



DISCLOSURE POLICY

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INTRODUCTION

1.0 Policy statement

- 1.1 The Scottish Criminal Cases Review Commission (the Commission) obtains information to carry out its primary statutory function.¹
- 1.2 The Commission discloses information about the cases it reviews only where it is entitled by law to do so.
- 1.3 The Commission operates within a framework of statutory provisions that limit its disclosure of such information, as set out in section 194A–T of CPSA, the Data Protection Act 2018 (DPA) and the UK General Data Protection Regulation (UK GDPR). Those provisions are not absolute: there are circumstances in which the Commission may disclose information about the cases it reviews.
- 1.4 This policy explains the circumstances in which the Commission may disclose information about the cases it reviews and to whom it may disclose the information.

¹ Which is that the Commission may, on the consideration of any conviction of a person in Scotland or the sentence imposed in such a case, refer the case to the High Court of Justiciary for determination where it believes there may have been a miscarriage of justice and it is in the interests of justice to make such a reference (the Criminal Procedure (S) Act 1995 (CPSA), s194B and C).

2.0 Policy authorisation

2.1 On 24 September 2021 the Board of the Commission approved this version of this policy.

3.0 Related documents

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

4.0 Disclosure in a reference case

4.1 Part 3 of DPA provides for the processing of personal data by competent authorities for 'the law enforcement purposes': see the Commission's data protection policy. The Commission processes the information in a reference case for a law enforcement purpose.

4.2 CPSA provides that where the Commission has decided to refer an applicant's case to the High Court, the Commission shall give a statement of reasons for its decision to the High Court, 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.²

4.3 CPSA provides that the disclosure of information is excepted from the Commission's obligations of non-disclosure under section 194J of CPSA where the disclosure is made in any statement or report required by CPSA or in connection with the exercise of any function under CPSA.³

4.4 The Commission will send the statement of reasons for its decision to the High Court, the applicant, the applicant's solicitor, the Lord Advocate and the Crown Agent.

4.5 The Commission will send copies of the documents on which it relied in taking its decision to the High Court, the applicant's solicitor and the Crown – subject to paragraphs 4.7 and 4.10 and the Crown's consent to disclose the supporting documents that the Commission obtained from the Crown.

4.6 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 to disclose a specific supporting document to them – subject to paragraphs 4.7 and 4.10 and the relevant consent by the Crown. The Commission will have regard to DPA, UK GDPR and The Law Society of Scotland's 'Code of Conduct for Criminal Work, Article 11– Documents and Materials'.

4.7 On occasions, the Commission obtains information from an organisation or agency on the basis that it will not disclose the information to third parties – it has, for example, obtained information on that basis from foreign states and the UK Security Service. The Commission will not disclose that information by narrating it in the statement of reasons, or by disclosing the document containing the information, without the consent of the organisation from which the Commission received the information.

² Section 194D(4) of CPSA.

³ Section 194K(1)(d) and (e) of CPSA.

4.8 Where it retains documents on which it did not rely in taking its decision, the Commission will, upon request, allow the Crown and the applicant's solicitor to view those documents at the Commission's office – subject to paragraphs 4.7 and 4.10 and the following conditions:

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

4.9 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 paragraphs 4.7, 4.8 and 4.10.

4.10 The Commission will not disclose any documents where disclosure may compromise the safety of a witness or potential witness or any other person.

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

5.0 Disclosure in a non-reference case (or before the Commission issues its decision in a case)

5.1 The Commission processes the information in a non-reference case for a law enforcement purpose under Part 3 of DPA.

5.2 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;⁴ see also section 194K(1)(d) and (e) of CPSA.

5.3 The Commission will send the statement of reasons for its decision to the applicant and the applicant's solicitor.

5.4 Where the applicant or the applicant's solicitor asks it for a report that it has instructed, or a report or document that it has obtained from the Crown, the police or other organisation, the Commission may disclose the report/document to them – subject to the Crown's consent in relation to the report/document that the Commission obtained from the Crown and subject to paragraphs 4.7 and 4.10. The Commission will have regard to the section 194K exceptions, DPA, UK GDPR, the tenets of administrative law and, where the applicant has not instructed a solicitor, The Law Society of Scotland's Code of Conduct for Criminal Work.

⁴ Section 194D(5) of CPSA.

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

The applicant's mental health

- 5.6 Where it has concerns that the applicant's receipt of the statement of reasons might cause the applicant to harm themselves, 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 prison, with a covering letter in which it asks the Governor/Director to pass the sealed envelope to the applicant and it explains that the contents of the envelope may cause the applicant distress.
- 5.7 Where it has such concerns, and the applicant is at liberty and represented, the Commission will ask the applicant's solicitor to request that the applicant attends the solicitor's office to collect the statement of reasons.
- 5.8 Where it has such concerns, and the applicant is at liberty but unrepresented, the Commission will tell the applicant that he or she should telephone the Commission if he or she wishes to speak to someone from the Commission about its decision.

6.0 Disclosure to a person who would not be a party to any appeal upon a Commission reference

Victim notification

- 6.1 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 Court, to the Crown Agent to tell them the Commission's decision. This enables the Crown Agent to attempt to tell the complainer or the victim's next of kin about the reference. The information is given to the Crown Agent on the strict understanding that such notification is not made until he is in possession of the statement of reasons.

Complainers, next of kin, witnesses, legal teams

- 6.2 Where it has decided not to refer an applicant's case to the High Court, and it has spoken to the complainer or the victim's next of kin during its review of the applicant's case, or it is reasonable to infer that they are aware that it has reviewed the case, the Commission will write to the complainer/the next of kin to tell them its decision not to refer the case and its final decision in the case.
- 6.3 Where an applicant has alleged that a witness has lied or has otherwise acted improperly, and it has sought the views of the witness about the allegation made against them, or it is reasonable to infer that the witness is aware of the allegation, the Commission will write to the witness to tell them its decision in the case and its final decision in the case.
- 6.4 Where an applicant has made an allegation of defective representation, and it has sought the views of the solicitor and counsel about the allegation made against them, or it is reasonable to infer that the solicitor or counsel is aware of the allegation, the Commission will write to the solicitor and counsel to tell them its decision in the case and its final decision in the case.

News release and general inquiries

- 6.5 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 applicant in certain circumstances – see paragraph 6.8.
- 6.6 Where it has decided to refer the case to the High Court, and a person who would not be a party to any appeal upon the reference ('the third party') asks the Commission whether it has referred the case to the High Court, the Commission will tell the third party that fact – subject to paragraph 6.8 – and only after it has issued the news release announcing the reference.
- 6.7 Where the third party asks the Commission whether a named individual has applied to it, the Commission will tell the third party whether it has received an application from the individual, whether it is reviewing the case and whether the review has concluded – subject to paragraph 6.8. Where the review has concluded, the Commission will tell the third party that fact only after it is satisfied that the applicant has received the final decision.
- 6.8 The Commission will anonymise the applicant in the news releases, and will not disclose the information in paragraphs 6.6 and 6.7, in the following circumstances:
- Where the applicant or the victim is under 18 years of age and the disclosure may reveal their identity to a third party;
 - Where the applicant or the victim is mentally *incapax* and the disclosure may reveal their identity to a third party;
 - Where the disclosure may reveal the identity of a victim of a sexual offence;
 - Where the disclosure may compromise the safety of a witness or potential witness or any other person;
 - Where the disclosure may compromise the physical or mental health of the applicant or any other person.

Other proceedings

- 6.9 The Commission may disclose information where, for example, the information is disclosed for the purposes of any criminal, disciplinary or civil proceedings,⁵ in or in connection with the exercise of any function under CPSA,⁶ or for the purposes of the investigation of an offence or deciding whether to prosecute a person for an offence.⁷
- 6.10 In deciding whether to disclose information in such circumstances, the Commission will have regard to Part 3 of DPA and Part 2 of DPA ('general processing'), and in particular sections 10 and 11 ('special categories of personal data') and section 15 in Part 2 of DPA ('restrictions on data subject's rights'), when read with Schedules 1 and 2 to DPA.

⁵ Section 194K(1)(a) of CPSA.

⁶ Section 194K(1)(e) of CPSA.

⁷ Section 194K(3)(a) and (b) of CPSA.

7.0 Subject access

- 7.1 Information about the cases the Commission reviews may constitute personal data.
- 7.2 The person to whom the data relate ('the data subject') has the right of access to their personal data that the Commission processes. The right is known as 'subject access'. It is, however, subject to certain exemptions under DPA and UK GDPR: see the Commission's data protection policy.
- 7.3 The Commission will respond to each subject access request made to it. It will decide whether to disclose the personal data on a case-by-case basis and in accordance with the relevant provisions of DPA and UK GDPR.

8.0 Freedom of information

- 8.1 The Commission is required to maintain a publication scheme which sets out the types of information that it routinely makes available and how an individual can access the information. To that end, it has adopted the Model Publication Scheme that the Scottish Information Commissioner (SIC) has produced: see [the Commission's publication scheme](#).
- 8.2 An individual has the right of access to recorded information that the Commission holds, and may make a freedom of information (FOI) request to the Commission. The Commission may withhold the information only where FOISA expressly permits it to do so.⁸
- 8.3 Section 26(a) of FOISA exempts the disclosure of information under FOISA where the disclosure is information which is prohibited by or under any enactment. The section 26(a) exemption is an absolute exemption in that it is not subject to the public interest test set out in FOISA.⁹
- 8.4 The Commission's disclosure of information about the cases that the Commission reviews, either in its publication scheme or in response to an FOI request, would constitute a breach of section 194J(1) of CPSA. Accordingly, such information is exempt from disclosure under FOISA. The SIC upheld the Commission's approach in this regard.¹⁰

9.0 Procedures for dealing with subject access and FOI requests

- 9.1 All subject access and FOI requests are dealt with in the first instance by the data protection officer. Where the data protection officer decides not to disclose the information requested, the requester may ask the Commission to review that decision, whereupon the Commission's Director of Corporate Services (DOCS) reviews the original decision.
- 9.2 Where the DOCS upholds the original decision, the requester may appeal to the appropriate statutory regulator, namely: the Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF, at www.ico.org.uk (subject access appeals), or the SIC, Kinburn Castle, Doubledykes Road, St Andrews, Fife, KY16 9DS, at enquiries@itspublicknowledge.info (FOI appeals).

⁸ Sections 1–3 of, and Schedule 1 to, FOISA.

⁹ Section 2 of FOISA.

¹⁰ See, for example, decision 075/2010 of the SIC, *Lucy Adams of The Herald and the SCCRC*.

9.3 The data protection officer deals with other requests for information. Where he has any concerns whether the information ought to be disclosed, the data protection officer will refer the matter to the Board of the Commission.

10.0 Review

10.1 The data protection officer will review this policy annually.

Date first approved	19 December 2014
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