

## **POST OFFICE LTD**

### **ADVICE**

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#### **DISCLOSURE THE DUTY TO RECORD AND RETAIN MATERIAL**

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##### **Background**

1. On the 3<sup>rd</sup> July 2013 I attended POL in conference at POL Head Office to consider issues relating to the Horizon computer system and the prosecution of criminal offences committed against POL by sub-Postmasters and clerks.
2. One of the topics considered by the conference was that of a disclosure: I advised that there ought to be a single, central hub, the function of which was to act as the primary repository for all Horizon-related issues. The hub would collate, from all sources into one location, all Horizon-related defects, bugs, complaints, queries and Fujitsu remedies, thereby providing a future expert witness, and those charged with disclosure duties, with recourse to a single information-point where all Horizon issues could be identified and considered. The rationale behind this advice derived from the need to protect POL from the current situation repeating itself in the future.
3. POL accepted that advice and according a weekly conference-call meeting was established so as to meet the requirement of the central hub. Participants were informed that they should bring all Horizon-related issues they had encountered to the meeting; minutes were

to be taken, centrally retained and disseminated to those who required the information, this list to include POL's Horizon expert witness.

4. Three such conference calls were convened, each conducted on a Wednesday morning. A representative from Cartwright King Solicitors 'attended' each meeting. A minute-taker was appointed for each call and I understand that each of the minute-takers retain their own hand-written minutes.
5. At some point following the conclusion of the third conference call, which I understand to have taken place on the morning of Wednesday 31<sup>st</sup> July, it became unclear as to whether and to what extent material was either being retained centrally or disseminated. The following information has been relayed to me:
  - i. The minutes of a previous conference call had been typed and emailed to a number of persons. An instruction was then given that those emails and minutes should be, and have been, destroyed: the word "shredded" was conveyed to me.
  - ii. Handwritten minutes were not to be typed and should be forwarded to POL Head of Security.
  - iii. Advice had been given to POL which I report as relayed to me verbatim:

*"If it's not minuted it's not in the public domain and therefore not disclosable."*

*"If it's produced its available for disclosure – if not minuted then technically its not."*
  - iv. Some at POL do not wish to minute the weekly conference calls.

### **The Duty to Record and Retain**

6. The duty of a prosecutor to record and retain material which may have a bearing upon matters of disclosure derives from four primary sources.<sup>1</sup> For purposes of clarity I extract the relevant provisions here:

- i. The Criminal Procedure and Investigations Act 1996, Part II requires the Secretary of State to prepare a Code of Practice. Sections 22(2) and (3) of the 1996 Act provides:

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- (2) In this Part references to material are to material of all kinds, and in particular include references to—
- (a) information.....
- (3) In this Part references to recording information are to putting it in a durable or retrievable form (such as writing or tape).

- ii. The Code of Practice issued under Part II of the 1996 Act, paragraphs:

#### **Definitions**

##### **2.1** In this code:

- *material* is material of any kind, including information and objects...

#### **Recording of information**

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

#### **Retention of material**

- 5.1** The investigator must retain material obtained in a criminal investigation which may be relevant to the investigation
- 5.4** The duty to retain material includes in particular the duty to retain material falling into the following categories, where it may be relevant to the investigation:
- communications between the police and experts such as forensic scientists, reports of work carried out by experts, and schedules of scientific material prepared by the expert for the investigator, for the purposes of criminal proceedings.

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<sup>1</sup> The Criminal Procedure and Investigations Act 1996, Part II; the Code of Practice issued under Part II of the 1996 Act; the Protocol for the Control and Management of Unused Material in the Crown Court; and the Attorney-General's Guidelines on Disclosure.

- iii. The Protocol for the Control and Management of Unused Material in the Crown Court:

**The duty to gather and record unused material**

- 13. For the statutory scheme to work properly, investigators and disclosure officers responsible for the gathering, inspection, retention and recording of relevant unused prosecution material must perform their tasks thoroughly, scrupulously and fairly. In this, they must adhere to the appropriate provisions of the CPIA Code of Practice

- iv. The Attorney-General's Guidelines on Disclosure

**Foreword**

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

**Introduction**

- 3. The scheme set out in the Criminal Procedure and Investigations Act 1996 (as amended by the Criminal Justice Act 2003) (the Act) is designed to ensure that there is fair disclosure of material which may be relevant to an investigation and which does not form part of the prosecution case. Disclosure under the Act should assist the accused in the timely preparation and presentation of their case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives risks preventing a fair trial taking place
- 4. This means that the disclosure regime set out in the Act must be scrupulously followed.
- 32. Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice and in accordance with the law.
- 42. Prosecution advocates should ensure that all material that ought to be disclosed under the Act is disclosed to the defence. However, prosecution advocates cannot be expected to disclose material if they are not aware of its existence. As far as is possible, prosecution advocates must place themselves in a fully informed position to enable them to make decisions on disclosure.

7. Thus “material” includes information;<sup>2</sup> and information must be recorded;<sup>3</sup> and retained.<sup>4</sup> The duty applies equally to material related to the use of expert evidence<sup>5</sup> such as pertains to the operation of Horizon. These principles must be followed by prosecutors.<sup>6</sup>
8. It can be seen therefore that the duty of any prosecuting body is to record and retain any material which might meet the test for disclosure set out in ss.3 and 7 of the 1996 Act.<sup>7</sup> Where the proper function of equipment is relied upon as part of the prosecution case this duty extends to the recording and retaining of information touching upon the integrity and robustness of that equipment. Horizon plainly falls within the scope of this duty. Similarly, where the prosecution rely upon the evidence of an expert, the duty to record and retain extends to any material known to the expert or brought to his attention by others, including but not limited to those who use, operate, maintain and repair such computer hardware and software about which the expert speaks.
9. The duty to record and retain material cannot be abrogated. To do so would amount to a breach of the law and, in the case of solicitors and counsel, serious breaches of their respective Codes of Conduct. Accordingly no solicitor, no firm of solicitors and no barrister may be a party to a breach of the duty to record and retain. Neither may they act in circumstances where they are aware, or become aware, that a practice has developed within the investigative or prosecutorial function such that the duty to record and retain is being deliberately flouted, or avoided. Again to do so would amount to breaches of both the law and Codes of Conduct. A decision-based failure to record and retain material would readily amount to such a practice. Such a decision, where it is taken partly or wholly in order to avoid future disclosure obligations, may well amount to a conspiracy to pervert the course of justice on the part of those both taking such a decision, and those who implement such a decision where they do so in the knowledge that it was taken partly or wholly for that purpose.

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<sup>2</sup> CPIA 1996, s.22(2); Code of Practice para.2.1; Protocol, para.13: see paragraphs 6.i., ii. & iii. above;

<sup>3</sup> CPIA 1996, s.22(3); Code of Practice para.4.1; Protocol, para.13:*supra*;

<sup>4</sup> Code of Practice para.5.1, paragraph 6.ii.above;

<sup>5</sup> Code of Practice para.5.4, paragraph 6.ii.above;

<sup>6</sup> A-G's Guidelines, paras.4, 32 & 42, paragraph 6.iv.above;

<sup>7</sup> *i.e.* Material which “...might reasonably be considered capable of undermining the case for the prosecution ...or of assisting the case for the accused...”

10. In view of the matters referred to in the previous paragraph, were the issue of disclosure to be raised in court in circumstances where an investigator or POL officer/employee suggested that advice different from that contained within this document had been given, such would amount to a waiver of Legal Professional Privilege so that this document would itself become admissible in proceedings.

### **Discussion**

11. Material does not become 'known' only by virtue only of the fact that it is recorded, and the question whether or not material is to be disclosed or not does not turn merely upon whether or not it exists in written form. Thus in the context of Horizon issues, if an individual investigator knows of material (information) which may undermine the integrity of Horizon, then regardless of whether or not he has written down or otherwise recorded that material, for the purposes of his duty he knows of the material. Similarly, if he orally imparts that material to others, they too then know of the material; the fact that such material is not written down or otherwise recorded is not to the point.
12. Referring back to those matters set out in paragraph 5 above, the only proper way forward is for the conference calls to be properly minuted, those minutes to be centrally retained and made available to all those who properly require access thereto. And were it to be determined that those telephone conferences were no longer to take place, the duty to record and retain nevertheless remains: individual investigators with knowledge are bound both by the duty to record and retain and to inform the prosecutor – POL.
13. I would advise that either the conference calls be continued or that some other centrally-based mechanism be designed, so as to permit the collation of all Horizon-related defects, bugs, complaints, queries and Fujitsu remedies, arising from all sources, into one location. Such a mechanism would amount to proper compliance with that aspect of a prosecutor's duty relating to the recording and retention of relevant information.

### **Conclusion**

14. Regardless of the position in civil law, any advice to the effect that, if material is not minuted or otherwise written down, it does not fall to be disclosed is, in the field of criminal law, wrong. It is wrong in law and in principle and such a view represents a failing to fully appreciate the duties of fairness and integrity placed upon a prosecutor's shoulders.

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**Simon Clarke**  
**Barrister**  
**Cartwright King Solicitors**

**2<sup>nd</sup> August 2013**