

BAR STANDARDS BOARD

REGULATING BARRISTERS

LED13 - Disclosure of documents in disciplinary proceedings

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1. Purpose of document

- 1.1. The purpose of this document is to set out the BSB's policy on disclosure of documents in the course of disciplinary proceedings and to provide guidance to staff and Tribunal representatives on this issue.

2. General

- 2.1. Regulation rE103 of the Disciplinary Tribunal Regulations (DTRs) imposes a requirement on the BSB to serve, within 28 days of serving the charge sheet, any documents upon which it intends to rely in support of the charges, and to file the same with BTAS. In practice, the BSB's supporting documents ("the bundle") are served at the same time as the charge sheet. In the majority of cases, virtually all the documents which the BSB has gathered during the course of the investigation of an allegation, except for routine correspondence, are included within the BSB bundle.
- 2.2. There is no specific requirement within the DTRs in relation to disclosure of any other documents and therefore this guidance should be followed when considering what other

information should be disclosed. The general approach to disclosure of documents, other than those included in the BSB's bundle of evidence, is set out below.

2.3. **Test for disclosure:** In all cases, staff should disclose any documents in the BSB's possession (or control) which might reasonably be considered capable of assisting the case for the respondent or undermining the BSB's case. The test is one of *relevance* and the disclosure exercise is limited to the accumulation and provision of relevant evidence. In this context, documents which might undermine the BSB's case may include correspondence and notes of telephone conversations with those who reported the conduct, or with witnesses or other third parties. Further examples of documents that most likely need to be disclosed include:

- Notes of oral statements made by witnesses (or potential witnesses) that are inconsistent with the statements served;
- Draft witness statements; and
- Other material which may have a bearing on the reliability or credibility of witnesses.

2.4. Where a document contains confidential information that does not pass the disclosure test (e.g. third party client data) then staff should consider redacting the confidential information from that document. These considerations also arise when dealing with linked cases, i.e. those with multiple respondents. In all cases, reasons for the redaction should be recorded on the disclosure log (see section 4). See section 7 below for practical guidance on redacting.

2.5. If in doubt, staff should seek advice from the appointed Tribunal representative about disclosure. The BSB's letter of instruction to counsel specifically requests advice on disclosure of documents which the BSB is **not** intending to rely on. However, the duty of disclosure is an ongoing one. Accordingly, throughout the course of the proceedings, staff should continually review all new material received, including notes they have prepared of conversations with witnesses which might cast doubt on their reliability, to determine whether it needs to be disclosed to the defence. In most cases, such concerns will need to be referred to the Tribunal representative in any event, because they may call into question the prospects of success.

2.6. The ongoing duty of disclosure also requires staff, on receipt of new evidence (whether from the respondent or otherwise), to review whether previous decisions to label existing material as "unused material" that has been disclosed (see paragraph 4.1 below), or material that is not relevant and should not be disclosed, remains correct.

2.7. Where issues of disclosure cannot be agreed with the defence, the Directions Judge¹ will be the final arbiter and it will be for the defence to make an application for disclosure. rE129 of the DTRs provide that the Directions Judge may make such directions for

¹ Or, if the disclosure issues arise following the directions phase, the Chair of the Tribunal, or the Tribunal itself.

matters as the Directions Judge considers will expedite the just and efficient conduct of the case. rE165 provides that the proceedings of a Disciplinary Tribunal shall be governed by the rules of natural justice.

- 2.8. The BSB should ensure that it has a clear reasoned basis for refusing to disclose documents. In most cases, the need for transparency and openness as a regulatory body will tend towards disclosure, but there are some documents which should not be disclosed, as covered in the paragraphs below. Nevertheless, the BSB must comply with any order for disclosure by a Directions Judge, Tribunal or court, whether or not it is in keeping with this guidance.

3. Timing of disclosure of unused material

- 3.1. As stated above (paragraph 2.5), the duty of disclosure, which includes unused materials, is an ongoing one. Any relevant documents arising from the investigation which the BSB is **not** relying on ("unused material") should initially be disclosed at the same time as the BSB's bundle of evidence is served. Thereafter, any further relevant material should be disclosed within a reasonable period after it has been received, subject to advice from the Tribunal representative. Unless there is good reason not to do so (which should be noted on the file), the general rule is that disclosure of relevant unused material received after the service of the bundle should be made within a maximum of three weeks of receipt.

4. Disclosure log

- 4.1. Following the referral of a case to a Tribunal, the Case Officer should create and maintain a disclosure log. This log will list all documents held on the case file, identifying what date they were disclosed to the barrister, whether they were disclosed in a redacted form (with reasons for redaction), or whether they were not disclosed at all (again, with reasons provided).
- 4.2. In compliance with the ongoing duty of disclosure, the Case Officer should regularly add to the log when any new documentation is received or created, including draft statements and attendance notes, then review each item to determine whether they should be disclosed, in full or in a redacted form.

5. Independent Decision Panel (IDP) Reports and IDP Decision Sheets

- 5.1. **Disclosure prior to IDP consideration:** On occasion, the person who reported the conduct, or the barrister who is the subject of an allegation, may ask for a copy of the IDB report prepared by the Case Officer in advance of consideration of the case by the IDP. Reports should not be disclosed at this stage.

- 5.2. **Disclosure after IDP consideration:** IDPs are required to give written reasons for their decisions and these will be disclosed to the barrister. If the barrister asks for a copy of the IDP report following an IDP meeting, they should be provided with them. If a matter is referred to a Tribunal then the IDP report and IDP decision sheet would not ordinarily be relied on as evidence in the case, but they should be included in any schedule or bundle of unused material sent to the respondent. The Case Officer will need to consider whether any redactions are appropriate before disclosure (for example where a report or decision contains sensitive or confidential information, which will usually be noted as such). This is particularly likely to arise in cases with multiple respondents. See section 7 below for guidance on redacting.
- 5.3. The person who reported the concern to the BSB may ask for a copy of the IDP report and the IDP decision sheet. Subject to the necessary redactions for confidential/sensitive information, these can be disclosed. From time to time, requests for these documents may come from other people involved in the allegation, particularly if they wish to seek a reconsideration of the IDP's decision. This may impact on the confidentiality of the allegation and should be considered on a case by case basis. As a general rule, the more that the person making the request has been involved in the allegation, the more likely it is that it will be appropriate to disclose – see rE64.2.
- 5.4. Any decision to disclose the IDB report or IDP decision sheet to somebody other than the subject of the allegation or the person who made the original report must be authorised by a senior manager.

6. Disclosure of documents subject to legal professional privilege

- 6.1. The BSB is not required to disclose documents or correspondence that are subject to legal advice privilege or to litigation privilege.
- 6.2. Legal advice privilege applies to communications undertaken for the purpose of giving or receiving legal advice by a lawyer to the BSB or its bodies/employees, which includes provision of legal advice to IDPs and Case Officers. In some cases, such as with APEX advice, it may be necessary to consider the initial instructions in order to determine whether legal advice privilege can properly be considered to apply – for instance, whether privilege was intended to apply and whether the advice given was intended to be confidential.
- 6.3. Litigation privilege applies to documents and communications created where proceedings (including disciplinary proceedings) are in contemplation and where the dominant purpose is for use in connection with litigation, such as communications with the Tribunal Representative.

- 6.4. In cases where any legal advice has been sought (including APEX or internally), the Case Officer will need to consider disclosure of that advice carefully, seeking the advice of the Tribunal representative or the Legal Support Team if needed. Where the advice has been provided by a lawyer and addresses the law (rather than, say, legal practice), it will most likely be subject to legal advice privilege. Any advice sought on a specific case should normally be provided to the IDP in full, if the allegation is referred to the IDP to consider.
- 6.5. Regardless of privilege, communications between staff and IDB members (or former PCC members), or with the Independent Reviewer, regarding individual cases or policy matters will otherwise be disclosed, judged by the relevance test - that is, if they tend to support a defence or may undermine the BSB's case. The same applies to communications with witnesses.

7. How to redact information

- 7.1. Once the final decision has been taken to redact any information for the purpose of disclosure, this should be done using Nuance PDF editor or CaseLines (as appropriate). Staff should not use electronic means other than this to block out text as some methods are not effective, and the information can potentially be revealed if sent electronically.
- 7.2. In exceptional / urgent cases where it is not possible to utilise Nuance or CaseLines, for instance when at a hearing, manual redaction is permitted. Manual redaction should be carried out carefully using a black marker pen. Since it is possible to read through marker pen, only photocopies of manually redacted papers should be sent or given to the recipient. Photocopies should be made on a dark setting, as it is sometime possible to read through the marker pen on pages photocopied on a lighter setting.
- 7.3. In all cases, the original copies of the redacted information should be retained on the case file, as well as the redacted disclosure copy.

8. Data protection issues

- 8.1. The approach outlined above should be taken in relation to all issues of disclosure during the course of the disciplinary process.
- 8.2. However, the BSB is required under the Data Protection Legislation (which includes the Data Protection Act 2018, the UK General Data Protection Regulation and any replacement legislation concerning data protection) to disclose applicable personal data in response to a Subject Access Request.
- 8.3. If an individual makes a Subject Access Request, we are required to disclose to them all their personal data which is in the possession of the BSB, except that which is subject to

an exemption under the Data Protection Legislation. The requirement applies to all documents that fall within the scope of the Data Protection Legislation, including the IDB report, the IDP decision sheet, and both parts of the Case Examiner's Report (for older cases – see section 9 below).

- 8.4. The requirement to disclose information in response to a Subject Access Request is limited to disclosure of personal data only and therefore it is not necessary to disclose the full contents of documents where the remainder of the document does not constitute the subject's personal data.
- 8.5. The Head of Operational Support handles all Subject Access Requests, including redaction of documents, and will discuss with staff the extent of any disclosure where a Subject Access Request has been made.
- 8.6. Exemptions under the Data Protection Legislation include, but are not limited to, legal professional privilege and disclosure of data that could prejudice performance of regulatory activities.

9. Cases previously decided by the Professional Conduct Committee (PCC)

- 9.1. For cases referred to a Disciplinary Tribunal before 15 October 2019, the majority will have been referred following a meeting of the (now disbanded) Professional Conduct Committee. In reaching the decision, the Committee will have used a report written by either a member of the Committee or staff as a starting point for any discussions. This report is referred to as a "Case Examiner's Report". We may be required to disclose such historic reports in the future. The Case Examiners' Reports were most recently set out in two parts:
 - Part one was the **Fact Sheet**, which summarised the relevant facts (any necessary background, the complaint, any response and other evidence).
 - Part two was the **Analysis Sheet**, in which the Case Examiner analysed this material and, on the basis of that analysis, recommended how the complaint should be disposed of. If disciplinary proceedings were recommended, the Case Examiner should have included **draft charge(s)**; if the Case Examiner recommended dismissal, the Case Examiner should have produced a **draft dismissal letter**. The contents of the Analysis Sheet provided a starting point for discussions at meetings, but did not always reflect the decision taken at the meeting.
- 9.2. The general policy on the disclosure of Case Examiners' reports is reflected in the paragraphs below:

- **Case Examiner reports written between 1 May 2013 and 14 October 2019:** During this period, the policy was to make both parts one and two of the Case Examiner's Report available *on request* to both the complainant (if there was one) and the barrister. However, the draft dismissal letter (should there be one) was **not** disclosable.
- **Case Examiner reports written before 1 May 2013:** *Only* the Fact Sheet (part one) will be disclosed to the complainant or barrister on request.
- **Old style sponsor reports:** In the past, Case Examiner notes were not divided into two separate parts setting out the facts and analysis. Since they would have been written before 1 May 2013, only the factual elements of the complaint are available on request (as above). It will be necessary to ensure that appropriate redactions are made of the passages dealing with the analysis (see section 8 in relation to Data Protection issues).

9.3. **Minutes:** Minutes of the meetings of the PCC were prepared by the Secretary of the Committee and signed by the Chair of the Committee. The relevant decisions were provided to both the complainant (if there was one) and the barrister, on respective request. When disclosing such information, the minutes should be redacted so that other decisions taken by the Committee on other cases are not disclosed.