

**PROTOCOL FOR THE PROVISION OF ADVANCE INFORMATION,
PROSECUTION EVIDENCE AND DISCLOSURE OF UNUSED MATERIAL IN THE
MAGISTRATES COURTS**

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Introduction

i. This protocol is a guide to all those involved in the control and management of criminal proceedings in magistrates' courts. The provision of advance information, prosecution evidence, and disclosure of unused material are important procedural steps in criminal trials, but widely misunderstood, particularly as to exactly what material the defence are entitled and the procedures to be followed. All too frequently applications by the parties and decisions by the court in this area have been based either on misconceptions as to the true nature of the law or a general laxity of approach (however well-intentioned). This failure properly to apply the binding provisions as regards disclosure has proved extremely and unnecessarily costly and has obstructed justice.

li This protocol identifies the different types of material that may be available in magistrates' courts, sets out the simple procedures that should be followed and aims to clarify the stages at which relevant duties arise.

iii. *This protocol must be read in the context of general case management, which is to be regarded as an essential duty of the court. The new Criminal Procedure Rules 2005 (CrimPR) impose duties and burdens on all the participants in a criminal trial, including the judge, and the preparation and conduct of criminal trials is dependent on and subject to these rules¹.*

iv. *The duty of courts to manage proceedings, and the requirement on the parties to conduct them, in order to achieve the overriding objective in Part 1 of the Rules, means there has to be a complete culture change. Nothing less is required to stem unnecessary delays and prevent potential obstructions to achieving justice. The summary trial process must not be delayed or unnecessarily complicated by inappropriate handling of prosecution material or misconceived applications in relation to such material.*

v. *It is essential that judges, magistrates and the parties are clear as to the law and procedure relating to provision of advance information, prosecution evidence and disclosure of unused material, act within the framework of the legislation and recognise and accept the role of the court in overseeing this process. This protocol is in part the reciprocal in magistrates' courts proceedings of Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court. The Court of Appeal made clear in R v K & others (2006) EWCA Crim 724 that 'the protocol should be applied by trial judges, and those who act for the prosecution and the defence should ensure that they have familiarised themselves with it'. This protocol should be regarded similarly.*

vi. *Magistrates will need to rely heavily on their legal advisers for guidance on the matters covered by this protocol. Legal advisers should ensure that they are familiar with the statutory provisions and applicable case law, and should draw the attention of the parties and the magistrates to this protocol. Any case which raises difficult issues of disclosure should be referred to a District Judge (Magistrates' Courts) for directions, where such a judge is available.*

¹ R v K & others (2006) EWCA Crim 724

PART 1

Advance information

1.1 Advance information (often erroneously referred to as ‘advance disclosure’) should not be confused with provision of prosecution evidence before trial, which is dealt with in part 2 of this protocol, or disclosure of unused prosecution material, which is dealt with in part 3.

1.2 Provision of advance information is a duty on the prosecution that arises on request by the defendant **before** the first hearing and **applies only to offences triable either-way**. It does not apply in respect of offences which are summary-only or triable only on indictment². This information is to be provided to enable the defendant to decide on venue and to make representations to the court at the first hearing at which venue will be determined and the plea taken. The court must be satisfied that the defendant is aware of his right to receive advance information³. Note: The pilot will examine best practice in relation to the provision of advance information in cases involving other offences.

1.3 The information that may be requested, and the procedure to be followed is contained in Crim PR, rule 21. There is no entitlement to be provided with all the actual prosecution evidence at this stage in the proceedings. There is no entitlement to disclosure of any unused material at this stage in the proceedings⁴.

1.4 In furtherance of the overriding objective to deal with cases efficiently and expeditiously⁵, the magistrates’ courts will expect to deal with both plea and venue on first hearing of a case. The prosecutor must therefore be in a position to comply with any request for advance information either before or at the first hearing. The defence advocates should, save in exceptional circumstances, expect to be ready to go through that material with the defendant and advise on venue, plea and any ancillary matters there and then without the need for an adjournment. If necessary,

² The restriction of advance information to offences triable either-way applies to youths as well as adults, even though youths must be ‘tried summarily’ unless s.24 Magistrates’ Courts Act 1980 provides otherwise. However, prosecutors in the Youth Court may wish to give consideration to providing case summaries in appropriate cases, even where the offence is not triable either way, to assist defence advocates: see para 1.8

³ CrimPR rule 21.5

⁴ Subject to the remaining common law provisions. See R v DPP ex parte Lee (1999) 2 Cr App R 304 and the notes in footnote 14, post.

⁵ Crim PR part 1, rule 1.1(e)

cases can be put back in the list to allow the defence sufficient time to consider any material provided.

- 1.5 The prosecutor may comply with a request for advance information either:
- a) by providing a copy of those parts of every written statement which contain information as to the *facts and matters*⁶ of which the prosecutor proposes to adduce evidence in the proceedings; or
 - b) a summary of those facts and matters⁷.

1.6 Where reference is made to a document *on which the prosecutor proposes to rely*, either a copy of that document or such information as is necessary to enable a request to be made to inspect the document must be provided (rule 21.3(3)). The law is still unclear as to what is to be regarded as a 'document' under the rule⁸.

1.7 Rule 21.6(1) states that if a request for advance information has been made and the requirements of the rules not complied with, the court shall adjourn proceedings for the purposes of provision of advance information *unless it is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement*⁹. **In particular, when faced with applications for adjournments to inspect documents referred to in advance information, courts should consider whether the information already provided is sufficient for the defendant to make an informed decision on venue and if so, whether any substantial prejudice will arise in refusing that application**¹⁰. The

⁶ Rule 21.4(1) permits the prosecutor to decline to disclose a particular fact or matter if disclosure might lead to intimidation or attempted intimidation of a prosecution witness or interference with the course of justice.

⁷ The Rules do not specify that such a summary has to be written or otherwise recorded.

⁸ In R v Calderdale Magistrates' Court ex p Donahue and Cutler [2001] Crim LR 141 the court granted an adjournment to allow the defendant to view a video constituting the identification evidence and referred to in the advance information. The case was founded on a concession that the video was a 'document' under the Rules, a point which remains to be formally decided. In R (on the application of the DPP) v Croydon Magistrates' Court [2001] EWHC Admin 552 reference in a case summary to results of DNA samples did not amount to reference to a document and the prosecution was not obliged to provide further documentary information about the DNA profiling at that stage of the proceedings.

⁹ Rule 21.6(2) provides that where the court decides not to adjourn, a record of that decision and the reasons why the court was satisfied that the conduct of the case for the accused would not be substantially prejudiced by non-compliance with the requirement must be entered in the court register.

¹⁰ See R v Dunmow Justices, ex parte Nash (1993) 157 JP 1153 where, prior to the new Criminal Procedure Rules, Watkins LJ expressed a view that there was sufficient description of the kind of pornography present in videos in material already provided to the applicant such

only express power the court has is to adjourn the proceedings pending compliance by the prosecution with the requirement to provide advance information. The court has no express power to order the prosecution to provide specific material by way of advance information¹¹, but a court should consider relying upon its general case managements powers if the interests of justice so require.

1.8 In cases where advance information is **not** required to be provided under the CrimPR, e.g. summary-only offences, prosecutors may choose to provide limited information voluntarily, but the proceedings should not be delayed for this purpose.

that the magistrates would be entitled to refuse an adjournment to allow disclosure of the videos.

¹¹ R v Dunmow Justices, ex parte Nash (supra) where Watkins LJ said, prior to the making of the new Criminal Procedure Rules, 'the only power under the rules given to the Justices, where they are satisfied that a defendant has not had proper disclosure from the prosecution, is to adjourn the matter before the Court'.

PART 2

Prosecution Evidence

2.1 The provision of prosecution evidence in summary trials is a duty on the prosecution that arises **only after** a not-guilty plea has been entered. It is not regulated by any statutory provisions, but is covered by the Attorney General's Guidelines on Disclosure (April 2005) (AG Guidelines). Para. 57 requires the prosecution to provide the defendant with all the evidence upon which they intend to rely at trial (in so far as it has not already been provided as advance information, where that duty arises) *to allow the defendant and his legal adviser sufficient time properly to consider the evidence before it is called*. Standard directions¹² currently set a time limit of 28 days from plea for prosecution to provide such evidence.

2.2 Prosecutors should act to ensure directions are complied with, to avoid delays. However, late provision of such evidence should not automatically result in a trial being adjourned. The court must take into account the nature of the evidence being provided late and form a view as to how long is required to properly consider it. In the majority of cases, a competent advocate will be able to deal with the material then and there by the court allowing time before the trial commences, or even during the course of the trial.

¹² Reference to 'standard directions' in this protocol means the default directions set out in the case progression forms for use in magistrates' courts in accordance with the Consolidated Criminal Practice Direction.

PART 3

Unused prosecution material and defence statement

Disclosure of unused prosecution material

3.1 This is a duty on the prosecution that arises **only after** a not-guilty plea has been entered¹³. Disclosure of unused material is governed by the Criminal Procedure and Investigations Act 1996¹⁴. The test for whether material should be disclosed will depend upon the date when the criminal investigation commenced (see **Annex A**). Standard directions allow 28 days following plea for initial disclosure to be provided.

3.2 The majority of cases are likely to be subject to the new disclosure regime which applies where the criminal investigation commenced on or after 4 April 2005. The law is set out in the CPIA as amended by Part V of the Criminal Justice Act 2003. The April 2005 edition of the Code of Practice under 23(1) of the CPIA applies ([see SI 2005 No. 985](#)). The amended test for disclosure of unused material requires the prosecutor to disclose any *prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused*. This one test applies throughout.

3.3 Justice requires that the prosecution complies fully with its legal duties of disclosure. The overarching principle relating to disclosure is that prosecution material must be disclosed at the appropriate stage in the proceedings, but **only if** it satisfies the appropriate statutory test for disclosure. It is the duty of the court to oversee and manage the process to see that the overriding objective in Part 1 of the CrimPR is achieved.

3.4 While the disclosure of unused material is undoubtedly essential to achieving justice, it is also essential that summary trials are not delayed or over-complicated by

¹³ Duties also arise in relation to cases being sent or committed for trial to the Crown Court, for which see [Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court](#)

¹⁴ There may be occasions when the prosecutor, pursuant to surviving common law rules of disclosure, ought to disclose an item or items of unused material in advance of disclosure under [CPIA](#), e.g. to assist a defendant in making a bail application. However, once the CPIA is triggered, the common law no longer applies. See *R v DPP ex parte Lee* (1999) 2 Cr App R 304. The circumstances in which common law disclosure should be given will be rare and the surviving common law rules must not be cited in an attempt to obtain disclosure before the statutory duty arises, or wider disclosure than would be available under the CPIA.

inappropriate disclosure of prosecution material or misconceived applications in relation to such material¹⁵.

The defence statement

3.5 Provision of a defence statement is voluntary where matters are tried summarily in the magistrate's court (s.6 CPIA). However in the absence of a defence statement, the defendant **cannot** make an application for specific disclosure under s.8 CPIA, and the court **cannot** make any orders for disclosure of unused prosecution material. Service of the defence statement is therefore a critical stage in the disclosure process, and timely service is crucial for the proper consideration of disclosure issues well in advance of the trial date. Defence advocates **must** give consideration at an early stage as to whether to serve such a statement.

3.6 In the past, defence statements have contained little more than an assertion that the defendant is not guilty. Reiteration of the defendant's plea is not the purpose of a defence statement, R v Patrick Bryant [2005] EWCA Crim 2079 (per Judge LJ, paragraph 12). Defence statements must comply with the requirements set out in the CPIA.

3.7 Enhanced requirements now apply to defence statements under section 6A of the CPIA¹⁶, as amended by the Criminal Justice Act 2003. The defence statement must spell out, in detail, the nature of the defence, and particular defences relied upon; it must identify the matters of fact upon which the defendant takes issue with the prosecution, and the reason why, in relation to each disputed matter of fact. It must further identify any point of law (including points as to the admissibility of evidence, or abuse of process) which the defendant proposes to take, and identify authorities relied on in relation to each point of law (see s.6A(1) CPIA). Where an alibi defence is relied upon, the particulars given must comply with [s.6A\(2\)\(a\) and \(b\)](#)

¹⁵ s.17 of the CPIA prohibits parties from using or disclosing *unused* material for any purpose unconnected with the proceedings. This is to ensure privacy and confidentiality of those who may have provided the material. Applications can be made to the court for permission to use or disclose protected material. Material, once displayed or communicated to the public in open court, is no longer so protected

¹⁶ Where the *pre-4 April 2005* CPIA disclosure regime applies, the defendant must, in the defence statement, set out the nature of the defence in general terms, indicate the matters upon which the defendant takes issue with the prosecution and set out (in relation to each such matter) why issue is taken (see s.5(6) of the Act, pre-amendment). Any alibi defence relied upon should comply with the formalities in s.5(7) of the Act, pre-amendment.

of the CPIA. Courts will expect to see defence statements that contain a clear and detailed exposition of the issues of fact and law in the case.

3.8 Courts should examine the defence statement with care to ensure that it complies with the formalities required by the CPIA. As was stated in paragraph 35 of R v H and C [2004]:

The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court.

3.9 Standard directions require that a defence statement, if there is to be one, must be served within 14 days of the date upon which the prosecution has complied with, or purported to comply with the duty to provide initial disclosure¹⁷. Courts will expect to see the standard timeframe met. However, there may be some rare occasions where it is simply not possible to serve a properly drafted defence statement within the 14 day period; well-founded defence applications for an extension of time under reg 3(1) of the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 may therefore be granted. Such applications **must** be made in writing in accordance with CrimPR rule 25.7, and **must** be made **before** the time limit expires (reg 3(2)¹⁸).

3.10 Late service of a defence statement does not, of itself, permit the prosecution to ignore it, nor does it preclude the court from considering a proper application under s.8 CPIA (DPP v Wood: DPP v McGillicuddy [2005] EWHC 2986). However, where late service of a defence statement results in potential delay in the proceedings, any application to adjourn for further disclosure or to make an application under s.8 CPIA, must be scrutinised carefully and if granted, the court should give consideration to the issue of wasted costs, or even drawing matters to the attention of the Legal Services Commission.

3.11 Courts must, of course, be alert to ensure that defendants do not suffer because of the failings of their lawyer, but there must be a clear indication to the

¹⁷ See also reg 2 of the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997

¹⁸ Applications must specify why it is not possible to provide a defence statement before the expiration of the time period and specify the number of days by which the accused wishes that period to be extended.

professions that if justice is to be done, proper consideration must be given to disclosure issues at an early stage and not left.

3.12 It is vital to a fair trial that the prosecution is mindful of its continuing duty of disclosure, and must particularly review disclosure in the light of the issues identified in any defence statement. While the defence may indicate what items of unused material they are interested in and why, such requests must relate to prosecution material (i.e. not third party material) and matters properly raised in the defence statement. (DPP v Wood: DPP v McGillicuddy [2005] EWHC 2986)

3.13 The court should not allow the prosecution to abdicate its statutory responsibility for reviewing the unused material by the expedient of allowing the defence to inspect (or providing copies of) everything on the unused material schedule, irrespective of whether it satisfies the relevant test for disclosure. Additionally, indications should not be given by individual prosecutors that disclosure will be provided of material that does not satisfy the relevant test. Such indications often result in fruitless adjournments for the promised material to be provided and applications to the court for directions in relation to such material, causing unreasonable expectations and delay, and unjustifiable public cost.

3.14 The prosecution must disclose material *only* if it meets the appropriate test for disclosure. Where the appropriate test is satisfied, it is for the prosecutor to decide the form in which disclosure is made. Disclosure need not be in the same form as that in which the information was recorded.

3.15 If the defence have a reasonable basis to claim disclosure has been inadequate, they must make a formal application under [s.8 of the CPIA](#). The procedure for making such an application is set out in CrimPR rule 25.6. This requires **written notice** in the form prescribed by rule 25.6(2). The prosecutor is entitled to 14 days within which to agree to provide the specific disclosure requested or to request a hearing in order to make representations in relation to the defence application (rule 25.6(5)). Courts should insist that the procedural rules are complied with and not agree to 'list' s.8 applications or consider ad hoc applications for disclosure at case management hearings without formal application being made as prescribed by the rules. **Courts must not hear such applications or purport to make directions for disclosure under s.8 in the absence of a defence statement.**

The court's duty to enforce the statutory scheme

3.16 For cases being dealt with summarily, following the entry of a not guilty plea, the standard directions in relation to disclosure will apply, unless specifically disapplied or varied. It may be appropriate to consider reducing the standard time allowed e.g. where the defendant is refused bail and an early trial date is fixed; where the defendant is a persistent young offender. However extensions of time should not be given lightly or as a matter of course.

3.17 If extensions of time are sought, then an appropriately detailed explanation in support must be given. It is not sufficient merely for the prosecutor to say that the papers have not yet been received, or were delivered late by the police (or other investigator): the court will need to know why there are no papers, or why they have been delivered late. Likewise, where the defendant has been dilatory in serving a voluntary defence statement, it is not enough simply to say insufficient instructions have been taken to meet the 14-day time limit: the court will need to know why this has occurred, and what arrangements have been made to rectify the situation.

3.18 Delays and failures by prosecution and defence in meeting their obligations to progress matters to trial are damaging to the timely, fair and efficient hearing of the case, and courts should identify and deal with all such failures firmly and fairly. The parties must not rely upon the court or others to remind them to act; they must take responsibility for meeting their obligations and to that end must monitor compliance with directions and take any necessary action at an early stage.

3.19 There is an expectation and duty (CrimPR rule 3.3) on the parties to have matters listed at the earliest opportunity for further consideration where directions have not been complied with, or the case is not trial ready. In appropriate cases, to save unnecessary costs, such applications may be made in writing¹⁹. Applications to

¹⁹ See R v K & others (supra) when dealing with matters preliminary to trial, if the judge thought it right to do so, case management powers permitted him to deal with issues of disclosure exclusively by reference to written submissions and also to limit them to a length specified by him. A judge was not bound to hear oral submissions and was entitled to put a time limit on them. Case management submissions are case specific and no particular method of approach is prescribed. The necessary public element of any hearing is sufficiently achieved if the defendants are supplied with copies of written submissions if they wish to see them, and similarly the media present for any hearing.

adjourn for disclosure made very late or on the day of trial without any good reason for failure to apply earlier in the proceedings should be dealt with robustly.

PART 4

Third party disclosure

4.1 The disclosure of unused material that remains in the hands of a third party is an area of the law that causes difficulty. The CPIA and code of practice are not directed to creating duties for third parties to follow: see DPP v Wood: DPP v McGillicuddy (supra). There is no specific procedure governing the disclosure of material held by third parties in criminal proceedings. The provisions of s.97 of the Magistrates' Courts Act 1980 can be used in order to obtain material in the hands of a third party. However the test to be applied is not the same test as under the CPIA. The material in question must be 'material' evidence, i.e. immediately admissible in evidence in the proceedings (see R v Reading Justices ex parte: Berkshire County Council [1996] 1 Cr. App. R. 239, R v Derby Magistrates' Court ex parte B [1996] AC 487; [1996] 1 Cr App R 385, R v Alibhai and others [2004] EWCA Crim 681).

4.2 Material held by government departments or other Crown agencies will not be prosecution material for the purposes of [s.3\(2\)](#) or [s.8\(4\)](#) of the CPIA, if it has not been inspected, recorded and retained during the course of the relevant criminal investigation. However, the AG Guidelines impose a duty on the investigators and prosecutors to consider whether such departments or bodies have material which may satisfy the test for disclosure under the Act. Where this is the case, they must seek appropriate disclosure from such bodies, who should themselves have an identified point for such enquiries (see paras 47 to 51 of the Guidelines).

4.3 Where material is held by a third party such as a local authority, a social services department, hospital or business, investigators and prosecutors may seek to make arrangements to inspect the material with a view to applying the appropriate test for disclosure to it and determining whether any or all of the material should be retained, recorded and, in due course, disclosed to the defendant. In considering the latter, the investigators and the prosecution will establish whether the holder of the material wishes to raise public interest immunity (PII) issues²⁰, as a result of which the material may have to be placed before the court.

²⁰ Public interest immunity applications are rarely heard in relation to proceedings in the magistrates' court. In the event of such an application, the guidance set out in the Crown Court Protocol should be followed. [S.16](#) of the CPIA gives such a party a right to make representations to the court.

4.4 Where a third party declines to allow inspection of the material, or requires the prosecution to obtain an order before handing over copies of the material, the prosecutor will need to consider whether it is appropriate to obtain a witness summons under section 97 of the Magistrates' Court Act 1980, if the statutory requirements are satisfied, and where the prosecutor considers that the material may satisfy the appropriate test for disclosure. R v Alibhai and others (supra) makes it clear that the prosecutor has a "margin of consideration" in this regard.

4.5 Where issues are raised in relation to allegedly relevant third party material, the court must ascertain whether inquiries with the third party are likely to be appropriate, and, if so, identify who is going to make the request, what material is to be sought, from whom is the material to be sought and within what time scale the matter must be resolved.

4.6 The court should also consider what action would be appropriate in the light of the third party failing or refusing to comply with a request, including inviting the defence to make the request on its own behalf. Where the prosecutor does not consider it appropriate to seek such a summons, the defence should consider doing so, provided always that the appropriate statutory test will be met. The defence must not sit back and expect the prosecution to make all the running. The court should specifically enquire whether any such application is to be made by the defence and set out a clear timetable. The objectionable practice of late applications being made in the few days before trial must end.

4.7 'Fishing' expeditions in relation to third party material – whether by prosecution or the defence - must be discouraged, and in appropriate cases, the court should consider making an order for wasted costs where an application is clearly unmeritorious and ill-conceived. When considering applications concerning technical material relating to approved devices used in the detection of road traffic offences (e.g. breathalyser machines, speed check devices etc.) the observations made in R v Skegness Magistrates' Court ex p Cardy [1985] RTR 49 remain relevant²¹. See also DPP v Wood: DPP v McGillicuddy (supra).

²¹ Per Goff J (later Lord Goff) "It is important to bear in mind ... that a witness summons must not be issued under s.97 of the Act of 1980 as a disguised attempt to obtain discovery. Nor can a witness summons be issued under s.97 summoning a person to produce documents at the hearing, when the documents are not likely to be material evidence, but it is merely desired to have them in court for the purposes of cross-examination."

4.8 Applications for a witness summons must identify what documents are sought and why they are said to be material evidence. This is particularly relevant where attempts are made to access the medical reports of those who allege that they are victims of crime. Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by the mere fact of making a complaint against the defendant. Courts should be alert to balance the rights of victims against the real and proven needs of the defence. The court, as a public authority, must ensure that any interference with the article 8 rights of those entitled to privacy is in accordance with the law and necessary in pursuit of a legitimate public interest. General and unspecified requests to trawl through such records should be refused. If material is held by any person in relation to family proceedings then careful consideration should be given to whether such material is permitted to be disclosed for the purpose sought without application to the family court.

PART 5

CCTV, police crime reports, records of emergency calls, previous convictions of witnesses and disciplinary records of police officers

5.1 Disclosure of this type of routine prosecution material frequently causes problems in summary proceedings and courts are too often asked to grant adjournments to allow for its inspection, or inappropriate directions sought for its disclosure. In the case of CCTV, it is important that prosecutors should be in a position to properly inform defence advocates and the court as to whether such material is available, and whether it will form part of the prosecution case. However, there is nothing special about CCTV, and it must be treated like any other form of material, in line with the guidance given in this protocol. Note: The pilots will examine best practice in relation to the time for the provision of CCTV evidence and the ability to play it in court.

5.2 Careful consideration must be given to the stage reached in the proceedings. There is no duty on the prosecution to provide the defence with material prior to plea unless the defendant is charged with an either-way offence and thereby entitled to request advance information; the duty is limited to that set out in Part 1. The court should only adjourn to allow inspection of a document referred to in advance information, where it is clear that it exists, is in the hands of the prosecutor and the prosecutor proposes to adduce it as evidence in the proceedings. Even where the duty to provide advance information arises, the court may still properly refuse an adjournment for service or inspection of such material if satisfied that the case for the accused would not be substantially prejudiced by the accused not having sight of it before the first hearing to determine venue and enter a plea.

5.3 Following a not-guilty plea, CCTV material secured by the police forms part of the prosecution material and should be dealt with like any other material (assuming it is relevant material): it will either be prosecution evidence²² (to be disclosed under the AG Guidelines in advance of trial), or unused material²³.

²² See Part 2 above

²³ See Part 3 above

5.4 If it is unused material, it should only be disclosed if it meets the appropriate test for disclosure under the CPIA²⁴. Disclosure may be by way of provision of copies or by allowing the defendant to inspect the material.

5.5 If the prosecutor forms the view that the CCTV does not meet the test for disclosure, in order to obtain disclosure, the defence *must* make a written application under s.8 CPIA (and must, therefore, have served a defence statement) before the court can give consideration to whether it should order disclosure of the CCTV. It is improper for courts to make general directions requiring the prosecutor to disclose such material within a specified time without a proper application and scrutiny of the matter in compliance with the CPIA.

5.6 Where such material is not in the possession of the police, but may be the property of a third party, the guidance in Part 4 above in relation to third party material will apply.

5.7 Crime reports and records of emergency calls are routinely provided by some prosecutors as part of a bundle of disclosure documents irrespective of whether the material (or all of the material) in question satisfies the appropriate test for disclosure. This practice does not comply with the overarching principle in para 3.3 of this protocol, and must cease. Such material must be dealt with in the same way as any other prosecution material. There are few cases where it is likely to form part of the prosecution case. It will generally be unused material and so it should therefore be dealt with properly under the statutory framework of the CPIA.

5.8 Previous convictions of witnesses and disciplinary proceedings relating to officers involved in any investigation may be part of the prosecution material and are likely to be unused material. Again, such material must be dealt with in the same way as any other unused prosecution material in compliance with the CPIA. Whilst the defence advocates and the prosecutor should cooperate to resolve all issues of disclosure, the practice of defence advocates sending letters as a matter of routine to the prosecutor requesting such material must cease. If the material falls to be disclosed under the CPIA, then the prosecutor must deal with it under the CPIA and in the time allowed by the standard directions. If it is not considered disclosable, then a proper written application must be made by the defence under s.8 CPIA.

²⁴ See Annex A

5.9 Courts must take control over issues relating to this type of material, and should be scrupulous about not allowing it to delay the progress of proceedings. In particular, courts should guard against granting unnecessary adjournments or making inappropriate directions and orders at an early stage in proceedings.

Conclusion

The public rightly expects that the delays and failures that have been present in some cases in the past where there has been scant adherence to sound disclosure principles will be eradicated by observation of this Protocol. The new regime under the Criminal Justice Act 2003 and the Criminal Procedure Rules 2005 gives courts the power to change the culture in which such cases are tried. It is now the duty of judges and magistrates to actively manage disclosure issues in every case. The court must seize the initiative and drive the case along towards an efficient, effective and timely resolution, having regard to the overriding objective of Part 1 of the Criminal Procedure Rules. In this way the interests of justice will be better served and public confidence in the criminal justice system will be increased.

Annex A

The appropriate test for disclosure of unused prosecution material

Investigations commenced on or after 1 April 1997 but before 4 April 2005

i) For criminal investigations commenced on or after 1 April 1997, but before 4 April 2005, the Criminal Procedure and Investigations Act 1996 (CPIA) in its original form will apply, with separate tests for disclosure of unused prosecution material at the primary and secondary disclosure stages. The 1997 edition of the Code of Practice issued under s.23(1) of the CPIA ([SI 1997 No. 1033](#)) applies.

ii) At the **primary stage**, material falls to be disclosed *if, in the opinion of the prosecutor, it might undermine the case for the prosecution against the accused*. At the **secondary stage**, (i.e. following service of a defence statement) material falls to be disclosed *if it might reasonably be expected to assist the accused's defence as disclosed by the defence statement*.

CJA 2003 amendment to CPIA – investigations commenced on or after 4 April 2005

iii) The majority of cases are likely to be subject to the new disclosure regime where the criminal investigation has commenced on or after 4 April 2005. The law is set out in the CPIA as amended by Part V of the Criminal Justice Act 2003. There is now a single amended test for disclosure which applies to both initial and secondary disclosure. The April 2005 edition of the Code of Practice under s.23(1) of the CPIA applies ([see SI 2005 No. 985](#)).

iv) The amended test for disclosure is *prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused*.

Annex B

The duty to gather and record unused material

i. 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.

ii. It is crucial that the police appoint competent disclosure officers, who have sufficient knowledge of the issues in the case, avoiding any conflict of interest. For example, an officer who is an alleged victim of an assault should not be appointed disclosure officer in any investigation in relation to that matter. Officers need to be sufficiently trained to make a proper assessment of the unused prosecution material in the light of the relevance test under para 2.1 of the Code, with a view to preparing full and accurate schedules of the retained material.

iii. In any criminal investigation, the disclosure officer must retain material that may be relevant to an investigation. This material must be listed on schedules (separate schedules are required for sensitive and non-sensitive material) in accordance with the Code of Practice. Each item listed on the schedule should contain sufficient detail to enable the prosecutor to decide whether or not the material falls to be disclosed. The schedules must be sent to the prosecutor. Wherever possible this should be at the same time as the file containing the material for the prosecution case but the duty to disclose does not end at this point and must continue while relevant material is received even after conviction.

iv. Scheduling of the relevant material must be completed properly and expeditiously, so as to enable the prosecution to comply promptly with the duty to provide disclosure. On occasions, material which is clearly to be used as prosecution evidence will erroneously appear on the unused material schedule, while other relevant material may be omitted. Disclosure officers must have proper regard to what information they include on the schedule, and if necessary seek guidance. Prosecutors must properly scrutinise schedules, and where it is obvious that material has not been included which should be listed, ensure that the schedules are returned to the disclosure officer to be amended. For example, in a straightforward case, a

prosecutor might expect to see the following listed on the non-sensitive unused material schedule²⁵:

- custody record;
- records of emergency calls and/or crime reports;
- unused CCTV footage if seized by police in the course of the particular investigation;
- record of examination of the defendant by the police doctor;
- the notice given to the defendant in relation to provision of copies of audio tapes of the interview under caution at the police station;
- previous convictions of witnesses;
- incident report books of officers not intended to give evidence at trial.

The non-sensitive unused material schedule will be provided to the defendant in line with the Code of Practice so that the defendant is aware of what material is in the hands of the prosecutor, but not intended to be used as prosecution evidence. Therefore, proper listing of material on the unused material schedule and appropriate scrutiny of it by the prosecutor is vital to the proper implementation of the statutory scheme.

v. In magistrates' courts, the duty to provide disclosure will be triggered on sending to the Crown Court under s.51 or 51A Crime and Disorder Act 1998, on committal for trial, or on entering a not guilty plea. There is an expectation that indictable-only cases will be sent to the Crown Court on first appearance. Where cases are triable summarily, pleas should be entered upon first appearance following charge. Investigators, disclosure officers and prosecutors must promptly and properly discharge their responsibilities under the Act and statutory Code, in order to ensure that justice is not delayed, denied or frustrated and directions complied with.

vi. CPS lawyers advising the police pre-charge at police stations should consider conducting a preliminary review of the unused material generated by the investigation, where this is practicable, so as to give early advice on disclosure issues. Otherwise, prosecutors should conduct a preliminary review of disclosure at the same time as the initial review of the evidence. It is critical that the important distinction between the evidence in the case, on the one hand, and any unused material, on the other, is not blurred. Items such as exhibits should be treated as such and the obligation to serve them is not affected by the statutory disclosure regime.

²⁵ This is not intended to be an exhaustive list, but merely illustrative of the type of material that might appear on the schedule.

vii. Where the single test for disclosure applies under the amended CPIA, the prosecutor is under a duty to consider, at an early stage of proceedings, whether there is any unused prosecution material which is reasonably capable of assisting the case for the defendant. What a defendant has said following arrest or charge, or in interview or given in a prepared statement can be a useful guide to making an objective assessment of the material which would satisfy this test.