

*Bond Dickinson*

Disclosure of documents in litigation

Post Office Limited

December 2014

The logo for Bond Dickinson, featuring the name in a stylized, handwritten-style script.

## 1 Disclosure

As part of the litigation process, Post Office is required to disclose to the other party any documents relevant to the case. The duty of disclosure is strict and the courts take it very seriously – failure to comply with disclosure rules can be a criminal offence.

## 2 Duty to preserve documents

From the point in time that Post Office is threatened with a legal claim, it is best practice to preserve all documents that might be relevant to future Court proceedings. Failure to preserve documents can be a breach of the Court rules and could undermine Post Office's legal position.

### *Things to consider when preserving documents*

- *Where is relevant information likely to be stored?*
- *Have you told everyone who may be holding relevant material not to destroy it? Think carefully about which departments may have been involved historically in any project or matter – its likely to be more than just one department.*
- *Do you need to suspend any automated destruction of electronic data (eg. the deletion of old emails from inboxes or backup achieves)?*
- *If there are limits of the size of email accounts or storage spaces, should those locations being copied now to ensure nothing is lost?*
- *If information is stored in shared workspaces, do those workspaces need to be locked down?*
- *Are you moving office or location – do you need to make sure that any hardcopy documents are not lost during the move or destroyed as part of the "clean up" before moving?*
- *Should you retrieve now any hardcopy documents from archives so to prevent their loss or destruction?*



### 3 Creation of documents

Post Office needs to be careful about creating new documents whilst the litigation is underway. Documents directly about the litigation are likely to be legally privileged and not disclosable – these documents should be marked "legally privileged" to help ensure that they are not accidentally disclosed.

Documents that refer only to the litigation but are not part of the litigation process (such as internal reports and papers for the board / Exco) may not be privileged and could be disclosable. Creation of such documents should be discussed with the legal team.

### 4 What documents must be disclosed?

Post Office is required to disclose all copies and versions of all documents that are relevant to the dispute case and in Post Office's control.

#### Documents

The word **document** has a very wide meaning under the court rules. It includes all media (including electronic media) in which information of any description is recorded.

#### *Examples of documents*

- *Hardcopy and paper records: letters, memorandums, reports, handwritten notes, print-outs of electronic documents.*
- *Electronic documents: computer records, databases, spreadsheets, emails, text messages, documents held in electronic form on servers.*
- *Images: pictures, photographs, diagrams, charts, presentations.*
- *Audio and video recordings: voicemail messages, recorded seminars, recorded video-conferences.*
- *Meta-data: the hidden electronic data that is automatically collected by computer systems about when documents are created, accessed and edited.*

#### Relevant documents

A document is **relevant** if it:



- Supports or undermines Post Office's case;
- Undermines the other party's case; or
- Supports the other party's case.

English litigation is conducted on an open basis. There is no scope to hide documents that may damage Post Office's case. It also cannot withhold relevant documents that would otherwise be considered confidential. The court rules require disclosure of any relevant document. The threshold for a document being relevant to the litigation is low. Even a document that may only have a very distant connection to the issues in dispute will be considered relevant.

### **Control**

You are obliged to disclose all relevant documents which are in your **control**.

The word **control** has a specific meaning under the court rules. It is not limited to documents which are in Post Office's possession. It also includes documents which it has the legal right to possess, inspect or copy. Control of documents may also extend to different systems and locations within the organisation.

Disclosure also extends to documents that were previously in Post Office's control but are no longer so. For example, if relevant documents are known to have been deleted, then a description of the deleted documents must be provided to the other side.

#### *Examples of documents that could be under Post Office's control*

- *Documents in different departments or in different offices.*
- *Documents in archives and off-site storage (both hardcopy and electronic).*
- *Documents on different electronic systems including personal computers, laptops, ipads, blackberrys, phones, memory sticks and back-up IT systems.*
- *Documents held on Post Office's behalf by its third party professional agents such as other firms of solicitors, financial advisors and accountants.*
- *Documents held by your subsidiaries.*



### Copy documents

Every **copy** of a document is deemed to be a separate document. Under the strict rules of disclosure, each individual copy may have to be disclosed. In practice, just one copy is disclosed unless the other party requests sight of all copies of the same document.

#### *Example*

*If an email was sent from A to B and B then printed out that email, there would be at least three copies (one in the sent items of A's email account, one in B's email inbox and the printed copy) plus any back-ups stored automatically by your IT systems.*

### Drafts, versions and variations

Each **draft or version** of a document is classed as a separate document and must be disclosed.

#### *Example*

*If a document is drafted on a computer, printed out and written on by hand, and then the amendments are typed into the electronic document but saved as a separate electronic file, this creates three documents (the original electronic document, the handwritten amendment and the second electronic version).*

## 5 The key stages of the disclosure process

### Step 1 - Defining the scope of disclosure

Given the general rules on disclosure described above, the scope of Post Office's disclosure obligation is very wide. To help narrow the scope of disclosure, Post Office may seek to agree disclosure parameters with the other party's solicitors. For example, the scope of disclosure could be limited by:

- An identified list of issues which are relevant to the case.
- An agreed list of "keywords" that can be searched on electronic systems.
- Specific systems and locations so that certain areas do not have to be searched. For example, parties sometimes agree not to search archives and back-up records or not to disclose meta-data.



Although these parameters help reduce the scope of Post Office's obligations, Post Office's general duty of disclosure will continue. If Post Office discovers relevant documents that are outside the disclosure parameters then these documents will still have to be disclosed.

The obligation to disclose any relevant documents that come to Post Office's attention is an ongoing obligation throughout the litigation process. If, after documents have been provided to another party, further relevant documents are discovered, Post Office is obliged to disclose those documents promptly.

## **Step 2 - Searching for documents**

Post Office has an obligation to conduct a reasonable search for relevant documents which are, or have been, in its control.

It is not obliged to carry out an exhaustive search for documents at unlimited expense. What constitutes a reasonable search will depend on the facts of each case. There are certain factors which the court will apply when assessing the reasonableness of a search, such as ease of access to documents and whether the cost of the search is proportionate to the matters in dispute and value of the claim.

In general, for significant litigation the Courts expect to see a comprehensive search for documents. The search process is therefore likely to be very time consuming and so Post Office should make sure that the proper resources (in terms of personnel, management supervision and IT support) are made available.

### *Points to consider before beginning your search for documents*

- *Who are the key individuals involved in the matter at Post Office (known as "custodians") and how do they each store information?*
- *Where and how does Post Office record information (both hardcopy records and electronic documents)?*
- *Where is information stored within the Post Office group structure?*
- *How do Post Office's IT systems store data?*
- *What electronic search tools are available for searching IT systems?*
- *Who is going to manage the search at Post Office?*

*Bond Dickinson*

The search for documents needs to be undertaken robustly. It is better to identify too many documents than too few. If the search is too narrow or not conducted thoroughly, this is likely to lead to complaints from the other party (and potentially costly applications to the court for specific disclosure).

Once Post Office has located any possibly relevant documents they can then be reviewed.

### **Step 3 - Reviewing and listing documents**

The usual process is for the legal team to review all the documents revealed by Post Office's searches to determine which documents need to be disclosed. During this review stage, it is common for gaps in the search and missing documents to be identified. This then usually leads to additional searches being undertaken and new lines of enquiry being explored. It is therefore important that the initial search for documents is undertaken promptly so to allow time for the search process to be checked and repeated if necessary.

Disclosure to the other party will initially be provided by way of a list of the documents revealed by Post Office's searches and determined to be disclosable. We will prepare this list on your behalf.

Certain documents that are relevant to the case will not be disclosable. In particular, documents which are privileged do not have to be disclosed. Generally, documents will be privileged if they are created either:

- For the purposes of obtaining legal advice.
- For the purposes of litigation.
- As part of an attempt to settle the litigation.

The legal team will assess whether privilege applies when reviewing the documents.

The list of documents will be accompanied by a "disclosure statement" signed by an appropriate person at Post Office. The disclosure statement describes the searches carried out by Post Office. It is very important that Post Office is confident that it has carried out all of its disclosure obligations prior to signing the disclosure statement. Signing the statement without an honest belief that it is true carries the risk of proceedings for contempt of court and, in the most serious cases, criminal fines and/or imprisonment for an individual who knowingly signs a false disclosure statement.

### **Step 4 - Inspection**

The other party is entitled to request copies of any documents included on Post Office's list. Likewise, Post Office is entitled to request copies of any documents on the other party's list. This process is known

*Bond Dickinson*

as "inspection of documents". In practice, it is common for parties to request copies of all listed documents as it is difficult to determine whether a document is relevant from the limited description provided on the list.

On receiving copies of the documents from the other parties, the legal team will review these documents to determine:

- Whether any of the documents affect the case.
- Whether the other parties' searches have been carried out properly.

### **Step 5 – Specific disclosure**

If a particular document or class of documents has not been disclosed, a party may request that the other parties disclose those documents. Likewise, if a particular area has not been searched, there may be a request that that area be searched.

If a party refuses to do this voluntarily, the other party may apply to the court for an order that further disclosure be made. This is called an application for "specific disclosure".

## **6 Key Points to remember**

- All relevant documents need to be disclosed even if they are confidential or harm Post Office.
- Do not destroy any documents that may be relevant.
- Be careful when creating new documents about the litigation.