Disclosure Law

Part 2: Disclosure of Electronic Material in Rape and Domestic Violence Cases

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Disclosure of Electronic Material in Rape and Domestic Violence Cases

Huge Wealth of Guides & Reviews of the Disclosure Process – Generally an Exercise in Platitudes

CPIA Code 2015, 2020

AG Guidelines 2013 (Blackstones app.4) 2020

CPS Disclosure Manual 2021

Judicial Disclosure Protocol 2013 (Blackstones app.4)

Protocol and Good Practice Model on Disclosure of Information in Cases of Alleged Child Abuse 2013

CPS Disclosure Guidelines on Communications Evidence 2018

CPS Disclosure Guideline - A guide to "reasonable lines of enquiry" and communications evidence 2018

CPS Disclosure Guideline - Disclosure of Material to Third Parties 2021

Joint Operational Instructions for the Disclosure of Unused Material 2004

The National Disclosure Standards 2018

Protocol between the Police Service and the CPS on dealing with 3rd Party Material

Disclosure of Electronic Material in Rape and Domestic Violence Cases

1. **When Are the Police Obliged to Seek to Examine a Complainant's Digital Devices and Records?**
2. **Are Complainants Obliged to Provide Them?**
3. **How Should Police Approach the Inspection & Disclosure of Large Data Sets?**
4. **What Options/Remedies do the Defence have to get Disclosure of Complainant's Devices?**

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1. When Are Police obliged to Seek to Examine a Complainant's Digital Devices and Records?

- Only if it would be a reasonable line of inquiry

The Code of Practice [3.4-5] requires that: "…*In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner*."

Relevant material is defined at [2.1] as: "…*it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case*".

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R v Bater-James **[2020] EWCA Crim 790, [2021] 1 W.L.R. 725 [68, 71, 78]**

"*There is no obligation on investigators to seek to review a witness's digital material without good cause. The request to inspect digital material, in every case, must have a proper basis, usually that there are reasonable grounds to believe that it may reveal material relevant to the investigation or the likely issues at trial ("a reasonable line of inquiry")…It is not a "reasonable" line of inquiry if the investigator pursues fanciful or inherently speculative researches. Instead, there needs to be an identifiable basis that justifies taking steps in this context. This is not dependent on formal evidence in the sense of witness statements or documentary material, but there must be a reasonable foundation for the inquiry…<u>There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded</u>, any more than there is a presumption that investigators will attempt to look through material held in hard copy. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation.*"

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a. It will be Fact & Case Specific

R v McPartland [2019] 4 W.L.R. 153 [44]: "*It was suggested on behalf of the defence in the course of argument that it is now entirely usual practice in cases involving allegations of sexual assault, that the mobile phone of a complainant should be examined. This is not and should not be thought to be correct. <u>What is a reasonable line of inquiry depends on the facts of each case</u>.*"

Guide to "Reasonable Lines of Inquiry" and Communications Evidence (July 2018) [13]: "*The examination of mobile devices belonging to the complainant is not a requirement as a matter of course in every case. There will be cases where there is no requirement for the police to take the media devices of a complainant or others at all, and thus no requirement for even a level 1 examination to be undertaken. <u>Examples of this would include sexual offences committed opportunistically against strangers, or historic allegations where there is considered to be no prospect that the complainant's phone will retain any material relevant to the period in which the conduct is said to have occurred</u> and/or the complainant through age or other circumstances did not have access to a phone at that time.*"

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2018 CPS Guidance on Communications Evidence [3]

Police are advised when considering what amounts to a reasonable line of enquiry to *inter alia*:

- Consider asking the suspect or/and complainant whether there might be communication material which may have a bearing on the case.
- It is necessary carefully to consider the facts of a particular case, the issues raised and any potential defence in order to decide what amounts to a reasonable line of enquiry.
- In reaching such a decision, prosecutors are reminded that the whole of a relevant download falls to be considered i.e. all forms of message communication [even if deleted] and photographs / videos if stored. Equally the investigation should not be limited to messages between the complainant and the suspect only as communications between either of them and others may have an impact on the case, for example, when reference is made by either to the events which are the subject of the allegations.

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b. Duty to Investigate is a Continuing Duty Throughout

Disclosure Guidelines on Communications Evidence [8]
"*Disclosure is an ongoing process and the impact of communication evidence must be reconsidered as appropriate. Most particularly, after receipt of the Defence Statement the procedures in Chapter 15 of the Disclosure Manual should be followed. This requires the prosecutor to consider the Defence Statement and identify the keys issues. It then requires the disclosure officer to re- examine all communication material to ascertain if any of it meets the disclosure test and, if so, to bring it immediately to the attention of the prosecutor*."

A Guide to "Reasonable Line of Enquiry" and Communications Evidence [15]
"*It would be prudent to retain a complainant's phone until there has been an opportunity to provide the accused with an opportunity to comment on the allegation, either through an interview or through liaison with defence representatives. This precaution itself will be fact sensitive, in that there may be cases where the delay to the return of a phone to a complainant would be disproportionate, but that consideration must be judged cautiously, with the benefit of the doubt resolved in favour of retaining the phone until an informed decision as to the level of necessary phone examination can be made."*

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c. Should Only Examine Complainant's Phone if Necessary

R v Bater-James (ibid) [79]: "*the investigator will need to consider whether, depending on the apparent live issues, it may be possible to obtain all the relevant communications from the suspect's own mobile telephone or other devices without the need to inspect or download digital items held by the complainant. The investigator, furthermore, can potentially review the relevant social media posts of the complainant without looking at the individual's mobile telephone, provided he or she is willing to provide a password.*"

d. Examining Should be Minimum Required for Line of Inquiry

R v Bater-James (ibid) [80]: "*an important question is whether a review of a discrete part of the digital record will suffice. Indeed, it may be unnecessary to ask the witness to surrender the device or to facilitate a digital download. Instead, putting focused questions to the witness together with viewing any relevant digitally recorded information, and taking screenshots or making some other suitable record, may meet the needs of the case.*"

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3 levels of data extraction and examination of mobile devices:

i) Level 1 – Configured Logical Extraction - Digital Forensics Kiosks

Provides the live data that is readily available on device, probably all of the data you could see if you were able to turn on the device and browse through it. A logical extraction will extract the live data that is supported by the extraction software. This could vary by handset, operating system and types of applications. It may not extract all of the data present and will not usually extract deleted material.

ii) Level 2 – Logical & Physical Extraction - Digital Forensics Hubs or Laboratories or Forensic Service Providers

Recovers a bit for bit copy of the data held on the memory chip of the device. Can extract deleted data, although again capabilities vary depending on the nature of the device, operating system, types of applications and whether they are supported by the extraction software.

iii) Level 3 – Specialist Extractions & Examinations - Central Digital Forensics Laboratories or Forensic Service Providers

Usually expert and bespoke methods to tackle complex issues or damaged devices. Examples include specialist evaluation and interpretation of digital data.

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A Guide to "Reasonable Line of Enquiry" and Communications Evidence [14, 16]

"There are equally cases where a level 1 examination is sufficient as a first step. Examples include cases where the parties are known to each other, particularly for a short period, but where there is no particular reason to consider that their communications will be of importance but there is the possibility that they will be of relevance. In such circumstances, the use of a level 1 examination is a reasonable first examination stage, always with the caveat that if either that level 1 examination reveals the need for a more detailed examination, or other material generated by the investigation, for example from an account in interview or via a defence statement from the accused, requires a deeper examination of the content of a device.

There will also be cases where the requirement from the outset is to undertake a level 2 or level 3 examination. These are likely to be required in every case where the offence is committed using electronic means, for example sexual communication with a child or possession of indecent images of children. This will also be the case where, beyond the issue of consent being raised at all by either complainant or accused, the credibility of the complaint or reliability of the complainant is put in issue from the outset and in circumstances that make a detailed examination of the complainant's phone necessary. This is a case by case assessment, but examples would include cases where the account of the complainant or an account provided by an accused either in interview or to others at a stage identifies a need to examine the past history and content of contact between the complainant and accused, or the complainant and an identified third party, and where there it is thought likely to be material of a kind that a level 1 search may not identify relevant to such issues."

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2. Are Complainant's Obliged to Provide Them?

Balancing the right to a fair trial with the right to privacy (Consultation on revisions to AG Guidelines, para.23): "*It is important that victims are not deterred from reporting criminal offences, or from participating in the criminal process. However, the right to a fair trial can mean that, in the course of pursuing lines of inquiry, personal information pertaining to a victim and/or witness may be obtained and disclosed. The balance between protecting the private rights of an individual and securing a fair trial is a complex one, and the Review recognised that clearer guidance was needed to assist with competing statutory duties (including but not limited to the CPIA 1996 and Article 6 and 8 of the European Convention of Human Rights)*".

Judicial Protocol on the Disclosure of Unused Material in Criminal Cases (2013), para 47: "*Victims do not waive . . . their right to privacy under article 8 of the ECHR, by making a complaint against the accused. The court, as a public authority, must ensure that any interference with the right to privacy under article 8 is in accordance with the law, and is necessary in pursuit of a legitimate public Interest.*"

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Court in *R v Bater-James (ibid)* invited complainants to be informed of the following [90-91]:

(i) The defendant does not have a general right to examine the content of a witness's digital device;
(ii) The police will only seek to examine the contents of such devices when to do so is in pursuit of a reasonable line of inquiry;
(iii) The witness is not obliged to co-operate with a police request, but if the witness fails to do so, there is a risk that it will be impossible to pursue the investigation, a witness summons may be issued or any trial resulting from the investigation may be halted;
(iv) The witness's device will only be copied and examined to the extent necessary to pursue the reasonable line of inquiry (if part or all of the device has been copied, frequently examination will be undertaken, at least in the first instance, by focused "search terms"), and otherwise the contents will not be looked at;
(v) Only material which might reasonably be considered capable of undermining the case for the Crown against the accused or of assisting the case for the accused will be disclosed to the defence, and any unnecessary personal details or irrelevant information will be redacted;
(vi) The witness will be consulted as to the regularity and extent of any contact by the investigators regarding the disclosure process; and,
(vii) If the witness declines to provide access they should be warned not to delete material as it may impede a fair investigation.

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If a Complainant Nevertheless Refuses?

R v Bater-James (ibid) [96]: "*An application can be made for a witness summons for the mobile telephone or other device to be produced. The witness in these circumstances will have the opportunity to make representations, to enable the court to assess his or her article 8 rights under the ECHR (see R (B) v Crown Court at Stafford [2007] 1 WLR 1524; see also Crim PR r 17.6). <u>The Crown submits that it would only be in an exceptional case that such an application would be made by the Crown</u>.*"

Witness summons may be issued where Court is satisfied that is likely to give material evidence and it is in the interest of justice to issue a summons to secure the person's attendance. (Section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965)

The subject of an application for a witness summons is permitted 10 business days to respond (CrimPR 17.5(4)(a). The subject can object on the basis the "*the document or thing…is not likely to be material evidence or even if it is likely to be material evidence, the duties or rights, including rights of confidentiality, of the proposed witness or of any person to whom the document or thing relates, outweigh the reasons for issuing a summons*." (CrimPR 17.6(1))

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Likely remedy in most cases where a complainant refuses access will be comment at trial on the refusal

R v Bater-James (ibid) [99,100]: "*Although each case will need to be assessed on its own facts, we stress the potential force of cross-examination and carefully crafted judicial directions. If the trial proceeds, the uncooperative stance by the witness, investigated by appropriate questioning, will be an important factor that the jury will be directed to take into account when deciding, first, whether to accept the evidence of the witness and, second, whether they are sure of the defendant's guilt… If the witness deletes material, although each case will need to be assessed on its own facts, we stress the potential utility of cross-examination and carefully crafted judicial directions.*"

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3. How Should Prosecution Approached the Inspection & Disclosure of Large Data Sets?

a. The Prosecution Should Not Simply Handover Download for Defence to Inspect

AG Guidelines 2020 [135]: "*Prosecution advocates must not abrogate their responsibility under the CPIA 1996 by disclosing material which does not pass the test for disclosure. This is especially so where it is proposed to disclose material engaging Article 8 rights.*"

b. The Prosecution are Entitled to Search or Sample a Dataset

AG Guidelines 2020 [20] "*Disclosure officers and/or investigators must inspect, view, listen to, or search all relevant material. The disclosure officer must provide a personal declaration that this task has been completed. <u>In some cases a detailed examination of every item of material seized would be disproportionate. In these cases the disclosure officer can apply search techniques using the principles contained in Annex A</u>. Whatever the approach taken by disclosure officers in examining material, it is crucial that disclosure officers record their reasons for a particular approach in writing.*"

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R v R (Practice Note) [2015] EWCA Crim 1941, [2016] 1 W.L.R. 1872 [36-37]:

"*The law is prescriptive of the result, not the method. This is particularly relevant in respect of a case such as this where the Crown has recovered vast volumes of electronic material. In our judgment, it has been clear for some time that the Crown is not required to do the impossible, nor should the duty of giving initial disclosure be rendered incapable of fulfilment through the physical impossibility of reading (and scheduling) each and every item of material seized; common sense must be applied. In such circumstances, the Crown is entitled to use appropriate sampling and search terms and its recordkeeping and scheduling obligations are modified accordingly…The right course at the stage of initial disclosure is for the Crown to formulate a disclosure strategy, canvass that strategy with the court and the defence and to utilise technology to make an appropriate search or conduct an appropriate sampling exercise of the material seized. That searches and sampling may subsequently need to be repeated (to comply with the prosecutor's continuing duty of disclosure under section 7A of the CPIA or to respond to reasoned requests from the defence under section 8) is neither here nor there; the need for repeat searches and sampling does not invalidate the approach to initial disclosure involving such techniques. The problem of vast quantities of electronic documents has, in a sense, been created by technology; in turn, appropriate use must be made of technology to address and solve that problem.*"

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c. Searches Must be Confined to that Necessary to Pursue Reasonable Line of Enquiry

R v Bater-James *(ibid)* [86]: "*it is becoming increasingly possible to search a mobile telephone download by way of data parameters, thereby avoiding consideration of irrelevant periods or aspects of the witness's life. If a reasonable line of inquiry enables targeted inquiries in this way, the use of unnecessarily broad search terms can be avoided. It is important, however, not to overstate what is currently feasible in this regard.*"

d. Search Methodology Must be Disclosed to the Defence

CPIA Code [44]: "*Where search tools are used to examine digital material <u>it will usually be appropriate to provide the accused and his or her legal representative with a copy of reasonable search terms used, or to be used, and invite them to suggest any further reasonable search terms</u>. If search terms are suggested which the investigator or prosecutor believes will not be productive for example because of the use of common words that are likely to identify a mass of irrelevant material, the investigator or prosecutor is entitled to open a dialogue with the defence representative with a view to agreeing sensible requirements. The purpose of this dialogue is to ensure that reasonable and proportionate searches can be carried out.*"

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A Guide to "Reasonable Line of Enquiry" and Communications Evidence [19]
"*As with all communication evidence, the prosecution must be able to explain to the defence and the court what we are doing as well as, importantly, what we will not be doing. Transparency of the approach that has been taken in every case is of paramount importance*."

See AG Guide Annex C for Disclosure Management Documents ("DMDs")

e. Only Disclosable Material Should be Disclosed

R v Bater-James (ibid) [88]: "*If material on the mobile telephone meets the CPIA disclosure test, it can, if appropriate, be served in a redacted form to ensure that irrelevant personal information (such as photographs, addresses or full telephone numbers) are not disclosed. It is important to have in mind that pursuant to section 17 of the CPIA, if the accused is given or allowed to inspect a document or other object following a disclosure exercise, he or she must not use or disclose any information recorded in it, save in relation to relevant criminal proceedings*."

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4. What Options/Remedies do the Defence have to ensure Disclosure of Complainant's Devices?

a. Proactive Defence Engagement Pre & Post Charge

Annex B 2020 AG Guidelines emphasise importance of pre-charge engagement with suspect to identify reasonable lines of inquiry, identifying potential sources of evidence or giving consent/granting access to sources of evidence.

b. Judicial Management of Disclosure

Judicial Protocol para 56: "*Historically, disclosure was viewed essentially as being a matter to be resolved between the parties, and the court only became engaged if a particular issue or complaint was raised. That perception is now wholly out of date. <u>The regime established under the Criminal Justice Act 2003 and the Criminal Procedure Rules gives judges the power indeed, it imposes a duty on the judiciary actively to manage disclosure in every case</u>. The efficient, effective and timely resolution of these issues is a critical element in meeting the overriding objective of the Criminal Procedure Rules of dealing with cases justly*."

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c. Stay for Abuse of Process

Not a disciplinary sanction (see *R v Salt* [2015] EWCA Crim 662; [2015] 2 Cr. App. R. 27).

R v Khalime Shah [2002] EWCA Crim 1623 [24]: "*the court is always going to be very reluctant to intervene and suggest that an enquiry of some kind should have been made when none has been made*."

Question is - is a fair trial now impossible?

R (Ebrahim) -v- Feltham Magistrates Court [2001] EWHC Admin 130, [2001] 1 W.L.R. 1293 [16]: "*the first stage of the court's inquiry will be to determine whether the prosecutors had been under any duty, pursuant to the [CPS Code for Crown Prosecutors and Attorney General's Guidelines] to obtain and/or retain the material of whose disappearance or destruction complaint is now made. If they were under no such duty, then it cannot be said that they are abusing the process of the court merely because the material is no longer available. If on the other hand they were in breach of duty, then the court will have to go on to consider whether it should take <u>the exceptional course</u> of staying the proceedings for abuse of process on that ground*.".

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Ebrahim (ibid) [27]: "*If…there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.*"

DPP v Fell [2013] EWHC 562 (Admin) [15]: "*The party seeking a stay must make good to the civil standard that, owing to the missing evidence, he will suffer serious prejudice to the extent that no fair trial can be held and that, accordingly, the continuance of the prosecution would amount to a misuse of the process of the court … [T]he grant of the stay in a case such as this is exceptional. It is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process. It is of course a very different situation where evidence has gone missing through some serious culpability or bad faith on the part of the prosecutor or investigator.*"

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Ebrahim (ibid)

[25] "*the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.*"

[39] "*Such a direction could point out in the conventional way the disadvantage the defence may have been under caused by the absence of this material and direct the jury to take that into account when applying the burden and standard of proof*."