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1. COURT ORDERS FROM A BRITISH COURT

The UK Border Agency is regularly required to provide witness statements in criminal proceedings. These statements may be required by UK Border Agency investigation units or the Police and are normally prepared by the Business Enquiry Service, Evidence & Enquiry (BES E&E), 12th floor long corridor, Lunar House, Wellesley Rd, Croydon CR9 2BY.

The Department will comply with court orders and subpoenas. Documents requested by a court should be provided to that court, **not** to one of the solicitors involved, unless ordered by the Judge. Where a subpoena has been obtained, it may be necessary for the member of staff named on the subpoena to attend the court, together with the required documents.

It is essential that a person writing a statement is aware of the background as to why the statement is needed so as to enable them to make an informed decision as to what information is included in the statement.

To help the statement writer decide what should go into a statement a list of information usually required by the requesting officer is at **Annex A**. This is not a comprehensive list and should only be used as a guide. On each occasion a statement is required the statement writer should confirm with the requesting officer if any, or all of the information listed is required. In respect of each piece of information requested the statement writer must be satisfied that release of the information is **necessary** for the purpose for which it is required. If the requesting officer requires additional information, for example names of family members or medical history of the applicant, further guidance should be sought with senior officers before complying.

1.1. Does UKBA have to comply with a request from the police for a statement?

There is no legal obligation to comply with a request from the police for a statement - The UK Border Agency is only obliged to provide a statement or information if there is an order from the court to this effect. However the UK Border Agency will always seek to assist other bodies investigating a criminal offence and would not normally insist on a court order from other public bodies before complying with a request for information provided we are satisfied that the information requested is relevant to and necessary for the purposes of the proceedings.

This is consistent with the general professional duty on Crown Servants to support the administration of justice, by ensuring that they give investigators, prosecutors and defendants full and proper assistance in their search for information about an alleged offence. (See the Guide for Crown Servants entitled "Giving Evidence or Information about Suspected Crimes" for more information

http://www.cabinetoffice.gov.uk/propriety_and_ethics/az_index/index.asp)

The Guide emphasises that Crown Servants must always seek advice through the established channels of communication for such matters before revealing official information, as some information is protected in law and some will need to be protected in the public interest.

The DPA does not preclude disclosures which are relevant to and necessary for the purposes of criminal proceedings. There are specific exemptions in the DPA which allow for disclosure of personal information in connection with criminal investigations and legal proceedings. These provisions of the DPA are permissive rather than coercive and *allow* (rather than *compel*) the UK Border Agency to disclose information on request.

Section 29 of the DPA provides an exemption from some of the provisions of the DPA for personal data processed for the purposes of the prevention or detection of crime, or the apprehension or prosecution of offenders, in any case where the application of those provisions would be likely to prejudice any of these matters.

More generally, section 35(1) of the DPA provides an exemption where the disclosure is required by court order, and section 35(2) provides an exemption where the disclosure is necessary for the purposes of, or in connection with, any legal proceedings (including prospective legal proceedings). ***[See section 1 for DPA exemptions].***

1.2. What information should/can go in a statement?

Requests for information should be as precisely drawn as possible, particularly where specific documents or facts are being sought.

Only information germane to the proceedings should be included in the statement. If it is not clear exactly what information is required and why, seek clarification from the requesting officer in the case before completing the statement. It is important to establish what the officer is seeking to gain by obtaining a statement from immigration records in order that only information necessary to achieve the purposes of the statement is included.

The statement writer should not be concerned with what may or not be admissible in court, but should include all facts that are relevant to the proceedings which are available from immigration records. Information given in a statement should be limited to facts only and expressions of opinion should not be included. ***[See section 3 'Handling Requests from the police' for more information].***

1.3. In cases where an asylum application is still outstanding is UKBA obliged to provide details from the application in a statement?

Only information relevant to the legal proceedings for which the statement is required should be included in a statement. If the fact that an individual has

claimed asylum, or facts included within their application for asylum are central to the case being challenged or made then these facts should be included within the statement. However, in many cases details of the asylum application are not relevant to the hearing and can be omitted. As set out in 1 above, it is essential that people writing statements are fully aware the background of why a statement is required, thus enabling them to make an informed decision as to what information is included.

In cases where information about an applicant's asylum claim has already been introduced into evidence either by the Defence or Prosecution, The UK Border Agency officers can either confirm or refute the facts already presented. However, UK Border Agency staff should not volunteer (i.e. provide without being requested to do so) information relating to an asylum application either in a statement or if giving oral evidence in court. ***[See section 4 for more information].***

1.4. How does UKBA handle a request for information or a statement from the defence?

Provided we can lawfully release information to the Defence, it is The UK Border Agency's policy to provide information to both the Prosecution as well as the Defence. Any decision to release information direct to the Defence should be done with the full knowledge of the Prosecution. In some circumstances this will not be necessary for example if the Defence are simply asking for confirmation of name. Therefore staff should make a judgement, based on the request, on whether to inform the Prosecution or not.

2. COURT ORDERS FROM A FOREIGN COURT

Foreign courts have no jurisdiction in the United Kingdom and we do not recognise foreign court orders unless they have been registered at the High Court, when they become, in essence, equivalent to British court orders.

3. PUBLIC INTEREST IMMUNITY

The only circumstances in which we would resist a court order or subpoena are where Public Interest Immunity (PII) is successfully claimed in the course of the proceedings. PII is claimed by making an application to the court not to disclose particular information because it would be injurious to the public interest to do so. The court must be satisfied that the disclosure of the information could cause real damage to a genuine public interest. This test has a very high threshold.

In criminal cases, PII issues can arise in the Prosecution's duty of disclosure to the Defence, or upon the issue of a Witness Summons by the Defence against a government department.

If the question of PII arises in any proceedings, the case should be referred to a Senior Caseworker / HMI / IAPT, who may seek advice from Legal Adviser's Branch.

Any claim for PII invites the Court to conduct a balancing exercise between two competing public interests - the public interest that, in the fair administration of justice, the courts should have the fullest possible access to all relevant material; and the need to maintain the confidentiality of information whose disclosure would be damaging to the public interest.

It is for the agency or person generating the material to assert a PII claim. Thus in the case of an asylum application, the UK Border Agency know the content of its material, and would be best placed to make the assessment of the damage to the public interest that would be caused by disclosure of such items.

It must be remembered that PII may only be claimed where the actual contents of the material merits it, it cannot be claimed by reference to the class of material that it may belong to.

There are three issues that apply in all cases, whether in civil or criminal proceedings.

- (a) Is there a duty to disclose?
- (b) Does PII arise? and
- (c) The balancing exercise.

The stages apply whether CPS has to consider disclosure, or whether the Defence approaches the CPS requesting the disclosure of material.

3.1. **Is there a legal duty to disclose the document or information?**

In criminal proceedings the Prosecution has an obligation to disclose automatically any potentially relevant document or information that satisfies either or both of the disclosure tests under Criminal Procedure and Investigations Act 1996 (CPIA). Material is relevant to an investigation if it has some bearing on any offence or person being investigated or the surrounding circumstances of the case see CPIA Code paragraph 2.1. ***[If more information is required about the CPIA code contact IAPT, 0208 760 4657].***

The CPIA primary disclosure test of materiality is whether in the prosecutor's opinion the material might undermine the Prosecution case. The secondary disclosure test of materiality is whether the material might reasonably be expected to assist the Defence case.

The practical application of the two tests will mean that material that supports the Prosecution case or is relevant, in the sense that it is neutral but does not assist the Defence or undermine the Prosecution, is in principle **not**

disclosable, so PII does not need to be considered, as the Prosecution can simply withhold the material.

Note however, the CPIA applies to *police investigations*, so those persons other than police officers who are charged with the duty of conducting an investigation should take the relevant provisions of the Code *into account* when applying their own operational procedures.

3.2. Does PII arise?

PII will only arise if disclosure could cause real damage to a genuine public interest. The nature of the damage which may be caused to the public interest by disclosure of particular documents or information must be considered carefully in each individual case. Damage which may justify a claim is hard to define neatly. Incremental damage, to which disclosure in a particular instance may contribute, may justify making a claim in individual cases.

On a practical level, claims will need to be articulated and explained to the court in detail, without disclosing the relevant material to anyone other than the Judge or Magistrate considering the claim. Whether claims are made by Ministerial Certificate, by written application, or orally by counsel will depend on the circumstances of the case.

3.3. The balancing exercise

Where PII arises, and the material does fall for disclosure applying the appropriate disclosure test, the court must balance the competing public interests for and against disclosure and take a view as to where the overall balance lies. If the court considers that the public interest is in favour of maintaining the confidentiality of the information, it will not need to be disclosed.

3.4. How much should be protected?

Only individual items whose disclosure would cause real harm to a genuine public interest can be protected.

3.5. Who makes the PII application?

It is the duty of the police to investigate all reasonable lines of enquiry. In cases with a UK Border Agency element, officers will inevitably come across material that is held by the UK Border Agency that may be relevant, disclosable and confidential. In non-UK Border Agency prosecutions, the Prosecutor decides whether to make a PII application, but would do so in consultation with the agency or other body asserting PII. (Indeed, other

government departments may instruct separate counsel for the hearing either to assist the court in balancing the competing public interests or to present the arguments in relation to the claim itself).

3.6. Criminal Proceedings

There are occasions when the prosecution has to rely on PII material as part of its case. The Prosecutor must balance the public interest in non-disclosure against the public interest in prosecuting and convicting those guilty of serious crimes. Once a decision has been taken to use or rely upon confidential material in court, PII cannot be asserted thereafter to withhold the contents from the jury or Defence. However, the extent to which the witness reveals the material when giving evidence in court will depend upon the judge's ruling in any individual case.

In criminal proceedings, there must be a presumption in favour of disclosure, and that substantial justification would be needed for not doing so. The need to avoid a miscarriage of justice weighs heavily in the balance both for Judges and Prosecutors. In criminal proceedings the decision-maker is usually balancing the public interest in non-disclosure against the value of the information to the Defence.

4. AT JUDGE'S DIRECTION

In some cases, a Judge will direct us to provide the court, or in some instances a named solicitor, with information about one or other of the respondents. Such directions should be complied with, but should be limited only to the specific information requested by the Judge.

5. REQUESTS LINKED TO NON-CRIMINAL (CIVIL) LEGAL PROCEEDINGS

Information about individuals which could be of assistance to a third party (not the Police, Crown Prosecution Service or other public body) involved in legal proceedings to which the Home Office is not a party and in which it has no interest, in most cases would not be disclosed unless so ordered by a Judge [see part 4 above]. However, if non-disclosure of material by the UK Border Agency would lead to a court ordering subsequent disclosure consideration **must** to given to disclose in order to prevent a waste of public money and time by insisting a court order be obtained.

A disclosure should only be made voluntarily if this can be done lawfully [**see sections 1 and 2 of this IDI**]. Each case must be considered on its own merits, bearing in mind that the Crown should be impartial towards civil litigants. There is no legal requirement to make material available both parties, however it is the UK Border Agency's policy to provide information to the Defence and Prosecution in such circumstances. If voluntary disclosure would be unlawful, the disclosure should only be made if ordered by the court.

Any disclosure made **must only** contain material relevant to the enquiry, which in turn **must** be germane to the case. In any event, the UK Border Agency **must not** make an individual's file available to a third party solicitor on request unless so ordered by a Court.

6. REQUESTS FOR ADDRESSES TO ENABLE LEGAL PROCESS TO BE SERVED

the UK Border Agency does **not** provide addresses to third parties to enable legal process to be served. A standard reply, which may be used in these circumstances, is as follows:

"I am writing in reply to your letter dated [INSERT DATE] in which you requested [INSERT DETAILS OF INFORMATION REQUESTED].

It is the UK Border Agency's policy not to become involved in private legal matters. Therefore I cannot provide the information which you have requested.

Yours sincerely,

[Signature of staff member]

[Insert full name of staff member dealing with request]

[Insert Directorate]"

Annex A

WHAT INFORMATION MAY BE REQUIRED IN A STATEMENT FOR CRIMINAL PROCEEDINGS:

1. Confirmation of personal details: names/DOB/nationality
2. Current immigration status
3. Immigration history
4. Any other specific details or references- including current or previous addresses/places of work or study/sponsor or reps details if known.
5. Any copies of documents to be exhibited.