010 Act.

34.8 Section 129 of the 2010 Act allows the accused to seek a review of a ruling under section 128 where the accused becomes aware of new information that might have made a difference to the decision of the Court. There is no similar right of review by the Crown.

34.9 Section 130 of the 2010 Act allows both the Crown and the defence to appeal against a ruling of the court under section 128.

34.10 The 2010 Act provides similar provision in relation to appellate proceedings. Section 139 of the 2010 Act permits the appellate to apply to the court for a ruling on whether information is disclosable under section 133 of the Act. As for applications under section 128 of the Act, an application under section 139 is only competent where the appellate has lodged a disclosure request under

[34] As provided by subsection (3) of section 128 of the 2010 Act
[35] As provided by subsection (8) of section 128 of the 2010 Act
[36] As provided by subsection (7) of section 128 of the 2010 Act

section 135 of the Act and the Crown has not disclosed or only partially disclosed the additional information requested

34.11 Applications under section 139 of the 2010 Act must be in writing and must set out:

i) The charge or charges to which the application relates (this is not required where the appellate proceedings relates only to one charge);
ii) A description of the information being sought; and
iii) The accused's grounds for considering the information to be material in terms of section 133(3) of the 2010 Act[37].

34.12 As far as possible, the application will be heard by the judges who are to hear the appellant's appeal[38].

34.13 Section 140 of the 2010 Act allows the appellant to seek a review of a ruling under section 139 where the appellant becomes aware of new information that might have made a difference to the decision of the Court. There is no similar right of review by the Crown.

34.14 Unlike for rulings under section 128, the 2010 Act does not provide for the right of appeal by either the appellant or the Crown against a ruling under section 139.

34.15 Sections 128 and 139 of the 2010 Act does not prevent the accused or appellant, as the case may be, from seeking disclosure or recovery of information under the common law right to petition the court for commission and diligence or recovery of documents. However, where the accused has made an application under either of these sections, the accused is not entitled to seek the disclosure or recovery of the same information under common law procedures on grounds that are substantially the same as the grounds under which the section 128 or 139 application was made[39].

34.16 Similarly, where an application has been made under the common law procedures, the accused or appellant is not entitled to make an application under either section 128 or 139 in relation to the same information on grounds that are substantially the same as those on which the common law application was made[40].

35. Recording Disclosure Decisions & Actions

35.1. In order to effectively keep disclosure decisions under review, it is essential that the Crown keeps a clear record of all decisions taken in respect of the disclosure of information.

35.2 In solemn proceedings, this should be done by recording disclosure decisions on the schedules of information provided by the police. Where the information is not listed in the schedules, e.g. information contained within a precognition, disclosure decisions must be recorded in the case records.

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[37] As provided by subsection (3) of section 139 of the 2010 Act
[38] As specified in subsection (9) of section 139 of the 2010 Act
[39] As specified in section 166(5) of the 2010 Act
[40] As specified in section 166(7) of the 2010 Act

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35.3 In summary proceedings, disclosure decisions should be clearly recorded on the case records.

35.4 In addition, the Crown should keep a record of the date on which such information is made available to the defence to either access or collect as this will be deemed to be the date on which the Crown makes information available to the defence, which will be relevant should the defence take any preliminary point during proceedings that there has been a delay in the disclosure of material information.

35.5 In order to be able to satisfy the Court, if requested, that disclosure of information has been carried out effectively, the Crown should ensure that there is record of all information disclosed to the defence, including details of the date on which the information is disclosed. This record of information should be available for use before the Court, as needed.

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Annex A Definitions & Abbreviations

Term	Meaning
Appellant	This includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue appellant proceedings
Appellate Proceedings	Under section 132 of the 2010 Act, appellate proceedings means: (a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice; (b) an appeal under paragraph (b), (ba), (bb) (c) (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice; (c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice; (d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section; (e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue; (f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act; (g) an appeal against conviction by bill of advocation; (h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence, (i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act; (j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of – i. a conviction, or ii. a finding under section 55(2) of that Act
Authenticated	*Civilian Witness statement* - where the officer who obtained the statement confirms that s/he has checked the consistency and accuracy of the manuscript statement as against the typescript version submitted to the Crown
CHIS	Covert Human Intelligence Source
Criminal history information	Information held on the Scottish Criminal History Database, relating to previous convictions, outstanding charges[41], direct measures and Children's Hearing appearances

[41] A separate definition of outstanding charges and direct measures are also contained in this Annex.

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Term	Meaning
Criminal Investigation	Any investigation by the police or other investigating agency into a crime / offence or a potential crime / offence
Direct Measures	As defined in the 1995 Act, these will include fiscal fines, fiscal compensation orders, combined orders and fiscal work orders
GPMS	Government Protective Marking Scheme
Highly sensitive	Information will be categorised as highly sensitive if its disclosure would be likely to: (a) Lead directly to the loss of life; (b) Directly threaten national security; or (c) Lead to the exposure of a CHIS. Information may also be considered as highly sensitive if the GPMS marking of the information is such that the information can only be viewed by persons within COPFS who have been vetted with SC Security Clearance.
Information	The definition of information is contained within section 116 of the 2010 Act and means material of any kind given to or obtained by the prosecutor in connection with the case against the accused. This section also provides that information in relation to appellate proceedings includes material of any kind given to or obtained by the prosecutor in connection with appellate proceedings or the earlier proceedings.
Investigating Agency	The definition of an investigating agency is contained within section 117(4) of the 2010 Act. An investigating agency means: (a) A police force; or (b) Such other person who – i) Engages (to any extent) in the investigation of crime or sudden deaths, and ii) Submits reports relating to these investigations to the procurator fiscal As the Scottish Ministers may prescribe by regulations
Manuscript	Original format in which a statement is obtained by the investigating agency, e.g. handwritten statement
Material	The definition of material information is contained within section 121 of the 2010 Act. Information will be material if: (a) It would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused; (b) It would materially strengthen the accused's case; or (c) The information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.
Materiality test	This is where information is assessed to determine whether it is material information under section 121 of the 2010 Act.

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Term	Meaning
Negative findings	Any forensic or other analytical findings that run contrary to the proof of the prosecution case
NSS	National Standard Statement
1995 Act	Criminal Procedure (Scotland) Act 1995
OSAG	Office of the Solicitor for the Advocate General in Scotland
Outstanding Charges	Any charges listed on the Criminal History Record where either: (a) The Crown has not yet taken any decision in regarding to proceedings; or (b) Proceedings have been commenced and are not yet concluded.
Redaction	The obscuring of information from a piece of information that has been disclosed. Such redaction must be obvious on the face of the piece of information being disclosed. Usually only immaterial information will be redacted. However, a partial non-disclosure order may be granted to obscure material information where the Court considers it in the public interest to redact the information.
Revelation	Revelation is the process by which the police, or other investigating agency, will advise the Crown of relevant information. Depending on the information, revelation will either consist of advising the Crown of the *existence* of the information or of submitting the information to the Crown. Information that will form part of the prosecution case or is otherwise *material* information should always be submitted.
Relevant Information	**Relevant information** is defined as any information that appears 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
Reporting Officer	The Reporting Officer is the person with overall responsibility for the conduct of an investigation where a Senior Investigating Officer has not been appointed. Where a dedicated Reviewing Officer has not been appointed, the Reporting Officer will also have responsibility for recording, reviewing and assessing all information obtained or generated during the investigation.
Reviewing Officer	The Reviewing Officer is responsible for reviewing and assessing all information obtained or generated during an investigation; determining whether it may be relevant; recording that information on the appropriate schedules; submitting schedules to the Crown and ensuring that information is, where appropriate, submitted to the Crown.
SCCRC	Scottish Criminal Cases Review Commission
Senior Investigating Officer	The Senior Investigating Officer is responsible for the direction and conduct of a major criminal investigation, and is accountable for the investigative strategies and associated policy decisions.

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Term	Meaning
	In particular, the Senior Investigating Officer has particular responsibilities in relation to: (a) Appointing Reviewing Officers; (b) Recording and retention of all information; and (c) Ensuring that all information that may be relevant is revealed to the Crown.
Sensitive	The definition of sensitive is contained within section 122(4) of the Act. Information will be categorised as sensitive if its disclosure would be likely to: (a) Cause serious injury, or death, to any person; (b) Obstruct or prevent the prevention, detection, investigation or prosecution of crime; or (c) Cause serious prejudice to the public interest
Special Counsel	A person appointed by the Court under section 150 of the 2010 Act to represent the interests of the accused where an application, review or appeal is made in respect of a non-disclosure, exclusion and/or non-notification order. Under section 152 of the 2010 Act, special counsel's duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.
SPR	Standard Prosecution Report
SPSA	Scottish Police Services Authority
Statement	A statement is defined in section 262 of the 1995 Act and includes any representation, however made or expressed, of fact or opinion by the witness and any part of a statement but does not include a statement in a precognition other than a precognition on oath. It will also include pro-forma questionnaires. Section 279 and schedule 8 to the 1995 Act provide further detail of when a statement contained within a document may be classed as a statement and admitted in evidence. A document includes in addition to a document in writing: (a) Any map, plan, graph or drawing; (b) Any photograph; (c) Any disc, tape, sound track or other device in which sounds or other data (not being visual images) are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and (d) Any film, negative, disc or other device in which one or more visual images are recorded so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom. "film" includes a microfilm "made" includes allegedly made.
2010 Act	Criminal Justice and Licensing (Scotland) Act 2010
VIPER	Video Identification Parade Electronic Recording System