



DISCLOSURE POLICY

1.0 Policy statement

1.1 The Scottish Criminal Cases Review Commission ('the Commission') ingathers information about the cases it reviews. Such 'case-related' information, much of which is sensitive in nature, enables the Commission to carry out its primary function: namely, the Commission, on the consideration of any conviction of a person or of the sentence passed on a person who has been convicted, may, if it thinks fit, refer the case to the High Court for determination.¹

1.2 The Commission operates within a framework of statutory non-disclosure provisions, as set out in the Criminal Procedure (Scotland) Act 1995 (CPSA), section 194J,² and the Data Protection Act 1998 (DPA). Those non-disclosure provisions are not absolute; there are circumstances in which the Commission will disclose case-related information. The Commission will disclose such information only where it is entitled by law to do so.

1.3 The Commission, in deciding whether to disclose such information, will take into account the exceptions to the non-disclosure provisions under CPSA and the provisions of DPA, as well as its third and fourth corporate objectives: namely, to promote public understanding of its role and to enhance public confidence in the ability of the criminal justice system to address miscarriages of justice.

2.0 Purpose

2.1 The purpose of this policy is to provide an indication of the circumstances in which the Commission will disclose case-related information and those in which it will not.

3.0 Policy authorisation

3.1 The Board of the Commission approved this policy on 19 December 2014.

¹ Section 194B(1) of Criminal Procedure (Scotland) Act 1995.

² Section 194J(1) provides that a person who is or has been a member or an employee of the Commission shall not disclose any information obtained by the Commission in the exercise of any of its functions unless the disclosure of the information is excepted from section 194J by section 194K of CPSA.

4.0 Related policies

4.1 This policy must be read in conjunction with the Commission's data protection policy, its publication scheme under the Freedom of Information (Scotland) Act 2002 (FOISA), its case handling procedures and its records management plan.³

5.0 Statutory environment

5.1 This policy complies with the following Acts:

- CPSA, section 194
- DPA
- FOISA
- PRSA

6.0 Disclosure of information in a referral case

6.1 CPSA provides that where the Commission has decided to refer an applicant's case to the High Court, the Commission shall give to the High Court a statement of reasons for its decision, and send a copy of the statement of reasons to every person who appears to the Commission to be likely to be a party to any proceedings on the appeal arising from the reference.⁴

6.2 CPSA provides that the disclosure of information is excepted from the Commission's obligations of non-disclosure of information where the information is disclosed in certain named circumstances, which include in any statement or report required by CPSA or in or in connection with the exercise of any function under CPSA.⁵

6.3 The disclosure of any 'personal data'⁶ and 'sensitive personal data'⁷ in the statement of reasons which is sent to the High Court and the aforementioned parties must comply with the provisions of DPA.⁸

6.4 Accordingly, the Commission will send the statement of reasons for its decision to the High Court, the applicant, his solicitor, the Lord Advocate and the Crown Agent. It will, in addition, send copies of the documents on which it relied in taking its decision to the applicant's solicitor and the Crown – subject to points **6.6** and **6.8**

³ The Commission's records management plan, as required by the Public Records (Scotland) Act 2011 (PRSA), was agreed on 30 April 2014 by the Keeper of the Records of Scotland.

⁴ Section 194D(4).

⁵ Section 194K(d) and (e).

⁶ Section 1 of DPA provides that personal data means data which relate to a living individual who can be identified (a) from those data or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the 'data controller' (the Commission is a data controller). See also the decision of the English Court of Appeal in *Durant v Financial Services Authority* [2003] EWCA Civ 1746.

⁷ As defined in section 2 of DPA. Sensitive personal data include personal data consisting of information about the commission or alleged commission of any offence by the individual concerned.

⁸ The Commission's entitlement to disclose such data in the statement of reasons, without the need for it to seek the consent of the people whose personal data are in the statement of reasons for it to do so, or even for it to notify them that it is doing so, derives from the exemptions under section 35(1) and (2) of DPA when read with the 'conditions of processing' under Schedules 2 and 3 to DPA.

below and the Crown's consent for the Commission to disclose to the applicant's solicitor the supporting documents it obtained from the Crown.

6.5 Where the applicant has not instructed a solicitor, the Commission may send copies of the documents on which it relied in taking its decision to the applicant, and it may accede to any request by the applicant for it to disclose a specific supporting document to him – subject to points 6.6 and 6.8 below and the Crown's consent for the Commission to disclose to the applicant the supporting documents it obtained from the Crown. In addition, in taking the decision whether to disclose the documents in such circumstances, the Commission will have regard to DPA and The Law Society of Scotland's 'Code of Conduct for Criminal Work, Article 11– Documents and Materials'.

6.6 Where it has relied on highly sensitive information it obtained from a person or organisation – for example, where it obtained an intelligence document from the security services – the Commission will not narrate in its statement of reasons the information contained in that document, or disclose the document itself, without the consent of the person or organisation from whom it obtained the document.

6.7 Where it has retained documents on which it did not rely in taking its decision, the Commission will disclose those documents to the Crown and the applicant's solicitor (by allowing them, on their request, to view those documents in the Commission's office) – subject to point 6.8 below and the following conditions:

- The Crown's consent for the Commission to disclose to the applicant's solicitor the documents the Commission obtained from the Crown;
- The applicant's consent for the Commission to disclose to the Crown the documents the Commission obtained from the applicant, his solicitor or his previous solicitor(s);
- The consent of the applicant's co-accused for the Commission to disclose to the Crown or the applicant's solicitor the documents the Commission obtained from the co-accused, the co-accused's solicitor or the co-accused's previous solicitor(s); and
- The consent of the accused in a case the Commission considers to be connected to the applicant's case for the Commission to disclose to the Crown or the applicant's solicitor the documents the Commission obtained from the accused in the connected case, his solicitor or his previous solicitor(s).

Where the applicant's solicitor or the Crown asks it for a specific document on which it did not rely in taking its decision, the Commission will disclose that document to the solicitor or the Crown – subject to the above conditions and point 6.8 below.

6.8 The Commission will not disclose any documents where it has concerns that such disclosure might compromise the safety of a witness or potential witness in the case or any other person.

6.9 The Commission will not disclose any internal documents (draft statements of reasons, emails etc) without a court order.

7.0 Disclosure of information in a non-referral case or before the Commission issues its decision in a case

7.1 CPSA provides that in every case in which the Commission has decided not to make a reference to the High Court, the Commission shall give a statement of reasons for its decision to the applicant.⁹

7.2 Accordingly, the Commission will send the statement of reasons for its decision to the applicant and his solicitor.

7.3 Where it has concerns that the applicant's receipt of the statement of reasons might cause the applicant to self-harm or commit suicide, the Commission will, where the applicant is in custody, send the statement of reasons, in a sealed envelope, to the Governor or the Director of the relevant prison, with a covering letter in which it asks him to pass the sealed envelope to the applicant and in which it explains that the content of the letter may cause the applicant distress. Where it has such concerns and the applicant is at liberty, the Commission will ask his solicitor to request that the applicant attends his office to collect the statement of reasons.

7.4 Where the applicant or his solicitor asks it for a report it has instructed or a document it has obtained from the Crown, the police or other organisation, the Commission may disclose the report or document to the applicant or his solicitor – subject to the Crown's consent for the Commission to disclose to the applicant or his solicitor the documents it obtained from the Crown. In addition, in taking the decision whether to disclose the report or document in such circumstances, the Commission will have regard to the section 194K(1)(d) and (e) exceptions, DPA and, where the applicant has not instructed a solicitor, The Law Society's Code of Conduct for Criminal Work, Article 11–Documents and Materials.

7.5 The Commission will not disclose any information where it has concerns that such disclosure might compromise the safety of a witness or potential witness in the case or any other person.

7.6 The Commission will not disclose any internal documents (draft statements of reasons, emails etc) without a court order.

8.0 Disclosure of information to a person who would not be a party to any proceedings on any appeal arising from a Commission referral

8.1 Where a person who would not be a party to any proceedings on any appeal arising from a Commission referral ('the third party') asks it whether a named individual has applied to it, the Commission will inform the third party whether it has received an application from the named individual and, where it has received the application, whether it has accepted the application for a Stage 2 review (full review) or whether it has still to decide whether to accept the application for a Stage 2 review – subject to the exceptions listed at point **8.9** below.

8.2 Where it has decided to refer an applicant's case to the High Court, the Commission will write, one week before the statement of reasons is sent to the High

⁹ Section 194D(4). See also section 194K(1)(d) and (e) of CPSA and section 35(1) and (2) of DPA and Schedules 2 and 3 to DPA.

Court, to the Crown Agent to inform her about the Commission's decision. The purpose of the letter is to allow the Crown Agent to attempt to tell the complainer or the victim's next of kin about the referral. The information is given to her at that stage solely for the purpose of notifying the complainer or the victim's next of kin, and it is given to her on the strict understanding that any such notification is not to be made until she is in possession of the statement of reasons.

8.3 Where it has decided to refer an applicant's case to the High Court, the Commission will issue a news release stating that it has done so. It will put the news release on its website. It will anonymise the name of the applicant in certain circumstances – for example, where the applicant or the victim of the crime is mentally incapax or is under 16 years of age (see also point **8.9** below).

8.4 Where it has decided to refer the case to the High Court, and where a request for information from a third party is one which concerns whether it has referred the applicant's case to the High Court, the Commission will inform the third party of that fact only after it has issued the news release announcing the referral, but it will not inform him about that fact where it has anonymised the name of the applicant in the news release (see also point **8.9** below).

8.5 Where it has decided not to refer the case to the High Court, and where a request for information from a third party is one which concerns whether it has referred the applicant's case to the High Court, the Commission will inform the third party only of the fact that it has concluded its review of the applicant's case, and it will inform him about that fact only after it has sent the final decision to the applicant – subject to the exceptions listed at point **8.9** below.

8.6 Where it has decided not to refer an applicant's case to the High Court, and where it has spoken to the complainer or the victim's next of kin during its review of the applicant's case, or where it is reasonable to infer that they are aware that it has reviewed the case, the Commission will write to the complainer or the victim's next of kin to tell them about its decision not to refer the case, and it will write to them to tell them about its final decision in the case.

8.7 Where an applicant has alleged that a witness has lied or has otherwise acted improperly, and where the Commission has sought the views of the witness about the allegation made against him, or where it is reasonable to infer that the witness is aware that such an allegation has been made against him, the Commission will write to the witness to tell him about its decision in the case, and it will write to them to tell them about its final decision in the case.

8.8 Where an applicant has made an allegation of defective representation against his solicitor or counsel, and where the Commission has sought the views of the solicitor or counsel about the allegation made against him, or where it is reasonable to infer that the solicitor or counsel is aware that such an allegation has been made against him, the Commission will write to the solicitor and counsel to inform them about its decision in the case, and it will write to them to tell them about its final decision in the case.

8.9 The Commission will not disclose the information in points **8.1**, **8.3** and **8.4** below in the following circumstances:

- where the applicant or the victim of the crime is under 16 years of age and the disclosure of the information may reveal his identity to a third party;
- where the applicant or the victim of the crime is mentally incapax and the disclosure of the information may reveal his identity to a third party;
- where the disclosure of the information may reveal the identity of a victim of rape or other sexual offence;
- where the Commission has concerns that the disclosure of information might compromise the safety of a witness or potential witness in the case or any other person; or
- where the Commission has concerns that the disclosure of information might compromise the physical or mental health of the applicant or any other person.

8.10 The Commission may disclose case-related information where the information is requested for the purposes of any criminal, disciplinary or civil proceedings,¹⁰ or where it concerns the prevention or detection of crime or it is requested for the purposes of the investigation of an offence or deciding whether to prosecute a person for an offence.¹¹

9.0 Data Protection Act 1998

9.1 As indicated, much of the information the Commission obtains in the exercise of its statutory functions is personal data or sensitive personal data.

9.2 The first data protection principle provides that personal data shall be processed (which includes the disclosure of data) fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 to DPA is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 to DPA is also met.

9.3 The Commission regards the fair and lawful processing of the personal data it processes as being critical to the successful performance of its statutory functions and to the maintaining of the confidence of the individuals whose personal data it processes. Accordingly, it has a separate data protection policy.

9.4 With specific reference to the disclosure of personal data, an individual has a right of access to his personal data which the Commission, as a data controller, holds.¹² The right is known as 'subject access'. It is, however, subject to a number of exemptions under DPA. The Commission will consider and respond to each subject access request made to it, and its decision whether to disclose the personal data will be taken on a case-by-case basis and in accordance with the provisions of DPA.

¹⁰ Section 194K(1)(a) of CPSA.

¹¹ Section 194K(3)(a) and (b). See also the 'crime and taxation' exemption under section 29(1) and (3) of DPA when read with the 'conditions of processing' under Schedules 2 and 3 to DPA

¹² Section 7 of DPA.

10.0 Freedom of Information (Scotland) Act 2002

10.1 An individual has the right of access to recorded information the Commission holds,¹³ and the Commission may withhold the information only where FOISA expressly permits it to do so.

10.2 In addition, the Commission is required to maintain a publication scheme which sets out the types of information it routinely makes available and how an individual can access the information.¹⁴ To that end, it has adopted the Model Publication Scheme produced by the Scottish Information Commissioner (SIC), which has the SIC's approval until 31 May 2019.

10.3 The Commission does not disclose case-related information under its publication scheme. In addition, where it receives a freedom of information request for such information, it will refuse such a request. FOISA exempts the disclosure of information under FOISA where the disclosure of information is information which is prohibited by or under any enactment.¹⁵ The disclosure by the Commission of such information would constitute a breach of CPSA. The section 26(a) exemption is an absolute exemption in that it is not subject to the public interest test set out in FOISA. Accordingly, case-related information is exempt from disclosure under FOISA. The SIC has upheld the Commission's approach in that regard.¹⁶

11.0 Procedures

11.1 All subject access requests (which must be made in writing) or freedom of information requests are dealt with in the first instance by the Commission's information officer. Where the information officer decides not to disclose the information requested, the requestor may ask the Commission to review that decision, whereupon the matter is passed to the Director of Corporate Services (DOCS). Where the DOCS upholds the original decision, the requestor may appeal to the appropriate statutory regulator: namely, the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF (for subject access appeals and other data protection matters), or the SIC, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS (for freedom of information appeals).

11.2 All other requests for information are dealt with by the Head of Casework. Where he has any concerns about whether the information ought to be disclosed, he will refer the matter to the Board of the Commission.

12.0 Review

12.1 This policy will be reviewed annually by the Head of Casework.

¹³ Sections 1 and 3 of FOISA and Schedule 3 to the Act.

¹⁴ Section 23.

¹⁵ Section 26(a).

¹⁶ See, for example, decision 075/2010 of the SIC, *Lucy Adams of The Herald and the SCCRC*.

Date approved	19 December 2014
Date of last review	8 February 2016
Date of next review	8 February 2017