

FORMAL MEMORANDUM
DISCLOSURE BY THE COMMISSION

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Introduction

1. This Formal Memorandum provides guidance on what should be disclosed to applicants and third parties as a result of a Commission review.¹
2. There are strict statutory controls on disclosure by the Commission, which are set out in sections 23-25 of the Criminal Appeal Act 1995. Parallel to those statutory controls is the requirement established in *Hickey & Others* [1995] 1 All ER 489 that the Commission must disclose information acquired in the course of its functions “if it would assist the applicant to make his best possible case”. These two factors create the need for a careful assessment of disclosure during every review. The statutory framework is considered in **Part I** and the general principles relevant to disclosure are considered in **Part II** of this Formal Memorandum.
3. As a general rule, full disclosure to an applicant and relevant third parties will be made when the Commission makes a decision about whether or not to refer. All such decisions are taken by a Commissioner, or a committee of Commissioners². Disclosure to applicants and third parties will generally be assessed and authorised at the same time. There are some exceptions to this general rule, which are set out in **Part II**.
4. All Commissioners take disclosure decisions, but two legally qualified Commissioners (referred to in this Formal Memorandum as “the designated Commissioners”) are specifically available to advise upon and decide particular disclosure issues that may arise. The role of Commissioners and staff in the process of disclosure is set out in **Part II**.
5. There are instances where the Commission will decline to make disclosure, set out in **Part III**.

¹ This Formal Memorandum does not cover the Commission’s approach to issues of Data Protection or requests made under the Freedom of Information Act 2000, which are the subject of separate policies.

² [Stage 2 Decision-making](#) explains this in more detail.

PART I: The statutory framework: Sections 23-25³

Overview

6. **Section 23** prohibits any disclosure by the Commission unless it falls within one of the exceptions in **section 24**. **Section 25** provides that a public body from which information has been obtained under **section 17**⁴ may notify the Commission that disclosure should not be made without prior consent. These provisions are discussed in greater detail below.

Section 23

7. No past or present Commissioner, employee or investigating officer may disclose any information obtained by the Commission in the exercise of its functions, unless it falls within one of the exceptions specified in **section 24**.
8. Any person who contravenes this section commits a criminal offence, and is liable on summary conviction to a fine.

Section 24

9. **Section 24** contains a list of exceptions to the general obligation of non-disclosure specified in **section 23**.
10. Disclosure to the applicant (or his representatives) is generally justified by reference to **sections 24(1)(e)** or **(f)**.
11. Disclosure to third parties can only be justified by reference to one of the other exceptions in **section 24(1)**. The Commission has a discretion whether to make disclosure for such purposes; disclosure will not be made simply because a request is received, or because **section 24** makes provision for such disclosure. Each request will be considered on its particular facts.

Section 24(1)(a)

12. **Section 24(1)(a)** permits disclosure “for the purposes of any criminal, disciplinary or civil proceedings”. There are several situations which could fall within this subsection, for example:

³ For the full text of these provisions see: [Criminal Appeal Act 1995](#)

⁴ See Section 17 Powers.

- (i) Information about a complainant of sexual abuse which could be of assistance to the prosecution or defence in separate criminal proceedings;
 - (ii) Disclosure of material relevant to disciplinary proceedings brought by a professional regulatory body, such as the Independent Police Complaints Commission (IPCC); the Solicitors' Regulation Authority (solicitors), the Bar Council (barristers); the General Medical Council (doctors); or the regulatory tribunals of the Royal Colleges;
 - (iii) Requests by an applicant to provide information relevant to a civil action for damages against his solicitor and/or against the police.
13. The variety of situations which could arise is such that specific guidance in relation to potential categories would have little value, but the following factors will generally be considered:
- (i) the reason why disclosure is sought and by whom;
 - (ii) the view of the person who provided the information;
 - (iii) the basis on which the information was received (e.g. whether there was any discussion or undertaking about confidentiality);
 - (iv) the consequences of disclosure for those persons who have a legitimate interest in the Commission's decision;
 - (v) whether it is necessary and appropriate to seek the view of the applicant or his/her legal representative;
 - (vi) whether the material falls within any category of information requiring special consideration (eg public interest immunity, sensitive or restricted information);
 - (vii) whether disclosure is in the public interest;
 - (viii) the fact that, if the Commission declines to disclose, the person or body making the request still has the option of applying for a court order.
14. The intention behind section **24(1)(a)** is that the disclosure is authorised for the purposes of existing criminal, disciplinary or civil proceedings, and not for the purposes of bringing such proceedings into existence.

Section 24(1)(b)

15. **Section 24(1)(b)** permits disclosure in order to assist in dealing with an application made to the Secretary of State for compensation for a miscarriage of justice. In the absence of any countervailing reason the Commission will make disclosure for this purpose, normally by providing a copy of the Statement of Reasons.

Section 24(1)(c)

16. **Section 24(1)(c)** permits (a) disclosure between Commissioners and Commission employees; or (b) to an “investigating officer” i.e. an investigating officer appointed under section 19.⁵

Section 24(1)(d)

17. **Section 24(1)(d)** permits disclosure by an investigating officer appointed under section 19 to a Commissioner or to an employee.

Section 24(1)(e)

18. **Section 24(1)(e)** permits disclosure “in any statement or report required by this Act”. This will generally be the Statement of Reasons which the Commission is required to provide in all referral and non-referral cases. It would include a report provided by the Commission to the Court of Appeal pursuant to a direction under **section 15**; or to the Secretary of State in connection with the prerogative of mercy under **section 16**.

Section 24(1)(f)

19. **Section 24(1)(f)** permits disclosure “in or in connection with the exercise of any function under this Act.” For example, the Commission may need to show material obtained in the exercise of its functions to an applicant, or to a professional or lay witness, or to legal representatives involved in the original trial.

Section 24(1)(g)

20. **Section 24(1)(g)** authorises disclosure “in any circumstances in which the disclosure of information is permitted by an Order made by the Secretary of State”. **Section 24(5)** goes on to provide that any such Order will be made by statutory instrument. This means that the statutory categories of

⁵ See [Section 19 Investigations](#).

disclosure to third parties could be expanded if necessary, but to date no such Order has been made.

Section 24(2)

21. **Section 24(2)** provides that an employee or an investigating officer may disclose information if it is authorised by a Commissioner.

Section 24(3)

22. **Section 24(3)** permits (but does not require) disclosure for the purposes of
- (a) investigating an offence, or
 - (b) deciding whether to prosecute a person for an offence.
23. The Commission must not disclose information pursuant to **section 24(3)** if it would normally be prevented from disclosure by “an obligation of secrecy or other limitation on disclosure (including any such obligation or limitation imposed by or by virtue of an enactment)”. This would prevent the Commission [for the purposes of **section 24(3)**] from disclosing without a court order information or material which attracts public interest immunity, and any information which it agreed to receive in confidence.

Section 25

24. **Section 25** applies where a public body which has provided information under section 17 notifies the Commission that all or part of the information is not to be disclosed without prior consent.
25. Occasionally, a public body will provide material of a sensitive nature without relying on section 25. In any such situation, the Commission will approach its consideration of whether the information should be disclosed on the basis that section 25 has in fact been raised.
26. Consent may only be withheld by the public body if the two conditions in section **25(2)(a) and (b)** are both satisfied:
- (i) the person would normally have been prevented from disclosing the information to the Commission by an obligation of secrecy or other limitation on disclosure (in other words the only reason the information has been provided to the Commission is because of its powers under **section 17**); and
 - (ii) it is reasonable for the person to withhold his consent to disclosure of the information.

27. Factors relevant to reasonableness will include (and this is not an exhaustive list):
- (i) The purpose for which the Commission wishes to disclose the information. If it provides the main reason or a significant reason for referral or non-referral, that will generally raise a strong argument in favour of disclosure.
 - (ii) The reason why the public body wishes to prevent disclosure to another person or body. Examples might include sensitive, protected or personal information, or information provided in confidence. Each time such a reason is put forward to the Commission by a public body, it will be considered on its own facts.
 - (iii) The extent to which withholding consent to disclosure would prevent the Commission from complying with the requirements of the Criminal Appeal Act 1995 and/or the common law principle in *Hickey*.
 - (iv) Whether the information falls within a class of information traditionally recognised by the courts as subject to public interest immunity (for example, police reports, informant information and social services documents).
28. **Section 25(3)** provides a special rule where an obligation of secrecy or other limitation on disclosure arises only where disclosure is not authorised by another person. An example is the general obligation of patient confidentiality on the National Health Service (NHS) in relation to a patient's medical records, which may be disclosed to the Commission pursuant to **section 17**. If the patient authorises disclosure then the obligation of confidence does not arise.
29. In such circumstances the first question which arises is set out in **section 25(3)(a)**: whether "reasonable steps have been taken by the public body to obtain authorisation". In the NHS example this would involve ascertaining whether any attempt was made to contact the patient to obtain authorisation. If the answer is in the affirmative, the public body may decide to withhold consent to disclosure provided the reasonableness criterion is satisfied. If the answer is in the negative, the next question is set out in section **25(3)(b)**: whether such authorisation could not reasonably be expected to be obtained. In the NHS example, this could arise if the patient was very ill, or had died, or could not be contacted and was therefore unable to give consent.

Disputes with public bodies about section 25

30. There is nothing in the wording of **section 25** to suggest that the Commission would be prevented from disclosing material where it considers that the withholding of consent by a public body is not reasonable.
31. In the event that a dispute with a public body cannot be resolved, however, the Commission will not make disclosure without first giving the public body a reasonable period of warning of its intention to do so. Generally this period will be **14 days**, although this may be extended by agreement. This would provide a public body with an opportunity to consider appropriate court action.

Part II: Disclosure

The decision in Hickey

32. Although the Criminal Appeal Act 1995 makes provision for the Commission to disclose, it does not specify what should be disclosed. There is guidance in case law, however. The starting point is *R v Secretary of State for the Home Department ex parte Hickey & Ors* (No.2) [1995] 1 All ER 489: (CCRC:#971478). *Hickey* established a general principle about the level of disclosure to be provided:

“The guiding principle should always be that sufficient disclosure should be given to enable the petitioner properly to present his best case. That can only be done if he adequately appreciates the nature and extent of the evidence elicited by the [Commission’s] inquiries.” (Emphasis added.)

33. In relation to the level of disclosure required, the Court referred to:

“... the altogether more difficult question of the precise requirements of just disclosure in this area of decision-making. ... Does fairness demand that experts’ reports, police statements, further statements from central witnesses and so forth be disclosed verbatim or will the gist do? What does the gist, the substance, really consist of? Should disclosure be made only of adverse material or is it necessary to disclose favourable fresh evidence too?”

Redaction, summaries and “the gist”

34. The Commission will approach each exercise of disclosure on the facts of the particular case, and for that reason it would be extremely difficult to lay down anything other than general guidelines. As a general rule, all material which supports the decision for referral or non-referral together with any further information that may assist the applicant in making his best case will be disclosed.
35. Redaction, summarising or disclosure of the gist of a document may be undertaken for the practical purpose of simplifying the material to be disclosed. All key points will normally remain, and no information relevant to the applicant’s case will be excluded. Such material may be appear in summary form within the Statement of Reasons, or in its amended form within a separate document, depending on which method will best assist full understanding of the reasons for the Commission’s decision and the material to be disclosed.

36. The Commission may decide to excise material which might assist the applicant's case, but which clearly should not be disclosed on public interest immunity principles: for example, information relating to the identity of a police informant, if to do so would lead to a risk to the informant's safety. This type of situation is examined further in **Part III**, which considers the circumstances in which disclosure may be withheld.

When should disclosure be made?

37. The Commission acknowledges that the need for disclosure may arise at any stage of the review, but in particular:
- (i) When a Provisional Statement of Reasons is issued. *Hickey* addresses the issue of when disclosure is required: fairness requires that the applicant has an opportunity to make representations "before any final adverse decision is made".
 - (ii) When a second provisional Statement of Reasons for non-referral is issued. The Commission may receive representations in response to a provisional Statement of Reasons which lead to further investigations taking place. If any new material is revealed by those further investigations, then the issue of *Hickey* disclosure will be considered afresh. If any significant further information falls to be disclosed, there will be a second provisional Statement of Reasons to enable the applicant to make an informed response.
 - (iii) When a decision to refer is contemplated, if it is thought that the applicant or his advisers may have something further to contribute to such a decision.
 - (iv) When a decision to refer has been made. The principle established by *Hickey* is only directly applicable to non-referral cases. In practice, however, the extent of disclosure is likely to be similar in referral cases, and case committees will go through a corresponding disclosure exercise.
 - (v) After a decision to refer has been made. This will be relatively rare, but matters may come to light, or be requested, after referral. The procedure set out at paragraph 52 will be adopted.

Interim disclosure

38. Disclosure will not be made prior to a provisional decision not to refer, or on a piecemeal basis throughout the review, unless the Commission considers that to do so would assist in the exercise of its functions or is required in the interests of fairness to the applicant.

39. Interim disclosure can have a detrimental effect on the progress of a review. It may generate correspondence, requests for further disclosure or representations on the items disclosed which can detract from the timetable set for the review and lead to delays. The Commission's general approach to the timing of disclosure is designed to ensure that the applicant's best interests are served, and that the review is conducted and completed as expeditiously as possible.
40. The Commission acknowledges that expert evidence can be complex, and it can take a considerable length of time to obtain and instruct an appropriate expert. An applicant may wish to obtain a further expert opinion in response to the opinion of an expert relied upon by the Commission. In any such case the need for interim disclosure will be considered and kept under review, or a longer period of time in which to make further representations will be granted.⁶
41. Any request for interim disclosure by the Commission will be considered on its particular facts and merits. The reasons for any decision not to make interim disclosure will be communicated to the applicant or his representative in writing.

Who will make or authorise disclosure?

42. It is clear from the wording of sections 23-24 of the Criminal Appeal Act 1995 that both Commissioners and employees of the Commission can make disclosure. Material which falls to be considered for disclosure by the Commission may be highly sensitive. The Commission has developed strict procedural requirements to ensure that a high level of scrutiny is directed to each instance of disclosure of any information obtained in the exercise of its functions.
43. Disclosure at the point of referral or non-referral will always be authorised by the decision-making Commissioner or committee of Commissioners.
44. Full or significant interim disclosure will always be authorised by the Assigned Commissioner (where one is appointed to the case) or, in any other case, a Designated Commissioner.
45. Often it will be necessary for case reviewers to disclose some basic information about a case during the investigative stage of the review: for example, providing information to a potential witness, or instructions to an expert. Any proposed disclosure of this type should be raised with the relevant Group Leader. Advice will be sought, if appropriate, from a Legal

⁶ See Extensions for Further Representations.

Adviser, Investigations Adviser, and/or an Assigned Commissioner or Designated Commissioner. All relevant advice and the details of the disclosure decision will be recorded in the case record.

Expert evidence

46. Expert reports will generally be disclosed in full. It will be acceptable for the Commission to disclose a summary or the gist of an expert's report if doing so satisfies the interests of fairness.

To whom should disclosure be made?

47. Disclosure will normally be made to the applicant or his legal representative or both. Much will depend on how the relationship between the Commission, the applicant and/or his legal representative has developed during the course of the review.⁷
48. The Commission must be satisfied that any person requesting disclosure is authorised by the applicant to act for him. If disclosure is to be made to anyone other than the applicant or his nominated legal representative, the written authority of the applicant must be obtained.
49. On referral, the Commission will make disclosure to
- (i) The Crown, e.g. the Crown Prosecution Service (in England and Wales); the Director of Public Prosecutions (in Northern Ireland); or any other relevant prosecuting authority (e.g. HM Revenue & Customs Prosecutions Office); and
 - (ii) The relevant appeal court.
50. As a general rule, the same information will be provided to all. The exception to this rule arises when sensitive information falls to be disclosed.
51. Sensitive material may be provided to the appeal court only, in a confidential annexe, and the court will subsequently decide the issue of disclosure to the applicant and the Crown. It may be appropriate to make disclosure to the Crown and the court but not to the applicant: e.g. when informant related material is involved.

Disclosure of material obtained under section 17

⁷ For further guidance, see [Communicating with applicants](#).

52. Public bodies providing information to the Commission under section 17 are advised that the material may be disclosed subsequently. This does not enable them to refuse to provide the necessary information, but it will alert them to the procedure in **section 25** (see **Part I** for further detail).

Requests for further disclosure after referral (or non-referral)

After non-referral

53. Requests for further disclosure after a non-referral will be dealt with as post-closure correspondence: see [Post Decision Activity on Cases.](#)

After referral

54. On the rare occasions that it is necessary for further disclosure to be made after a referral, even-handed disclosure will be made to both parties to the appeal and to the Court. The Commission will compile a bundle of material for further disclosure, which will be forwarded to the Court, the Crown Prosecution Service (or other relevant prosecuting authority) and the applicant and/or his legal representative at the same time. This will be accompanied by a letter explaining the reason why further disclosure is being made.

Expense related to disclosure

55. Where disclosure of material is necessary in order to enable the applicant to make his best case in response to a provisional statement of reasons, or to understand the basis for a referral, the Commission will provide copies at its own expense.
56. The provision of copies of material outside that category, and which are available to an applicant through other sources, will be at the discretion of the Commission. The reasonable costs of photocopying and postage of such material may be requested in advance.

Disclosure to those instructed by the Commission to carry out inquiries

57. Experts and those instructed by the Commission to carry out any inquiry or investigation should be given such information as is necessary to enable them to discharge their duties.

58. It may be appropriate to obtain formal undertakings from experts that material will not be disclosed by them.⁸

Disclosure to persons with information that may assist the Commission

59. The Commission may be approached by persons who state that they have information to assist the review of a case. If such a person requests any form of disclosure, the Commission must first satisfy itself that disclosure is indeed necessary.
60. Requests made during the currency of a review will be considered by the Assigned Commissioner. If such a request is made outside the scope of a current review, or in a review where there is no Assigned Commissioner, disclosure will be considered by a Designated Commissioner.

⁸ [Experts – Selection and Instruction](#) contains specific guidance on the information to be provided to experts.

Part III: Non-disclosure

General

61. *Hickey* confirms that information may be withheld where the public interest requires it.
62. The decision to withhold any information which is *Hickey* disclosable will always be made by a Commissioner or a committee of Commissioners.
63. Such a decision will be made clear to the applicant unless there is a compelling reason not to do so. Decision-making Commissioners will record (in the case record or case committee minutes) their reasons for not making disclosure to the applicant.

Disclosure of irrelevant material

64. If the information being considered for disclosure would not assist the applicant to make his best possible case, then there is no duty on the Commission to disclose. This may apply, for example, to a line of enquiry which the Commission decides to pursue on its own initiative, but which proves to be a "cold trail", or information which has no bearing whatsoever on the issues in the case or the decision made. Every such situation will be assessed on its own particular facts, but fairness to the applicant will be the general guiding principle.
65. The applicant will be alerted to any material that may assist his case, but which does not form any part of the Commission's reasons for referral. An applicant may, for example, wish to apply for leave to add another ground to the appeal.⁹

Public interest immunity

66. It is in the public interest that the courts should have full access to all relevant material in a criminal trial. Where the public interest in disclosure is outweighed by the public interest in non-disclosure, however, material can be withheld from court proceedings on the basis that it attracts "public interest immunity" (PII).

⁹ Section 315 Criminal Justice Act 2003 came into force on 4 April 2005, amending s.14 of the Criminal Appeal Act 1995. In respect of all appeals to the Court of Appeal resulting from referrals made after 4 April 2005, the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference unless leave is obtained from the Court to put forward further (unrelated) grounds of appeal.

67. In *D v NSPCC* [1978] AC 171 HL at 230 Lord Hailsham observed that “the categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop”. The Commission’s approach to the usual categories of PII material is as follows.

(i) The identity of informants

68. The rationale behind protecting the anonymity of persons who provide assistance to the police without wishing their identity to be known lies in the public interest of such sources of information and co-operation continuing.

69. If the Commission has been made aware of the identity of an informant, and it would endanger his safety if he were to be named, the usual duty of disclosure will be overridden by the principles of public interest immunity.

70. Even confirmation of the mere fact that there was an informant could put an informant’s safety at risk. In such cases particular care will be exercised to ensure that nothing is disclosed by the Commission that might lead indirectly to the conclusion that there was an informant, or to the identity of that informant.

(ii) Police reports, manuals and methods

71. The reports of investigating officers into complaints against the police are generally withheld in litigation. The rationale is that disclosure would have an “undesirably inhibiting” effect on investigating officers’ reports.

72. Details of police observation posts will generally be withheld. The rationale is that this may identify a person who has allowed his premises to be used for surveillance, creating a risk to his safety; and if the location is compromised it cannot be used again.

73. Details of police investigative or surveillance methods will generally be withheld on the basis that it would be contrary to the public interest for such information to go into the public domain. If such information became known, counter measures could be developed.

(iii) Files held by Social Services departments in child care proceedings

74. It is well established that various categories of documents and records maintained by Social Services and organisations such as the NSPCC in relation to children are subject to PII. This is justified on the basis that those who record in such files may be inhibited if disclosure were to be

routinely made, and this could have an adverse effect on the welfare of children.

(iv) PII information created in the exercise of the Commission's functions

75. The Commission may withhold disclosure of its own material on the basis of PII. Requests are sometimes made of the Commission for items such as the full reports of investigating officers, case committee minutes, internal memoranda and case records which may contain sensitive material. Each situation will be considered individually, and the Commission's consideration will include application of the following principles:
- (i) The public interest in full disclosure will be weighed against the public interest in non-disclosure;
 - (ii) The Commission will only claim PII very sparingly;
 - (iii) PII will not be claimed solely on the basis of any potential embarrassment to the Commission.

(v) Further examples of PII material

76. Information pertaining to national security, diplomatic relations and international comity; and communications to and from ministers and high-level government officials regarding the formulation of government policy. The reasons why such information is generally subject to PII and withheld in the public interest are self-evident.

When can PII material be disclosed by the Commission?

77. The fact that information may be protected from disclosure by PII by a Court or another authority does not mean that it cannot be disclosed by the Commission. First, PII material might assist an applicant in making his best case, in which case disclosure must be considered. Second, relevant PII material may need to be disclosed on referral. Extreme caution should be exercised, however, in any situation where PII material may need to be disclosed. Two particular situations fall to be considered:
- (i) Information or material already certified as PII by a Court.
 - (ii) Information or material obtained in the course of a Commission review which is sufficiently sensitive to justify withholding disclosure on a PII basis.

78. In the event of a referral, the Commission will disclose PII material to the Court of Appeal in a confidential annexe. It then becomes a matter for the Court of Appeal as to how the material is handled. In this situation it will not generally be necessary to seek the view or consent of the “owner” of the material or the judge who made the original PII order.
79. In the event of a non-referral, the situation becomes more complex due to the need to put the applicant in a position where he can make his best case in response to a provisional decision not to refer.
80. Strictly speaking, a PII ruling applies to the proceedings in which it is made, and only binds the parties to those proceedings. As time goes by the factors which made it contrary to the public interest for particular evidence to be disclosed might change. If the body which originally asserted PII no longer wishes to assert it, and if the public interest is not in jeopardy, it may not be necessary to revert to the judge who originally made the order.
81. An initial approach will need to be made to the “owner” of the material to ascertain whether the material is still regarded as sensitive. This will generally remove the need to approach the judge who made the original order, although the question of whether the judge should be approached (or notified as a matter of courtesy) will always be considered.
82. Where it is clear that the material is still sensitive, or consent from the “owner” is not forthcoming, it may be necessary and appropriate to make an approach to the Court which made the original order before PII material can be disclosed.
83. Where the Commission considers that disclosure should not take place but nonetheless concludes that the material supports an argument that there has been a miscarriage of justice the Commission may decide to seek the advice of the Court of Appeal under section 14(3) of the Act.
84. If the Commission obtains sensitive information in the course of its review other than from a public body, for example from a witness or from a private body providing information on a voluntary basis, public interest considerations still apply. A witness may assert that another person has acted (formally or informally) as an informant to the police. Such allegations may be made anonymously. Such information may be true or it may be untrue, but particular consideration will be given to the effect the information might have if it were to be disclosed. It may be appropriate to seek to discuss the matter with the person who has provided the information, but it is the public interest and not the desire of the provider which prevails.

Statutory restrictions on disclosure

85. If a statute provides that material should not be disclosed, the Commission is bound to have regard to any such restrictions.

Part IV: Miscellaneous disclosure issues

Identity of Commissioners

86. It is important that the Commission should be in a position to safeguard the integrity of its strategic, interim and final decision-making processes. Accordingly, the identity of
- Commissioners involved in a review as Assigned Commissioner; and
 - Commissioners engaged in Case Planning Committees or Advisory Committees; and
 - Commissioners who take decisions not to refer as Single Commissioner; and
 - Commissioners who take decisions to refer (or to exercise the discretion not to refer) at case committees
- will not generally be provided to applicants or their representatives until the end of the review.

Material provided to the Commission "in confidence"

87. A person may state that they are only willing to provide information if an assurance is given that the Commission will not forward the information to anyone else or rely on the information in any document which might become available to persons outside the organisation.
88. The Commission will not give undertakings that might inhibit it from exercising its statutory powers and duties freely and properly. It will generally be impossible for the Commission to say in advance that information will not be disclosed. Case reviewers are unable to give such assurances during the course of a review. Any such request will generally be referred to an Investigations Adviser in the first instance.
89. Requests for confidentiality from persons who provide information to the Commission will always be considered. However, if disclosure is required in order to enable the applicant to respond effectively to a provisional Statement of Reasons, or to enable him to present his appeal properly after referral, then this will generally outweigh the interest in confidentiality in the absence of compelling countervailing reasons.

Material subject to legal professional privilege

90. Legal professional privilege attaches to written and oral communications between a professional legal adviser and his client. Communications between:

- (i) a client and a legal adviser made for the purpose of the obtaining and giving of legal advice; and
 - (ii) a client or his legal adviser and third parties, the dominant purpose of which was preparation for contemplated or pending litigation (for example expert reports)
- are privileged from compulsory disclosure in legal proceedings, subject to certain limited exceptions. The professional rules governing solicitors and barristers also impose on them a duty of confidentiality to their clients.

(i) Public bodies

91. Some documents provided to the Commission under section 17 will be protected by legal professional privilege (e.g. the advice of a local authority solicitor to a social worker). Section 17(4) makes it clear that the Commission is entitled to disclosure notwithstanding that a document is covered by legal professional privilege. The Commission will consider the reasonableness of the public body's stance if it subsequently withholds consent to onward disclosure under section 25.

(ii) Private bodies or individuals

92. The Commission has no power to compel the disclosure of any information from private bodies or individuals. Any co-operation afforded to the Commission will be on a voluntary basis.

Waiver of legal professional privilege

93. Communications and documents between lawyer and client are "once privileged, always privileged" and the principle that a client should be free to consult his legal advisers without fear of disclosure is a fundamental one.
94. If the Commission wishes to obtain documents or discuss the way in which the applicant's case was prepared or conducted at trial with his legal advisers, a specific waiver of legal professional privilege will first be obtained from the applicant. A request for a waiver of privilege should only be sought when it is necessary, and not on a general or speculative basis.
95. The Commission's standard form of waiver will be used. This contains a reminder that an applicant may wish to seek legal advice before waiving privilege. The applicant's signature on an application form is not sufficient for this purpose.
96. As a general rule privilege is either waived completely or it is not waived at all. Applicants may seek to place limitations on a waiver of privilege, either

by confining the waiver to specific information or indicating that material must not be disclosed outside the Commission.

97. If the Commission can be specific about the information it wishes to examine, for example an expert's report, a proof of evidence or an unused defence witness statement, then rather than seeking a full waiver of privilege it may be appropriate to obtain the applicant's permission to obtain that single piece of information.
98. The Commission may wish to obtain information from the legal representative of someone other than the applicant (for example a co-defendant). The person from whom authorisation is sought should be informed that, while due regard will be paid to any wish they express that the information be treated as confidential, the material may be disclosed if it is necessary in the exercise of the Commission's functions.

Professional undertakings

99. In some circumstances the Commission may need to consider obtaining an undertaking from a legal representative to prevent onward disclosure. Legal representatives may be prevented by their professional rules from giving such undertakings: for example, the current *Guide to the Professional Conduct of Solicitors* states

"In general terms, since the solicitor is the agent of the client, all information coming into his or her possession relating to the client's affairs must be disclosed to the client."

100. Breach of a professional undertaking by a solicitor or barrister will be investigated by the Solicitor's Regulation Authority or Bar Council as a potential disciplinary offence.
101. The Commission will not accept undertakings from private individuals, as there is no formal mechanism to ensure that they are honoured.

Material which is incriminating

102. In the course of its review of a case the Commission may receive information or material which incriminates the person who provides it in a criminal offence.¹⁰ A public body cannot refuse to provide documents to

¹⁰ At common law there is a privilege against self-incrimination which permits a witness to refuse to answer questions or provide documents, the answers to which, or the contents of which, tend to incriminate him by exposing him to subsequent proceedings for an offence. The scope and meaning of the privilege at common law is complex and there are various statutory provisions which limit its scope.

the Commission on the basis that the contents might incriminate any member of its staff.

103. In relation to private individuals, the Commission will
- (i) Consider whether disclosure of the material is necessary to assist the applicant to make his best possible case.
 - (ii) Consider whether it is necessary to disclose personal details such as the name and address of the provider to the applicant.
 - (iii) Consider whether there is any risk of prejudice to the person who has provided information either because of a risk to his personal safety (in which case considerations of public interest immunity arise) or because of the risk that he may be prosecuted.
 - (iv) Consider whether a matter should be reported to the police. For further information [see Reporting matters to the police or other CJS agencies.](#)

Disclosure of sexually explicit material

104. The detail of sexual offences will not generally be rehearsed in a Statement of Reasons unless it is necessary to do so in order to answer the applicant's submissions.
105. In most cases the applicant will have been aware of such material at the time of conviction, but in a few cases there may be sexually explicit material obtained during the course of the review which the applicant has not previously seen. Potential sources (and this is not an exhaustive list) are medical records, medical reports, Criminal Injuries Compensation Authority applications and Social Services material.
106. Material relating to sexual matters may raise issues of public interest immunity, for example where the material has been disclosed to the Commission by Social Services departments or where the disclosure of the material by the Commission could involve the risk of harm to a child.
107. Great care will be taken when deciding how such information should be disclosed and made available to the applicant or his legal representative.
108. The Sexual Offences (Protected Material) Act 1997 has never been brought into force, but the Commission has based this aspect of its policy on its contents. It was aimed at preventing the underground circulation of

sexually explicit material generated during criminal cases. It includes a specific provision setting out how the Commission should disclose “protected material” during the course of its reviews.

109. “Protected material” is widely defined as, in relation to proceedings for a sexual offence, a copy (in whatever form) of any of the following material:
 - (i) A statement relating to that, or any other sexual offence, made by any victim of the offence (whether in writing or in any other form);
 - (ii) A photograph or pseudo-photograph of the victim;
 - (iii) A report of a medical examination of the physical condition of any such victim.

110. The Commission will only disclose such material to an applicant via solicitors or prison governors under a strict regime of control. If the applicant has no solicitor and is not in prison, s/he will only be allowed to view the material at the Commission’s premises or at a local police station. Anyone else to whom such material is disclosed (experts or investigators) will be required to give an undertaking to keep it secure.

111. The Commission may decide to disclose material to the applicant's legal representative, and to obtain a professional undertaking in the following terms:
 - (i) To inform the applicant (or any relevant third party) that he can only inspect the material under supervision, and that it may be an offence for the applicant to have such material in his possession otherwise than while inspecting it, or to reveal its contents or transmit a copy to a third party;
 - (ii) To ensure that protected material is shown to the applicant in circumstances where it is possible to exercise adequate supervision to ensure that the applicant cannot retain the material or make a copy;
 - (iii) That the material will not be shown to anyone other than the applicant unless it is necessary for the purposes of the inquiry, or for the purposes of assessing the applicant for the purposes of a formal report;
 - (iv) To inform the Commission should he cease to be the applicant's legal representative, and if the Commission informs him that the applicant has a new legal representative to transmit the material to that legal representative;

- (v) To inform the new legal representative that the material is protected material and to inform him of the extent to which the material has been shown to, or copies provided to, any person other than the applicant.
112. The Commission will advise these authorities that they should take all reasonable steps to ensure the preservation of confidentiality, and that they should not allow the applicant to remove material or take photocopies.