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# PRACTICE NOTE

## Disclosure

This Practice Note has been issued jointly by the HPC Practice Committees for the guidance of Panels and to assist those appearing before them.

### Introduction

The requirement that prosecution authorities disclose to the defence all material evidence for or against the accused is a facet of the right to a fair hearing protected by Article 6 of the European Convention on Human Rights.<sup>1</sup>

For this purpose, “prosecution authorities” include regulators<sup>2</sup> and that disclosure obligation requires the HPC to disclose to the registrant concerned any evidence which the HPC holds but which it will not rely on as a part of its case and which weakens its case or strengthens that of the registrant.

### Background

In investigating allegations, HPC does not adopt the one-sided approach of only seeking evidence to prove that an allegation is well founded, but acts as an objective fact finder, gathering all relevant evidence in a fair and balanced manner and presenting it in a format which will assist a Panel to determine whether there is a ‘case to answer’ or that the allegation is well founded.

At the preliminary investigative stage, prior to the determination of whether there is a case to answer, registrants are entitled to see and comment upon all of the material that will be considered by the Panel in making that determination. Consequently, up to that point there will be no material in HPC's possession which has not been disclosed to the registrant concerned.

Where a decision is made that there is a case to answer, it is possible that material obtained by HPC in the course of its further investigations will not be included in the evidence relied upon by HPC for the final hearing. Generally, such unused material will be rare but, where it does exist, the material will be provided to the registrant or the registrant concerned will be made aware of its existence by means of a "Disclosure Schedule".

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<sup>1</sup> *Edwards v UK* (1992) 15 EHHR 417

<sup>2</sup> *Feldbrugge v Netherlands* (1986) 8 EHRR 425

## **Disclosure Schedule**

At the same time as they receive the evidence upon which the HPC proposes to rely at the final hearing, the registrant concerned will receive either a Disclosure Schedule ( and, if in the view of the HPC, a document is disclosable, a copy of that document) or a letter confirming that no unused material exists.

The Disclosure Schedule will list the evidence and documents in the possession of the HPC or its solicitors which they do not propose to rely on as part of their formal case and, as a minimum, will contain the following information:

- the name or title of the document or class or category of document;
- the location of the document;
- a brief description of the document; and
- a statement setting out whether or not the document is disclosable.

A 'document' in this context means anything in which information of any description is recorded and therefore includes electronic documents, videos and photographs. It may also include 'real evidence' e.g. a physical object.

Class or categories of documents may be used where the group of documents can be said to be of the same or a similar character. For example, draft witness statements or correspondence between a witness and the HPC.

## **Applications for Disclosure**

A registrant may apply to the HPC for disclosure of any document or evidence on the Disclosure Schedule which has not previously been disclosed.

Applications must be made in writing to the HPC and identify the documents or evidence sought. Whilst a registrant is not obliged to disclose details of his or her defence, it will be of assistance if the registrant sets out in the notice how the documents or evidence sought would assist in the preparation of their defence as, without that information, the HPC may not be able to determine whether it has a disclosure obligation.

Other than in exceptional circumstances, disclosure applications should be made at least 28 days before the final hearing. The HPC will normally respond to such applications within 7 days.

## **Limits on the duty to disclose**

The obligation to disclosure (whether in relation to items identified in a Disclosure Schedule in a or otherwise) only applies to material which is in the possession of the HPC or its solicitors and which came into their possession in relation to the case in question. The HPC has no duty to seek or provide disclosure of material held by a third party.

The HPC will make a reasonable search for any material requested which is in its possession, but what is reasonable will depend of the facts of each case and will be for the HPC to determine. In doing so, the factors taken into account will include but not be limited to:

- the number of documents involved;
- the nature and complexity of proceedings;
- the ease and expense of retrieval of any particular document;
- the significance of what is likely to be located during the search; and
- the extent to which the registrant can use any documents disclosed.

The HPC has no obligation to disclose documents which are subject to legal privilege or public interest immunity.

### **Challenging the HPC's decision**

A person who is dissatisfied with a decision the HPC in relation to disclosure may apply to a Panel of the Committee which is due to hear the case to seek a ruling on the request for disclosure.

An application should be made in writing, at least seven days before the final hearing is due to take place, setting out:

- the name, address and registration number of the registrant;
- details of the documents or evidence sought; and
- an explanation of why it is considered that disclosure will assist the defence.<sup>3</sup>

In all but exceptional cases, Panels should deal with such applications by means of correspondence. If doing so would be inappropriate then the Panel should hold a preliminary hearing to determine the application.

In order to make a determination, the Panel will need to be provided with a copy of the material in question<sup>4</sup> and any written submissions which the applicant and the HPC wish to make. In deciding whether a document is to be disclosed the fundamental question which the Panel must consider (the Disclosure Test) is:

whether a document which the HPC has in its possession but does not seek to rely upon would assist the registrant in preparing his or her case?

If the answer is "yes" then, subject to any other constraints, disclosure should be ordered. If the answer is "no", then the document need not be disclosed.

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<sup>3</sup> as noted above, this is not mandatory but will assist the Panel in determining the application

<sup>4</sup> unless it is subject to legal privilege

In determining an application, a panel should consider all relevant factors, taking account of whether:

- the document in the possession of the HPC or its solicitors;
- the Disclosure Test is met;
- the document is subject to legal privilege;
- the document is relevant to the allegations;
- the registrant would be prejudiced without it; and
- the HPC would be prejudiced if directed to disclose it?

### **Registrants' obligations with respect to disclosed material**

A registrant should only use disclosed material for the purpose of the proceedings in which they are disclosed, unless:

- that material has been read or referred to in the course of public hearing;
- the Panel has given express permission for its use for other purposes; or
- the HPC has given such express permission.

In line with the decision in *Taylor v Director of Serious Fraud Office*,<sup>5</sup> material will only be disclosed if the registrant concerned provides an undertaking not to use the material for any purpose other than the proper conduct of the particular case.

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<sup>5</sup> [1999] 2 AC 177