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PRACTICE MEMORANDUM
To Counsel, Criminal Law Division

Date: June 11, 2009

Subject: **DISCLOSURE**

Synopsis: Crown counsel must make disclosure according to law. Where Crown counsel proposes to provide, withhold, or restrict disclosure for reasons that are not recognized by current case law or statute, he/she must have the approval of his/her Crown Attorney, and the Director of Crown Operations for his/her region. Crown counsel must make full and timely disclosure of information in the Crown's possession or control to the defence, subject to established legal limitations on the duty to disclose in order to protect legal privileges, including the need to protect the privacy and safety of witnesses. The instances of delaying disclosure should be rare and Crown counsel should consult with his/her Crown Attorney before exercising this discretion.

Crown counsel should consult about difficult decisions. Disclosure decisions can have a permanent impact upon the rights of accused persons and third parties. Improper disclosure may result in miscarriages of justice, mistrials, retrials, stays of proceedings and lawsuits. Many areas of the law of disclosure continue to develop.

This memorandum provides guidance to Crown counsel regarding disclosure issues, setting out general principles, the Crown's duty to disclose and the limitations on this duty, typical disclosure items, disclosure of sensitive materials, procedural issues, and defence responsibilities with respect to disclosure.

Reference should be made to the policies and memoranda on Case Management, Physical Scientific Evidence, Child Abuse, Spouse/partner Offences, Victims of Crime, Sexual Offences, Recanting Witnesses, Conduct of Witness Interviews and In-custody Informers. **This practice memorandum replaces PM [2005] No. 35.**

Table Of Contents

Opinion/Advice:

1. General Principles

a. Legal Duty of the Crown

Disclosure is a legal duty, and is not a matter of prosecutorial discretion.[1] Crown counsel must make disclosure according to law. As a general principle, Crown counsel have an ongoing responsibility to disclose *all* relevant material in the possession or control of the Crown, whether inculpatory or exculpatory. This duty is subject to Crown counsel's discretion to refuse to disclose information that is privileged or clearly irrelevant.[2]

[1] *Krieger v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 (S.C.C.) at 118.
[2] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Taillefer*, [2003] 3 S.C.R. 307 at para. 59.

When the Crown provides full disclosure in a timely manner and the defence uses it diligently, the administration of justice benefits as a whole.[3] Full and timely disclosure:

- Helps to guarantee the accused's ability to make full answer and defence;[4]
- Helps to prevent miscarriages of justice;[5]
- Promotes the accused's section 11(b) *Charter* rights;
- Promotes the early resolution of cases, which benefits victims and accused persons; and
- Promotes the early resolution of non-contentious and time-consuming issues in preliminary hearings or trials.

Crown counsel may delay or limit disclosure only in certain circumstances as prescribed by law**.** In general, Crown counsel may only justify non-disclosure in the following situations:

- Where the material is not in the Crown's possession, and is beyond the Crown's control;
- Where the material is clearly irrelevant;
- Where there is a legal limitation on the obligation to disclose the material protected by a form of privilege, including the duty to protect the identity of confidential informants[6];
- Where the material is protected by a court order or by a statutory provision that it not be disclosed.[7]

Where Crown counsel proposes to provide, withhold, or restrict disclosure for reasons that do not accord with this Practice Memorandum, Counsel must have the approval of his/her Crown Attorney and the Director of Crown Operations for his/her region. When refusing to disclose material, Crown counsel should offer an explanation in writing to the defence. **Crown counsel must exercise the discretionary powers associated with these aspects of disclosure honestly and in good faith.**

Crown counsel should consult with his/her Crown Attorney before making any decision to delay the legally required provision of disclosure in the possession or control of the Crown. Crown counsel must never delay disclosure for purely tactical reasons. However, the provision of disclosure material may be delayed to protect a witness or complete an investigation.[8]

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[3] Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Queen's Printer for Ontario, 1993) at 196 [hereinafter *Martin Report*].
[4] *R. v. Taillefer, supra*; *R. v. Carosella*, [1997] 1 S.C.R. 80.
[5] *R. v. Trotta*, [2004] O.J. No. 2439 (C.A.); overturned on other grounds [2007] S.C.J. No. 49.
[6] *R. v. Stinchcombe, supra*, at 339; *R. v. Chaplin*, [1995] 1 S.C.R. 727 at para. 21; *R. v. Egger*, [1993] 2 S.C.R. 451 at para. 19.
[7] For example, third party records pursuant to s. 278 (*Criminal Code of Canada)*, or as captured by *R. v. O'Connor*, [1995] 4 S.C.R. 411.
[8] *R. v. Egger*, *supra*, at para. 19.

b. Facilitating Judicial Review

Virtually all decisions by Crown counsel with respect to disclosure, including the timing and manner of disclosure, are reviewable by the courts. In order to avoid a delay of the trial, Crown counsel may suggest that defence counsel exercise his/her right to make a court application to resolve any disclosure issues as early as possible. Upon request, Crown counsel should take any steps reasonably necessary to facilitate a review by the court of any decision with respect to disclosure, should defence counsel bring such an application. In appropriate cases, Crown counsel may consider seeking the direction of the court on a disclosure issue in an effort to avoid a delay of the trial.

2. Duty to Disclose Relevant Items in the Possession or Control of the Crown

The Crown has an ongoing duty to disclose all relevant items in the possession or control of the Crown unless those items are protected by a court order or statutory provision requiring that the items not be disclosed, or unless the nondisclosure of the material is required by the rules of privilege**.**[9] Crown counsel should consult with his/her Crown Attorney with respect to difficult decisions regarding disclosure.

Items in the possession of the Crown include all materials in the physical possession of the Crown, as well as materials gathered or created by a police agency in the course of the investigation that are in the possession of that police agency.[10] Crown counsel should obtain all information concerning the case at hand from the investigating police agency or, in the case of a joint forces investigation, from all police agencies.

When Crown counsel is aware of any potentially disclosable information that is not in the possession or control of the Crown, Crown counsel should disclose the fact of the existence of such material to the defence, unless Crown counsel is prohibited by court order or statute from doing so.

When Crown counsel is aware that another Crown agency, ministry, or department has been involved in the investigation, Crown counsel should make reasonable inquires of all such agencies or departments that could reasonably be considered to be in possession of disclosure material. If Crown counsel is denied access to another agency's file, this should be disclosed to the defence**.**[11]

Materials that are in the possession of the police or other Crown agencies that were not created in the course of, or otherwise related to, the investigation at hand are not considered to be in the possession of the Crown. The defence must bring an *O'Connor* application in order to seek

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[9] *R. v. Stinchcombe, supra; R. v. O'Connor, supra,* at para. 4 –5.
[10] *R. v. T.(L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.) at 94; *R. v. Styles,* [2003] O.J. No. 5824 (S.C.J.) at para. 14.
[11] *R. v. Arsenault* (1994), 93 C.C.C. (3d) 111 (N.B.C.A.).

access to these "third party records" unless they are already in the physical possession of the Crown.[12]

In *Attorney General of Ontario (3rd Party Record Holder) v. McNeil*, [2009] S.C.J. No. 3 the court created a third category of records that they refer to as a "bridge" to *O'Connor*. Information relating to serious police misconduct that could reasonably bear on the case against the accused, even though unrelated to the investigation at hand, falls into this category. Where such information exists, the defence should be provided with enough materials to either raise the issue at trial, or make an informed decision as to whether to bring an *O'Connor* application to access the rest of the materials. All records or information related to police misconduct that is related to the investigation at hand should be disclosed as a matter of course.

a. Relevance

In general, relevant material includes all evidence or information, whether Crown counsel or police believe this material to be credible or not, that could reasonably:

- Be used by the defence in meeting the case for the Crown;
- Be used by the defence in advancing a defence or otherwise in making a decision which may affect the conduct of the defence (e.g. whether to call evidence or whether to conduct further investigation);[13] or
- Be relevant to sentence**.**

Crown counsel must continually assess relevance both in relation to the charge itself, and to the defences that are reasonably possible, or that may become reasonably possible.[14] **The duty to disclose extends to any material where there is a reasonable possibility that the material would be useful to the defence in making full answer and defence.**

Frequently, Crown counsel do not know what defences will be raised, and the relevance of material or information may change as the case progresses. Crown counsel should therefore err on the side of inclusion, unless the evidence or information is clearly irrelevant.[15]

As discussed in the *Kaufman Report*[16], one of the dangers of failing to broadly consider the possible relevance of material is the risk that a miscarriage of justice may result from the failure to disclose material that ultimately is of some relevance or use to the defence**. Crowns must therefore guard against approaching a case with "tunnel vision"**[17] **where disclosure issues are concerned.**

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[12] See *R. v. Sheppard*, [1998] O.J. No. 6427 (Gen. Div.); *R. v. Fudge* [1999] O.J. No. 3121 (S.C.J.); *R. v. O'Carroll*, [2000] O.J. No. 3173 (S.C.J.); *R. v. Hankey*, [2000] O.J. No. 5490 (S.C.J.); *R. v. Small*, [2001] O.J. No. 2231 (S.C.J.); *R. v. Khan*, [2004] O.J. No. 3811 (S.C.J.) at para. 3.
[13] *R. v. Dixon*, [1998] 1 S.C.R. 244 at para. 23; *R. v. Egger, supra*, at para. 20.
[14] *R. v. Taillefer, supra*, at 334.
[15] *R. v. Chaplin, supra*; *R. v. Dixon, supra*, at para. 21.
[16] Ontario, *Report of the Commission on Proceedings Involving Guy Paul Morin* (Queen's Printer for Ontario, 1998) [hereinafter *Kaufman Report*].
[17] *Supra*, Recommendation 74, at 1136.

b. Limitations on the Obligation to Disclose

The duty to disclose relevant material is subject to certain legally established limitations. Although this Practice Memorandum is intended to provide guidance regarding this duty and its limits, the law of privilege is constantly evolving. **Where Crown counsel proposes to provide, withhold or delay disclosure for reasons that are not recognized by current case law or statute, he/she must have the approval of his/her Crown Attorney and the Director of Crown Operations.**

Crown counsel have a duty, subject to review by the court, to withhold disclosure where there is reasonable cause to believe that withholding disclosure is necessary to:

- **Preserve any other legally recognized privilege, including the identity of a confidential informant[18]; or**
- **Comply with any court orders or statutory prohibitions.**

Crown counsel must disclose any information that does not violate this privilege, court order or statutory prohibition. Crown counsel should notify the defence when there is information that is in the Crown's possession that is being withheld, taking care not to violate the privilege, court order or statutory prohibition in question. Specific limitations on the obligation to disclose are discussed below.

In some circumstances, it may be more appropriate to delay rather than to withhold disclosure. The provision of disclosure material may be delayed to protect a witness or to complete an investigation. However, the instances of delaying disclosure should be rare and Crown counsel should consult with his/her Crown before exercising this discretion.

i. Public Interest - s. 37 of the *Canada Evidence Act*

In some circumstances, the protection of a "public interest", as set out in s. 37 of the *Canada Evidence Act*, may provide a basis for the Crown to withhold disclosure. The Crown bears the onus of justifying non-disclosure[19] on this basis.

Although a hearing and any appeals pursuant to s. 37 must be held expeditiously, the time spent on such a matter may nonetheless delay the criminal proceedings. In the event that Crown counsel is not successful in justifying non-disclosure on the public interest grounds set out in s. 37, any delay caused in litigating the issue may be attributed to the Crown.

ii. Crown 'Work Product'

Items that are the work product of the Crown, and which contain neither material inconsistencies nor additional facts not already disclosed to the defence, such as

[18] *R. v. Chaplin*, *supra*, at para 21-22
[19] *R. v. Delong* (1989), 47 C.C.C. (3d) 402 (Ont. C.A.); *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.); *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.).

internal Crown counsel notes, memoranda, correspondence, or legal opinions, are privileged[20] and should not be disclosed.

However, where Crown counsel learns of additional relevant information in the course of interviewing Crown witnesses, this information should be disclosed as soon as practicable. Reference should be made to the Crown policies and practice memoranda relating to witnesses.

iii. Legal Opinions Provided to Police

Legal opinions provided by the Crown to the police may be subject to solicitor-client privilege. However, there may be a duty to disclose such advice where the police intentionally waive the privilege or where the police assert that their actions were carried out in good faith and pursuant to advice from Crown counsel.[21] Even in other situations, the right of the accused to make full answer and defence may require disclosure of this information, depending on the circumstances.

Crown counsel should always be aware that any advice given to police might be unexpectedly subject to disclosure, should the police officer waive the privilege. Any request or application to obtain disclosure of legal advice given by Crown counsel to the police should be brought to the attention of the local Crown Attorney or to his/her designate.

Care should be taken in the vetting of disclosure provided to the defence to ensure that legal opinions provided by the Crown to the police are not inadvertently disclosed in situations where the police do not waive the privilege and where there are no other reasons compelling the disclosure of such information. For example, such advice is often recorded by police officers in their notebooks, which are routinely photocopied for disclosure purposes.

Reference should be made to the Crown policies and practice memoranda relating to the relationship between the police and Crown counsel.

iv. Third Party Records Covered by s. 278.1

The provisions in s. 278.1 to s. 278.9 of the *Criminal Code* apply to disclosure in cases involving sexual offences as enumerated in s. 278.2**.** These provisions prohibit the production to an accused of the private records of a complainant or a witness unless the complainant or witness has expressly waived the application of s. 278.3 to s. 278.91.

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[20] *R. v. O'Connor*, *supra*; *R. v. Brennan Paving and Construction Ltd.*, [1998] O.J. No. 4855 (C.A.); *R. v. Regan*, [1997] N.S.J. No. 428 (N.S.S.C.).
[21] *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

These provisions engage the legal rights of victims and witnesses. Crown counsel should ensure that victims and witnesses are aware of the requirements of disclosure generally. In addition, in these specific types of applications, Crown counsel should ensure that victims and witnesses are aware of their right to independent legal advice and of the possibility of legal aid assistance. The local disclosure protocol should address how this will be accomplished in each jurisdiction. Crown counsel should avoid giving any legal advice to a victim or witness regarding providing these private records or waiving privacy interests in them.

Where the Crown has possession of such records, Crown counsel should, without disclosing the contents of the records, notify the accused that the records are in the Crown's possession and will not be disclosed because they are covered by the statutory regime.

Where the defence requests records that are not in the Crown's possession, the Crown should advise the defence of this fact without revealing any of the content of those records, if known, so that the defence may take the necessary steps to seek access to the records.

Where Crown counsel or the police are specifically advised of the existence or location of records subject to the provisions of s. 278.1 to s. 278.9, that information should be disclosed to the defence without revealing any of the content of those records, if known.

Reference should be made to Crown policies and practice memoranda regarding sexual offences, and to Crown policies and practice memoranda relating to victims of crime, where applicable.

v. Third Party Records NOT covered by ss. 278.1 to 278.9 (*O'Connor/Mills* Applications)

Where the offence is not a sexual offence, as enumerated in s. 278.2, the disclosure of private third party records is governed by the common law, primarily as established in *R. v. O'Connor* and *R. v. Mills.*[22]

Records in the possession of third parties such as boards, social agencies, rape crisis centres, women's shelters, doctors' offices and mental health and counselling services, are not deemed to be in the Crown's possession for the purposes of disclosure in the absence of actual physical possession of these records by the Crown or police.

Where the Crown has possession of such records (or where the police have obtained the records in the course of the investigation) with the informed consent of the complainant or witness to whom they relate, they may not be withheld from the defence unless clearly irrelevant.[23]

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[22] *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.).
[23] *R. v. O'Connor, supra.*

Where Crown counsel has concerns that the records may have been provided without the informed consent of the victim or witness to whom they relate, Crown counsel should consider taking the position that the records should not be disclosed on the basis that the complainant or witness has a reasonable expectation of privacy in the records which has not been waived.[24]

In cases where Crown counsel does not disclose the record to the defence, he or she should advise the defence of the existence of the records, and of the fact that the records are in the possession of the Crown. Crown counsel should set out the basis upon which the Crown is refusing to disclose the record, without revealing the sensitive information in the records themselves. Defence counsel will then be in a position to bring a motion for disclosure.

When Crown counsel receives requests for third party information that is not in the possession of the Crown, the defence should be advised of that fact in a timely manner so that the defence may, if it chooses, bring an *O'Connor* application. Where Crown counsel has information regarding the location of such records, this information should be provided to the defence. However, Crown counsel should not take any steps to obtain such records until the court has ruled on this application.
Crown counsel should not provide any advice directly or indirectly to third parties regarding the records, or whether the third party should provide the records, or whether the third party should waive privacy interests in them.

Crown counsel should ensure that third parties are aware that any record that they consent to provide to the police or Crown not captured by s. 278 will be disclosed to the accused and that they are entitled to seek their own independent legal advice before making a decision to provide or withhold the record. This information may be conveyed by the Crown, police or possibly by VWAP. The local disclosure protocol in each jurisdiction should address the specific responsibilities (and training) of the police and/or the Crown in this regard.

Under no circumstances should third parties be left with the impression that they should destroy anything that may be evidence with respect to a criminal offence, and, if necessary, they should be clearly warned not to do so.[25]

Reference should be made to the policies and practice memoranda relating to sexual offences and to victims where applicable.

vi. Disclosure of Police Misconduct Materials

In *Attorney General of Ontario (3rd Party Record Holder) v. McNeil*, [2009] S.C.J. No. 3, the Supreme Court of Canada discussed disclosure obligations with respect to files relating to police misconduct.

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[24] *R. v. Mills, supra,* at paras. 108-9; *R. v. Kporwodu*, [2005] O.J. No. 1405 (C.A.) ; *R. v. Trotta, supra*.
[25] *R. v. Carosella, supra*.

The *McNeil* decision imposes an obligation on the police to provide to the Crown two types of information: (a) findings or allegations of police misconduct that relate to the subject matter of the offence for which the accused is charged; and (b) findings/allegations of serious misconduct that could reasonably bear on the case against the accused.

(A) The Stinchcombe (or First Party) Disclosure Package

In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the Court held that the Crown's obligation at trial is to make timely disclosure to an accused of all relevant information in the Crown's possession. In the trial context, relevant information refers to any information that there is a reasonable possibility may assist the accused in any aspect of the exercise of the right to make full answer and defence.

Records pertaining to findings or allegations of police misconduct that relate to the subject matter of the offence are so interrelated to the investigation of the accused as to be properly considered part of the fruits of the investigation against the accused. Therefore, this material should be disclosed as part of the main *Stinchcombe* disclosure package, whether or not the misconduct (actual or alleged) is 'serious' in nature.

(B) The McNeil Package

The second type of records, serious police misconduct that is not related to the incident, were previously dealt with by way of *O'Connor* applications for third party records. However, the Supreme Court in *McNeil* has determined that these records should be reviewed by the Crown to determine if there is any material that could reasonably impact the case against the accused. The Supreme Court speaks of the disclosure of these records as being required to bridge the gap between disclosure and *O'Connor* applications. This disclosure is not intended to provide defence counsel with all of the information he or she might need to raise the misconduct at trial, but rather, Crown counsel should provide enough information so that the defence can either raise the issue at trial or make an informed decision as to whether to bring an *O'Connor* application to obtain the rest of the records.

Information regarding findings or allegations of serious police misconduct that do not relate to the incident at hand provided by the police in a separate, sealed *McNeil* package, should be reviewed by Crown counsel to see if there is information there that could reasonably impact the case against the accused.

(i) Contents

The police should provide to the Crown the following records in a sealed package:

(a) Any convictions or findings of guilt under *the Canadian Criminal Code* or *Controlled Drugs and Substances Act*[26];

(b) Any outstanding charges under the *Criminal Code* or the *Controlled Drugs and Substances Act;*

(c) Any conviction or finding of guilt under any other federal or provincial statutes[27];

(d) Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*;

(e) Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

The package should contain the date of the conviction or allegation, the charge, and any findings. In addition, a synopsis should be enclosed, or if a synopsis does not exist, a brief description of the offence should be provided.

The *McNeil* package will not include records of misconduct that do not come within one of these five types of misconduct. For example, misconduct findings exclusive to the employer-employee relationship, such as findings pertaining to trade union activities; political activities; improper dress; and leaving work without an excuse will not be part of any package provided to the Crown.

(ii) Screening the *McNeil* Package

Crown counsel must review these *McNeil* materials but recognize that the standard of relevance at this stage is the *Stinchcombe* standard ("likely relevant" or to state it in the negative "not clearly irrelevant"). This analysis is two-fold as the Crown should look to the role the officer played with respect to the current case before the court and the nature of the misconduct,

[26] The police are not required to disclose: findings of guilt for which a pardon has been granted; findings of guilt that have resulted in an absolute or conditional discharge, where the requirements of s. 6(1) of the *Criminal Records Act* have been met (more than one year has elapsed since the offender was discharged absolutely; or more than three years have elapsed since the offender was discharged on the conditions prescribed in a probation order). Youth records should be dealt with in accordance with the records provisions of the *Youth Criminal Justice Act.*

[27] As per the Ferguson report and approved of in *McNeil*.

and then determine whether the nature of the misconduct is relevant in light of the role the officer played. For example, if the officer did *not* handle exhibits or deal with an accused and his/her role was limited to crowd control in the current matter, what relevance exists in relation to a prior finding of misconduct 10 years ago?

Crown counsel should consider any submissions provided in writing from the subject police officer in relation to the disclosure of the documents. However, the decision about whether or not the law requires the disclosure of the information rests with the Crown.[28]

(iii) Disclosing the *McNeil* Package

After vetting out identifiers etc., Crown counsel should provide to the defence materials deemed to be likely relevant. Crown counsel should disclose these materials, only to the defence counsel, in a sealed envelope. There should be an accompanying notice to defence counsel setting out that there is an implied undertaking in the acceptance of the package that the materials are only for use with respect to the current matter before the court and are not to be provided to anyone else or used for any other purpose. The letter should also advise defence counsel of any limitations on the gathering, by the police service, of *McNeil* package materials, such as no search for POA convictions or no records kept before 1998, etc. A draft notice setting out the implied undertaking and other suggested conditions is attached as an Appendix to this memorandum, and may be reproduced or modified for use as necessary.

Unrepresented accused should not be provided with a copy of the *McNeil* package and will instead have to review the materials on-site in the Crown Attorney Office. Accused persons should not be permitted to photocopy or take away any portion of these records.[29]

A copy of the cover letter, outlining exactly what *McNeil* materials were disclosed to the defence, will be forwarded to the officer who compiled the original *McNeil* package in accordance with local disclosure protocols arranged between the Crown Attorney Office and the local police service. This will enable the compiling officer to advise any officer impacted by this disclosure, and will enable the police service to track what has been disclosed in relation to each case an officer is involved in, if so desired.

(iv) Duty to inquire

Crown counsel have a duty to inquire/seek out more information beyond that which is included in the *McNeil* and *Stinchcombe* packages when they are put

[28]Any such submissions from the police are not subject to disclosure; they are privileged, and should be retained with the Crown copy of the *McNeil* package.
[29] Such a practice conforms to the Martin Report.

on notice of the existence of relevant information and where it is reasonably feasible to do so.

(v) When *McNeil* materials should go in first party *Stinchcombe* disclosure package

When reviewing the *McNeil* package, Crown counsel should bear in mind that there may be records pertaining to findings of serious misconduct that reach a level of relevance such that they would be properly part of the Crown's first party disclosure obligations and for which the Crown may be required to inquire into and provide the underlying materials. Examples include previous findings related to perjury or to drug offences where the investigation relates to drugs.

However, most of the material in the *McNeil* package that relates to serious police misconduct will be material that the Crown needs only to review to determine whether it is relevant for the purpose of facilitating an *O'Connor* style, third party records application.

(vi) *McNeil* materials that are NOT disclosed

Materials that are not disclosed are to be retained in a sealed envelope within the Crown copy of the brief. Given the ongoing disclosure obligation of the Crown, Crown counsel should maintain an on-going awareness of the issues within the trial, and whether relevance is triggered at a later date within the process. At any time Crown counsel makes any further disclosure of these materials, he or she should include a *McNeil* cover letter, and should provide the compiling officer with a copy of the cover letter.

vii. Duties of Crown Counsel When Withholding Addresses and Phone Number of Witnesses

The addresses and phone numbers of witnesses, other than the work addresses and work phone numbers of professionals or expert witnesses providing statements in the course of their duties, should be vetted out of the disclosure provided to the defence to protect the privacy and/or safety of witnesses.

The local disclosure protocol with the local police service should set out who will vet this personal information from disclosure.

When Crown counsel withholds the address of a witness whom the defence wishes to subpoena, Crown counsel should facilitate the service of a subpoena to that witness.

Defence counsel may request the addresses and phone numbers of witnesses for the purpose of interviewing them. The defence is entitled to request an interview with a

victim or Crown witness, although that witness has a right to privacy and is not required to grant an interview.

Crown counsel should consult with the investigating officer and consider carefully in the circumstances of each case what actions, if any, would be appropriate for Crown counsel and/or the investigating officer to take. One of the following options may be appropriate to protect the privacy and security of the witness, while allowing the accused to make full answer and defence:

- Passing on a letter to the witness from defence counsel requesting an interview;
- Contacting the witness and advising him or her of the defence request;
- Seeking agreement from the witness to disclose his or her address or phone number to the defence;
- Facilitating an interview of the witness by defence counsel at an acceptable location with the consent of the witness; or
- Making best efforts to inform the witness in advance that a decision has been made to disclose the address of that witness.

Where disclosure of the victim/witness' contact information might raise safety issues, options involving disclosure of the victim's contact information and/or address should not be utilized. In circumstances where Crown counsel (or the police at the behest of Crown counsel) has contact with a witness at the request of the defence, this should be done either in writing or in the presence of a police officer or other note-taker. In such cases, Crown counsel should ensure that witnesses are not left with the impression that they should not grant the defence an interview, but, rather, that it is completely up to the witness as to whether he/she submits to the interview.

Crown counsel may also advise witnesses that they may be cross-examined on statements given to defence counsel.

3. Typical Disclosure Items

The following is a non-exhaustive list of information that the Crown should typically disclose, subject to the exceptions and safeguards noted above, unless clearly irrelevant:

a. The Charge(s)

A copy of the charge(s) as contained in the information or indictment or a copy of the information/indictment itself should be disclosed.

b. The Synopsis

A copy of an accurate synopsis of the circumstances of the offence, as prepared by the investigating agency, should be disclosed.

c. Statements or Notes Regarding Witnesses or Accused

All statements and notes obtained from, or relating to, persons who have provided relevant information to the authorities should be disclosed, even if Crown counsel does not propose to call them as witnesses. This includes the notes and statements of or relating to any accused, co-accused, or accomplices, whether made to a person in authority or not.[30]

Subject to the duty of Crown counsel to protect legitimate privacy concerns, legal privileges, and to abide by court orders or statutory provisions, any verbal or written information provided by witnesses, victims or accused to the police or Crown should be disclosed to the defence, including, the contents of any interview, and any victim impact statement.

Reference should be made to Crown policies and practice memoranda regarding victims of crime, where applicable.

d. Video and Audio Tapes

A copy of any video or audio recording, with the possible exception of audios or videos of sensitive materials (as discussed below in s. 6 of this PM, "Safeguarding Disclosure"), should be disclosed.

e. Transcripts of Audio and Videotapes

Any transcripts of audio and/or videotapes that exist, subject to appropriate safeguards for sensitive materials (as discussed below in s. 6 of this PM, "Safeguarding Disclosure"), should be disclosed.

Crown counsel should seek approval from their manager to have a transcript prepared and disclosed of an audio or video tape where Crown counsel intends to use or introduce the audio or videotape at trial (i.e. for a s. 715.1 or *K.G.B.* application).

f. Information Relevant to Credibility/Reliability

Crown counsel is required to disclose any information in the Crown's possession that is relevant to the credibility/reliability of any proposed witness.[31] For example, Crown counsel is required to disclose:

- Any inconsistent statements or recantations in the possession of the Crown;

- Particulars of any promise of immunity or assistance given to the proposed witness with respect to a pending charge, bail, or sentence, or any other benefit or advantage given that is within the knowledge of the Crown. *Reference should be made to Crown policies and practice memoranda regarding in-custody informers, where applicable;* and

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[30] *R. v. Malcolm* (1993), 81 C.C.C. (3d) 196 (Ont. C.A.) at 204.
[31] *R. v. T.(L.A.), supra*, at 94.

- Any information in the possession of the Crown relating to any mental disorder the witness is suffering from that is relevant to the reliability of his or her evidence, subject to any limitation imposed by statute or case law regarding third party records. Crown counsel should consider such issues before providing such disclosure.[32]

Information regarding the criminal record of the accused and any co-accused must be disclosed. However, if Crown counsel chooses to disclose the information in the form of the CPIC printout, Crown counsel should ensure that the FPS number of the witness is not disclosed.

Upon request, the defence should be provided with information including convictions, discharges, withdrawals, acquittals, stays and other court-related dispositions regarding the criminal records of material Crown or defence witnesses that are relevant to credibility.

If Crown counsel declines to disclose information relating to the criminal record of a material witness, Crown counsel should so advise the defence immediately.

g. Records of Young Persons (Part VI of the Youth Criminal Justice Act)

Absent authorization under *Part VI* of the *YCJA*, access to, disclosure of[33], or publication of[34], a record[35] or information that identifies a young person as having been dealt with under the *Juvenile Delinquents Act*, YOA or *YCJA*, is prohibited by ss. 110, 118, 129, and 138 of the *YCJA*[36].

Crown counsel are authorized to access records of a Youth Justice Court, Review Board, and other Court records, police records and government records pursuant to the terms of s. 119(1)(c) of the *YCJA*, within the access periods set out in s. 119(2). However, subsequent disclosure of this information is prohibited by s. 129 unless authorized by the *YCJA*.

If the young person is convicted of an offence, committed when he or she is an adult while the access period to the youth record is open, s. 119(9)(b) provides that the youth record shall be dealt with as an adult record.

Crown counsel are permitted by s. 125(2)(a) to disclose information contained in a youth record kept under s. 114 and s. 115 to a person who is a co-accused with the young person, provided that the access periods in s. 119(2) have not expired.

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[32] On the issue of mental illness affecting competency, see *R. v. Hawke* (1975), 7 O.R. (2d) 145 (C.A.).
[33] "Disclosure" is defined as "the communication of information other than by way of publication" in s. *2, YCJA.*
[34] "Publication" is defined in s. 2, *YCJA.*
[35] "Record" is defined in s. 2, *YCJA.*
[36] Part VI of the *YCJA* (Publication, Records and Information) applies to *JDA* and *YOA* records by virtue of s. 163 of the *YCJA*. Privacy interests of young persons dealt with under the *JDA, YOA* or *YCJA* are protected by the *YCJA.*

Crown counsel are permitted by s. 125(2)(b) to disclose to an accused information that identifies a witness as a young person who has been dealt with under the *YCJA*. Crown counsel may disclose a youth record to an accused or his/her counsel pursuant to s. 119(1)(q), provided an affidavit is sworn to the effect that the record is necessary to make full answer and defence and provided the access period set out in s. 119(2) has not expired. If the access period has not expired but Crown counsel is not satisfied that the record is necessary to make full answer and defence, then defence counsel must make an application for access to the record to the youth justice court pursuant to s. 119(1)(s) of the *YCJA*. Crown counsel should not withhold a youth record in these circumstances if the record is relevant to full answer and defence. If the access period under s. 119(2) has expired then defence counsel must bring an application for access to the record to the youth justice court pursuant to s. 123.[37]

Absent a court order, Crown counsel are normally not authorized to access a youth record outside of the access periods. However, notwithstanding the restrictions of the *YCJA*, should such information come to the attention of Crown counsel, he or she should contact the Criminal Law Policy Branch for further guidance.

Where defence counsel is applying for an order permitting access to a record that has not resulted in a finding of guilt, acquittal, verdict of not criminally responsible, extrajudicial sanction, dismissal, withdrawal or stay of proceedings, Crown counsel should thoroughly review ss. 114 to 129 of the *YCJA* as those records may be subject to other access and disclosure restrictions.

For more detailed advice, reference should be made to the memoranda on the Youth Criminal Justice Act.

h. Police Notes, Occurrence Reports and Records

Defence counsel should be provided with copies of, or be given an appropriate opportunity to inspect, police notes, occurrence reports and supplementary reports, including allegations/findings of police misconduct, relating to the investigation of the offence.

Any requests for such records outside of the parameters of the investigation of the offence should be dealt with according to the Supreme Court's judgment in *McNeil*. (See above discussion in section 2(b)(vi) "Police Misconduct Records").

In the case of a defence request for any existing occurrence reports on witnesses (other than police witnesses), Crown counsel should consider whether there are privacy interests associated with this information and/or whether the information is clearly irrelevant and ought not to be disclosed.

[37] "Youth Justice Court" is defined in sections 2 and 13 and is, for the most part, the Ontario Court of Justice, unless the young person elects to be tried by a Superior Court Judge, with or without a jury, in which case the Superior Court is deemed to be a youth justice court. See *S.L. v. N.B.*, [2005] O.J. No. 1411 (Ont. C.A.).

If Crown counsel decides not to disclose witness occurrence reports, Crown counsel should ensure that defence counsel is advised that the material exists and should explain the reason for withholding disclosure. Defence counsel may then decide whether to apply for a court order that the material be produced.

i. Expert Evidence and Scientific Reports

Medical and laboratory reports relating to the investigation of the offence, as well as the reports of forensic scientists consulted by the police during their investigation or retained by the Crown to give evidence, must be disclosed to the defence.

The defence is entitled to disclosure of any requested underlying materials contained in the case file. In those exceptional cases where the volume of material requested or other considerations make it impracticable to provide disclosure copies, Crown counsel should assist in making satisfactory arrangements for defence to access the material.

With respect to any expert opinion that may be expected to form part of the Crown's case, reference should be made to the notice and disclosure requirements in s. 657.3 of the *Criminal Code*.

Reference should be made to the Crown policies and practice memoranda regarding physical scientific evidence, where applicable.

j. Documents and Photographs

Subject to s. 6 in this PM, "Safeguarding Disclosure", the defence should be provided with copies of all relevant documents, photographs and other analogous material that was obtained during the investigation and is reasonably capable of reproduction.

All feasible technological alternatives should be explored to facilitate disclosure of this material to the defence. For large or complex cases, the provision of electronic disclosure may meet the legal disclosure requirements (see s. 8 of this PM, "Form of Disclosure").

k. Search Warrants

Subject to the terms of any sealing orders, Crown counsel should provide the defence with a copy of all search warrants relating to the matter, a list of any items seized pursuant to such warrants, copies of any search warrant returns, and ensuing court orders. In addition, Crown counsel should provide the defence with access to or a copy of the information used to obtain the search warrant, subject to the existence of any sealing order.

The provision of disclosure with respect to search warrants is subject to Crown counsel's discretion to delay disclosure or withhold details in accordance with the limitations on the obligation to disclose set out in s. 2(b) of this PM to protect a legal privilege, including protecting the identity of a confidential informer.

Where any of the disclosure material is subject to a sealing order, Crown counsel should notify defence of the existence of the sealing order and the need to bring an application for an order to unseal the material before it can be disclosed.

Crown counsel should consider whether it would be appropriate to consent to an application to have the sealing order terminated or varied pursuant to s. 487.3(4) of the *Criminal Code* to allow for the provision of disclosure. In certain cases, it may be appropriate for Crown counsel to actually bring the application pursuant to s. 487.3(4).

When consenting to the termination or variation of the sealing order to permit the disclosure of material to the defence, Crown counsel should carefully review the material to ensure that no privileged material is released to the defence.

l. Wiretaps

Disclosure of any documents relating to an application under *Part VI* of the *Criminal Code* must only be made in accordance with the provisions of s. 187 of the *Criminal Code*.

Reference should be made, in particular, to s. 189(5), which requires the party intending to adduce the contents of a private communication to provide reasonable notice of such an intention, along with a transcript of the private communication and a statement respecting the time, place and date of the private communication and the parties thereto, if known.

***m.* The Domestic Violence Supplementary Report/Checklist of Risk Factors (DVSR)**

Police complete the DVSR for domestic violence cases. Crown counsel should disclose the DVSR after vetting out information related to victim safety and privacy. (e.g. victim's contact information, address, safety plan etc.)

4. Establishing Local Protocols for Disclosure

The Crown Attorney of each jurisdiction must establish a local protocol for disclosure that meets the criteria set out in this Practice Memorandum.

The local disclosure protocol should set out the particulars of Crown and police responsibilities regarding the vetting of personal information from disclosure.

The Crown Attorney shall ensure that the local disclosure protocol includes a system to track, in writing, what disclosure was initially made, to whom it was made, and when it was made. The Crown Attorney shall also ensure that this local protocol includes a system for responding to further disclosure requests in a timely manner, as well as tracking such requests and the timeliness of responses. In addition, the local protocol must include a system to ensure that appropriate police records are being received from the police (as per *McNeil*, see above).

The local disclosure protocol for each jurisdiction should address any particular issues in that jurisdiction with respect to communication between trial and appellate counsel on disclosure issues.

The Crown Attorney for each jurisdiction shall ensure that the notice respecting the confidentiality and proper use of the Crown brief set out in Attachment #1 to this PM is appended to each disclosure package when Crown disclosure is handed out. Additional clauses may be added to this Notice if required, at the discretion of the Crown Attorney.

The local disclosure protocol should also address the means by which the obligations to advise victims of the requirements of disclosure will be fulfilled, and the specific responsibilities of Crown counsel, police or VWAP to ensure victims are aware of the disclosure process and issues surrounding third party records.

Reference should be made in this regard to Crown policies and practice memoranda regarding victims of crime, where applicable.

5. Timing of Disclosure

a. "First Appearance" Disclosure

Given the importance of the Crown's disclosure obligations and the benefits of early disclosure to the administration of justice, disclosure should be provided to the accused as soon as possible.

When the accused is out of custody, the Crown should give substantial disclosure to the accused or counsel appearing for the accused in the majority of cases by the first appearance in the Ontario Court of Justice. A formal request by an accused or his or her counsel should not be a prerequisite for the provision of disclosure.

b. Disclosure for Purposes of the Bail Hearing

When an accused is not released upon arrest, the police must prepare a bail brief that contains some disclosure material. In all cases, a copy of the synopsis and the accused's criminal record should be made available to duty counsel or defence counsel prior to the bail hearing, so that defence counsel can review these documents with the accused in advance of the bail hearing.

Subject to the provisions of this memorandum, disclosure that is currently available should be disclosed upon request to duty counsel or to defence counsel, where the defence requires this information for the purpose of conducting a bail hearing, even though the full disclosure package may not be ready. This may necessitate a short delay in the provision of disclosure to ensure the material is properly vetted and reviewed. With regard to such

requests, reference should be made to s. 7 of this PM, "Defence Responsibilities with Respect to Disclosure".

c. Limited Discretion to Delay Disclosure

While the law provides for delayed disclosure in limited circumstances[38], such delays should be rare. Disclosure should never be delayed for purely tactical reasons**.** Crown counsel should only delay providing disclosure after consultation with their Crown Attorney.

When disclosure has been delayed, Crown counsel must disclose the information as soon as the justification for the delay no longer exists. The fact that some disclosure is being delayed should be communicated to the defence when this can be done without jeopardizing the reason for the delay.

Crown counsel should not engage in resolution discussions or expect the defence to make significant decisions about the conduct of the defence when delayed disclosure is outstanding. **Crown counsel must not withhold or delay disclosure of information for the purpose of cross-examining on it, or for the purpose of calling it in reply. Delaying disclosure to prevent an accused from "tailoring" the defence case is not a proper exercise of Crown counsel's discretion.**

If Crown counsel receives new information during the course of cross-examination, the Crown must disclose the information to defence counsel immediately even though the defence is prohibited from speaking to his/her client during the cross-examination.

d. Continuous Obligation to Disclose

The obligation to disclose relevant and non-privileged information in the Crown's possession or control is a continuing one. Subject to the Crown's discretion to delay disclosure in certain circumstances, this ongoing obligation requires that disclosure be made as additional information becomes available and be completed as soon as is reasonably possible.[39] The obligation to disclose continues through the appeal process.[40]
If, during the trial, it becomes reasonably foreseeable that particular evidence in the possession of the Crown may be relevant, whether by virtue of the unfolding narrative of events from Crown witnesses or by virtue of cross-examination or any other indication by defence counsel, that evidence should be disclosed as soon as reasonably possible. Such evidence should not be held back and only disclosed prior to an attempt to call it in reply.

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[38] *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 (Ont. C.A.).
[39] *R. v. Stinchcombe, supra; R. v. Girimonte, supra,* at 42.
[40] *R. v. Trotta, supra,* at para. 22.

e. No Disclosure if Charge is Withdrawn

If a charge is withdrawn or stayed prior to full disclosure having been made, the Crown has no legal obligation to make any further disclosure with respect to that charge. Access to further material or information would have to be obtained pursuant to an appropriate request that would be governed by the *Freedom of Information and Protection of Privacy Act.*

f. Continuing Obligation to Disclose Throughout the Appellate Process

While an appeal is "in the system", Crown counsel continue to have legal obligations to disclose relevant material or information as soon as it becomes apparent that relevant material or information is in the possession of the Crown that had not previously been disclosed.[41] This ongoing disclosure obligation is not dependant upon further defence requests for disclosure.

After an appeal has been filed, Crown counsel assigned to the appeal has the primary obligation to make disclosure until the disposition of the appeal. The appellate Crown should consult with the trial Crown and should have access to the entire Crown brief. Unique issues may arise when fresh evidence is discovered or raised on appeal.

Appellate Crown counsel should consult with the police, where appropriate, to ensure that all information in the possession of the police relating to the fresh evidence is disclosed. The Crown counsel who conducted the trial should be apprised of the nature of the fresh evidence and of any investigation conducted into that fresh evidence. The trial Crown should advise the appellate Crown of any disclosure issues that, in his or her view, arise out of the fresh evidence process.

If a new trial is ordered, the new trial Crown has the obligation to provide appropriate further disclosure, or to provide the initial disclosure material to any new defence counsel retained, as necessary. The appellate Crown should forward to the trial crown all materials relating to any fresh evidence or information that may have arisen during the appeal process. In an accompanying memorandum, the appellate crown should indicate whether any portions of the material have already been disclosed, along with any new disclosure issues that may have arisen as a result of the appellate proceedings.

Reference should be made to Crown policies and practice memoranda regarding appeals, where applicable.

g. Continuing Obligation to Disclose Following the Conclusion of all Proceedings

Following conviction and after all appeals have been exhausted or the time to file an appeal has expired, Crown counsel continue to have an obligation to disclose material or information that comes to the attention of Crown counsel which is exculpatory, which may raise a doubt as to the accused's guilt, or which may have assisted the accused in his or her

[41] *R. v. Trotta*, *supra,* at para. 25.

defence**.** Such information may be of assistance in an application to the Justice Minister pursuant to s. 696.1 of the *Criminal Code*.

6. Safeguarding Disclosure

Crown and defence counsel have professional obligations to act responsibly with respect to all disclosure material and to ensure that copies of disclosure material are not improperly disseminated.[42]

a. Notice Respecting Confidentiality and Proper Use of Crown Disclosure

Disclosure materials that are provided to the accused to enable the preparation of full answer and defence to criminal charges must not be used for an extraneous or ulterior purpose[43]. **Crown counsel must ensure that the "Notice Respecting Confidentiality and Proper Use of Crown Disclosure", set out in Attachment #1, is provided to all accused at the time disclosure is given.** Such notice is particularly important in cases where disclosure is being given to accused persons who are *not* represented by counsel. Additional clauses may be added as necessary at the discretion of the Crown Attorney.

In addition to ensuring that the notice respecting confidentiality, as set out in Attachment #1 to this PM, is appended to all disclosure, Crown counsel should consider additional safeguards when an unrepresented accused is involved. Crown counsel should consider whether it would be appropriate to seek an order from the Court prohibiting the accused from copying or disseminating disclosure materials, and placing other appropriate restrictions on the use of disclosure materials, before providing such materials to an unrepresented accused. In some situations, rather than providing the accused with the materials in question, it may be appropriate to provide the accused with an opportunity to view the evidence in the Crown's office or police station. Special care should be taken in all cases involving "sensitive materials", as discussed below.

b. Definition of Sensitive Materials

Sensitive materials include but are not limited to:

- Any videotape, audiotape, photograph, or computer generated image or material depicting or recounting a sexual crime;

- Any videotape, audiotape, photograph, or computer generated image or material depicting or recounting a crime of child abuse;

- Any videotape, audiotape, photograph, or computer generated image or material depicting or recounting a crime involving a vulnerable victim/witness;

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[42] *Martin Report, supra*, at 179-184.
[43] *Hedley v. Air Canada*, [1994] O.J. No. 287 (Gen. Div.) at paras. 33-34; *P (D.) v. Wagg*, [2004] O.J. No. 2053 (C.A.)

- Any videotape, audiotape, photograph, or computer generated image or material that shows the deceased person[44]; or

- Police misconduct records that are not related to the investigation of the offence for which the accused was charged (contents of the "*McNeil* package"). Where *McNeil* records are provided they should be accompanied by a cover letter outlining limitations on their use and thus, will not require an undertaking to be signed by defence counsel. However, part (e) "Disclosure of Sensitive Materials When Accused Not Represented by Counsel" does apply to these records.

c. Special Considerations Relating to the Disclosure of Sensitive Materials

The subject matter of some material engages such extreme personal privacy interests and is so vulnerable to misuse that such material merits special consideration and protection in the disclosure process. For example, the risk of harm from the improper use of sensitive disclosure materials, such as videotapes or photographs that depict or describe sexual and/or child abuse, is so great that there is an important public policy interest in ensuring that these materials are not improperly disseminated or misused during or after criminal proceedings.

Videotaped statements of victims of sexual offences or physical abuse depict these victims in a particularly vulnerable state. The dissemination of this highly sensitive material can have a devastating effect on the privacy and security of victims and witnesses.

Steps should be taken to prevent the improper dissemination of such material. Failure to protect a witness's privacy in this regard can cause the victim to feel re-victimized and can have a chilling effect on potential witnesses coming forward to provide information. This chilling effect undermines the effective operation of the administration of justice.[45]

In addition to privacy or security concerns, some of this material may be contraband, and possession of it, or in some cases even accessing it, may constitute a criminal offence, absent a defence as outlined in the *Criminal Code*.

In all cases involving sensitive material, a notice should be provided to the accused and/or defence counsel.

Crown counsel should be particularly mindful of the possibility that material in the Crown Brief or the police investigation file might be sought pursuant to civil proceedings, and could be improperly disseminated once obtained. *Reference should also be made to Crown policies and memoranda relating to applications for access to Crown Briefs and police files in civil proceedings.*

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[44] *Martin Report, supra,* at 235.
[45] *Martin Report, supra,* at 180 and 235.

d. Disclosure of Sensitive Materials When Accused Represented by Counsel

i. Providing a Copy of the Sensitive Material

When Crown counsel is confident that the privacy concerns of the victim may be met by an undertaking from defence counsel, a copy of the sensitive material may be provided to defence counsel upon completion of such an undertaking.

The Court has the power to require defence counsel to give an express undertaking with respect to disclosure material before receiving that disclosure material.[46] Defence counsel may be required to undertake:

- That the disclosure be used only for the purpose of making full answer and defence in the within prosecution;

- That the disclosure will be retained by counsel in his/her possession and control at his/her place of business or residence, and not released to anyone other than an expert in accordance with specified conditions;

- That no one, including the accused, have possession or control of the disclosure for any purpose, except counsel and any expert hired by counsel;

- That no one be permitted to view the disclosure except the accused, counsel, any expert hired by counsel and persons acting under the supervision of counsel;

- That any disclosure provided to a defence expert be kept secure within that expert's possession and control, and that any material provided be returned to defence counsel upon completion of the expert's examination;

- That the disclosure will not be copied by anyone for any purpose;

- That the disclosure will be returned to the Crown Attorney's Office immediately upon conclusion of counsel's retainer or upon the conclusion of the proceedings, whichever occurs first;

- That if, for any reason, defence counsel is unable to comply with the conditions in the undertaking, counsel shall obtain the consent in writing of the Crown or a court order to deviate from them.

ii. Providing an Opportunity to View the Sensitive Material

After consultation with his/her Crown Attorney, Crown counsel may be justified in deciding to provide counsel (and the accused) with a reasonable opportunity, in

[46] *R. v. Blencowe*, (1997), 118 C.C.C. (3d) 529 (Ont. Gen. Div.); *R. v. Schertzer*, [2004] O.J. No. 5879 (S.C.J.).

private, to view and listen to the original or a copy of the sensitive material, rather than providing the material in question, for example:

- Where Crown counsel is of the opinion that privacy concerns cannot be met by defence counsel providing an undertaking;[47]

- Where defence counsel refuses to sign an undertaking; or

- Where Crown counsel has reasonable grounds to believe that the undertaking given by defence counsel will not be honoured.[48]

e. Disclosure of Sensitive Materials When Accused Not Represented by Counsel

The risk of harm from the improper use or dissemination of sensitive disclosure materials is of particular concern where the accused is unrepresented.[49] Crown counsel should not disseminate sensitive material directly to an unrepresented accused or to a non-lawyer representing an accused, but rather should provide the accused with an opportunity to view the evidence in the Crown's office or police station.

If there is an evidentiary basis to conclude that there is a reasonable possibility that the right of the accused to make full answer and defence would be impaired by this method of providing disclosure, Crown counsel should seek an order from the Court prohibiting the accused from copying or disseminating disclosure materials, and placing other appropriate restrictions on the use of disclosure materials, before providing such materials to an unrepresented accused.[50]

f. Disclosure of Illegal/Contraband Materials

Police should retain any illegal/contraband materials and Crown counsel should invite defence counsel to attend to view them. The viewing should be offered in a secure, private location that is available to defence counsel at his/her convenience. Where the material is in electronic form, Crown counsel should explain about the potential problem and liability of residual/cached images being left on counsel's hard drive if a disc is viewed on his/her system.

Where defence counsel take the position that they need to be provided with a copy of the illegal material, Crown counsel should consider whether it is reasonably possible to make a copy. Where Crown counsel is of the view that a copy can be provided the materials should only be disclosed subject to an order of the court with conditions sufficient to satisfy concerns that 1) the possession or accessing of the material by defence counsel would not in itself constitute a criminal offence - for example where the material is child pornography conditions should be tailored to restrict the possession or accessing to acts which have a "legitimate purpose connected to the administration of justice" that "[do] not

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[47] *R. v. Blencowe, supra.*
[48] *R. v. D.K.*, [2003] O.J. No. 641 (O.C.J.) at para. 5.
[49] *R. v. Papageorgiou*,[2003] O.J. No. 2282 (C.A.) at paras. 10, 11, 14, 16.
[50] *R. v. Papageorgiou, supra.*

pose an undue risk of harm to children" and 2) the privacy and sexual dignity interests of any children in the materials are adequately protected.

Where the accused is not represented by counsel no access should be permitted to such materials.

Reference should be made to Crown policies and practice memoranda regarding victims of crime, sexual offences and child abuse, where applicable.

7. Defence Responsibilities With Respect to the Disclosure Process

Defence counsel has an obligation to act responsibly in the course of the disclosure process.[51] Crown counsel are strongly encouraged to work with defence counsel to narrow and define the issues to determine whether the information sought by defence counsel is relevant, and to ensure that any appropriate further disclosure is provided in a timely manner.

Dialogue between Crown counsel and defence counsel regarding disclosure issues prior to setting a date for preliminary inquiry or trial is strongly encouraged. In keeping with the Law Society of Upper Canada's *Rules of Professional Conduct*, and as officers of the court, Crown and defence counsel should be able to resolve most disputes with respect to disclosure, and resort to court applications should be rare.

Crown counsel should address disclosure issues at the judicial pre-trial in order to resolve them as soon as possible. If disclosure issues cannot be resolved, and it appears that pre-trial motions will be required, Crown counsel should request that a trial judge be appointed early in order to avoid a request for an adjournment of the trial date. Counsel should ask for time to litigate the disclosure issue before the trial date.

a. Defence Requests for Further Disclosure

Crown counsel should carefully consider defence requests for further disclosure. In some cases, it may be appropriate to ask the defence to particularize the information sought and to set out the relevance of this information.

When reviewing further disclosure requests and underlying reasons, Crown counsel should be cognizant of the potential for "tunnel vision"[52], and should err on the side of making disclosure where there is no legal privilege or protection attached to the requested material.

b. Defence Requests for Further Police Investigation

Crown counsel may receive defence requests for additional police investigation. Additional appropriate investigation may assist in resolving a case at an earlier stage, and may help to prevent tunnel vision on the part of Crown counsel or the police.

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[51] *Martin Report*, at 175–184.
[52] *Kaufman Report, supra,* Recommendation 74, at 1134.

If the request seems reasonable, and may produce material that is arguably relevant to the Crown's case, or to a defence that could be raised, Crown counsel should convey the request to the police.

c. Defence Access to Police Investigative Files

Counsel on behalf of the accused, or an unrepresented accused, should be permitted to inspect the investigating agency's file in relation to the offence upon request, subject to the judicially reviewable discretion of Crown counsel to withhold material that is clearly irrelevant, privileged or protected (as discussed above).

Where possible, the defence should be asked to particularize their request to assist Crown counsel in determining the relevance of any undisclosed information in the possession of the investigating agency. It is expected that most requests for access to such material can be arranged by mutual agreement between Crown counsel and defence counsel, in consultation with the investigating agency, and that resort to court applications for such access will be rare.

When Crown counsel does not permit inspection of the investigating agency's file, or when disclosure of certain information from the investigative file is withheld, Crown counsel should nonetheless advise the defence of the existence and nature of the undisclosed information or material without disclosing its contents. Crown counsel should be frank whenever possible with respect to what is being withheld, and why. It should be extremely rare for Crown counsel to decide not to advise defence counsel of the existence and general description of material in the possession of an investigating agency. Such scenarios should be discussed with the local Crown Attorney or his or her designate.

Crown counsel may provide the defence with access to copies of particular items from the investigation file whenever necessary to preserve the integrity of the originals. When arranging to give the defence access to the investigating agency's file, Crown counsel should consult with the investigating agency and take any other reasonable steps necessary to protect:

- The safety, security or freedom from harassment of people who have provided information to the authorities (including addresses and telephone numbers, as discussed in s. 2(b) of this PM, " Limitations on the Obligation to Disclose");

- Any ongoing police investigations or investigative techniques; or

- Any other legal privilege or protection that may apply to the material.

d. Defence Inspection of Seized Items and Retention of Evidence for Replicate Testing

Defence counsel should be given an appropriate opportunity to inspect any relevant items seized or acquired during the investigation of the offence that remain in the possession of

the police, whether or not Crown counsel intends to introduce them as exhibits in court, subject to certain restrictions required to preserve the integrity of the items.

Reference should be made to Crown policies and practice memoranda regarding physical scientific evidence.

8. Form of Disclosure

The accused does not have the right to receive original documents. Subject to the legal duty to disclose relevant information, Crown counsel may control the form of disclosure, including:

- Whether, or how much of, the disclosure is provided in an electronic format. Electronic disclosure should be in a format that is readily accessible using widely available technology or software. In many cases, the electronic disclosure may well be superior to "hard copies" because of the ability to electronically search this information in an efficient manner.[53] Crown counsel are encouraged to consult with the Criminal Law Division Director of Law and Technology where any issues are raised relating to the adequacy of electronic disclosure.

- Providing copies of the material, vetted to remove personal identifiers where appropriate (see s. 2(b) of this PM, "Limitations on the Obligation to Disclose")

- Requiring counsel to sign an undertaking in order to receive sensitive disclosure material (see s. 6 of this PM, "Safeguarding Disclosure");

- Providing an accused with the opportunity to view sensitive materials in private where the Crown has reason to believe that the witness's privacy interests would not be adequately protected by an undertaking given by defence counsel or where an accused is unrepresented;

- Providing the accused with a reasonable opportunity to view original material where there is an issue with respect to the original materials;

- Providing the accused with any relevant new information where new information arises in the course of Crown preparation, but not a copy of Crown counsel's notes. (See s. 2(b) of this PM, "Limitations on the Obligation to Disclose", and specifically "Crown 'Work Product'" and "Legal Opinions Provided to Police".)

9. Obligation to Preserve Information

The Crown's duty to disclose gives rise to an obligation on the Crown and the police to take reasonable steps to preserve relevant evidence from damage, loss or destruction.[54]

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[53] *R. v. Blencowe, supra*, at 542*; R. v. Hallstone Products Ltd* (1999), 46 O.R. (3d) 382 (S.C.J.); *R. v. Jarvie* [2003] O.J. No. 5570 (S.C.J.) at para. 37.

[54] *R. v. La* (1997), 116 C.C.C.(3d) 97 (S.C.C.) at paras. 16-22; *R. v. Bero*, [2000] O.J. No. 4199 (C.A.).

10. Provincial Offences Prosecutions

Crown counsel or provincial prosecutors should apply the guidelines in this memorandum with such modifications as may be necessary, depending on the nature of the provincial prosecution, in order to provide full disclosure to defendants according to law. Crown counsel or provincial prosecutors should consider requesting an appeal of any Provincial Offences Court disclosure ruling that may have a wide systemic impact, and should consult the Criminal Law Policy Branch or the Crown Law Office – Criminal about such appeals.

Attachments: Attachment #1 - Notice Respecting Confidentiality & Proper Use of Crown Disclosure

Contact Person: Criminal Law Policy Branch
416 314 2955

Signed by: John D. Ayre
Assistant Deputy Attorney General
Criminal Law Division

Practice Memoranda are not considered to be confidential and may be given to defence counsel or other interested persons, upon request.

MANDATORY LANGUAGE

Disclosure is a legal duty, and is not a matter of prosecutorial discretion. Crown counsel must make disclosure according to law.

Where Crown counsel proposes to provide, withhold, or restrict disclosure for reasons that do not accord with this Practice Memorandum, Counsel must have the approval of his/her Crown Attorney and the Director of Crown Operations for his/her region. Crown counsel must exercise the discretionary powers associated with these aspects of disclosure honestly and in good faith.

Crown counsel must continually assess relevance both in relation to the charge itself, and to the defences that are reasonably possible, or that may become reasonably possible. The duty to disclose extends to any material where there is a reasonable possibility that the material would be useful to the defence in making full answer and defence.

Crowns must therefore guard against approaching a case with "tunnel vision" where disclosure issues are concerned.

Where Crown counsel proposes to provide, withhold or delay disclosure for reasons that are not recognized by current case law or statute, he/she must have the approval of his/her Crown Attorney and the Director of Crown Operations.

Crown counsel have a duty, subject to review by the court, to withhold disclosure where there is reasonable cause to believe that withholding disclosure is necessary to:

- **Preserve any other legally recognized privilege, including the identity of a confidential informant; or**
- **Comply with any court orders or statutory prohibitions.**

Crown counsel must disclose any information that does not violate this privilege, court order or statutory prohibition.

Crown counsel must review these *McNeil* materials but recognize that the standard of relevance at this stage is the *Stinchcombe* standard ("likely relevant" or to state it in the negative "not clearly irrelevant").

Medical and laboratory reports relating to the investigation of the offence, as well as the reports of forensic scientists consulted by the police during their investigation or retained by the Crown to give evidence, must be disclosed to the defence.

Disclosure of any documents relating to an application under *Part VI* of the *Criminal Code* must only be made in accordance with the provisions of s. 187 of the *Criminal Code*.

The Crown Attorney of each jurisdiction must establish a local protocol for disclosure that meets the criteria set out in this Practice Memorandum.

The Crown Attorney shall ensure that the local disclosure protocol includes a system to track, in writing, what disclosure was initially made, to whom it was made, and when it was made. The Crown Attorney shall also ensure that this local protocol includes a system for responding to further disclosure requests in a timely manner, as well as tracking such requests and the timeliness of responses. In addition, the local protocol must include a system to ensure that appropriate police records are being received from the police (as per *McNeil*, see above).

Crown counsel must ensure that the "Notice Respecting Confidentiality and Proper Use of Crown Disclosure", set out in Attachment #1, is provided to all accused at the time disclosure is given.

When disclosure has been delayed, Crown counsel must disclose the information as soon as the justification for the delay no longer exists.

Crown counsel must not withhold or delay disclosure of information for the purpose of cross-examining on it, or for the purpose of calling it in reply. Delaying disclosure to prevent an accused from "tailoring" the defence case is not a proper exercise of Crown counsel's discretion.

If Crown counsel receives new information during the course of cross-examination, the Crown must disclose the information to defence counsel immediately even though the defence is prohibited from speaking to his/her client during the cross-examination.

Crown counsel must ensure that the "Notice Respecting Confidentiality and Proper Use of Crown Disclosure", set out in Attachment #1, is provided to all accused at the time disclosure is given.