Disclosure of Documents in Disciplinary Proceedings

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 prosecutors on this issue.

1. General

1.1. Regulation 7 of the Disciplinary Tribunal Regulations 2009 (DTRs) imposes a requirement on the BSB to serve a charge sheet and, within 28 days at the latest, any documents upon which it intends to rely in support of the charges. In practice the BSB’s supporting documents (“the bundle”) is served at the same time as the charges. In the majority of cases, virtually all the documents which the BSB has gathered during the course of the investigation of a complaint, except for routine correspondence, are included within the BSB bundle.

1.2. 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.

1.3. In all cases staff should disclose any documents in the BSB’s possession [or control] which tend to support a defence or undermine 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 with complainants/witnesses or other third parties and notes of telephone conversations with witnesses. In this context, examples of other documents that should be disclosed include:

- Written statements and notes of oral statements made by witnesses that may be inconsistent with the statements served;
- Other material which may have a bearing on the reliability of witnesses;
1.4. Plainly, if there is any inconsistency in the witness statement and previous drafts, or the complaint form then such documents should be disclosed.

1.5. If in doubt, staff should seek advice from a prosecutor about disclosure. The BSB’s letter of instruction to prosecutors specifically requests advice on disclosure of documents which the BSB is not intending to rely on (unused material). However, as the duty of disclosure is an on-going one, 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 and which may need to be disclosed to the defence. In most cases, such concerns will need to be referred to a prosecutor in any event because they may call into question the prospects of success.

1.6. Where issues of disclosure cannot be agreed with the defence, the Directions Judge will be the final arbiter and it will be for the defence to make an application for disclosure. Rule 9(11) of the Disciplinary Tribunals Regulations 2009 provide that the Directions Judge may make such directions for matters as he deems expedient to the efficient conduct of the hearing. Regulation 11 provides that the proceedings of a Disciplinary Tribunal shall be governed by the rules of natural justice. However, 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.

2. Reports of the Case Examiner

2.1. The current format for Case Examiners’ Reports is set out in two parts: part one contains a Fact Sheet which summarises the relevant facts (any necessary background, the complaint, any response and other evidence); part two contains an Analysis Sheet in which the Case Examiner analyses this material and, on the basis of that analysis, recommends how the complaint should be disposed of (and, if disciplinary proceedings are recommended, includes drafts charge(s)).

2.2. Following the receipt of advice, the general policy on the disclosure of Case Examiners’ reports (reflected in the paragraphs below) has been amended so that the factual and analytical elements of the Note should now made available on request (previously, only the fact sheet has been made available, on request).

2.3. Therefore, as of 1 May 2013, it is the policy of the Committee to make the Case Examiner’s Report available to both the complainant (if there is one) and the barrister on request (following a decision by the Committee to take ‘No Further Action’ or dismiss).
This is because the Committee takes the view that the parties to the complaint should be allowed to know the factual and analytical basis on which the Committee made its decision.

2.4. However, for Case Examiner reports written before 1 May 2013, only the Fact Sheet will be disclosed on request.

2.5. **Old style sponsor reports:** in the past, Case Examiner notes were not divided into two separate parts setting out the facts and analysis but as indicated in paragraph 3.1, because they were written before 1 May 2013 disclosure of the factual elements only are available on request. It will be necessary to ensure that appropriate redactions are made of the passages dealing with the analysis (see paragraph 5 in relation to Data Protection issues).

2.6. **Disclosure prior to Committee consideration:** on occasion complainants or barristers who are the subject of complaints ask for a copy of the Fact Sheet and Analysis Sheet in advance of consideration of the complaint by the Committee. Reports should not be disclosed at this stage. Any party aggrieved by the Committee’s decision on disposal of a complaint has the right to ask for it to be reconsidered in the light of new evidence or for some other good reason.

3. **Professional Conduct Committee Meeting minutes**

3.1. Minutes of the meetings of the Professional Conduct Committee are prepared by the Secretary of the Committee and signed by the Chair of the Committee. The following information is set out in the minutes of the Committee meeting:

- the date of the meeting;
- the place of the meeting;
- a list of all persons that attended such meeting;
- a list of the members of the Committee that participated in the meeting, specifying the form of such participation;
- apologies;
- the agenda;
- any matters arising from the minutes of the previous meeting;
- the Committee’s decision on individual complaints and reasons for these decisions (in the context of the regulatory objectives);
- any actions arising from the Committee’s decision; and,
- details of policy issues.
3.2. It is the policy of the Committee, after deciding on the disposal of a complaint at a meeting, to make the relevant decisions as detailed in the minutes available to both the complainant (if there is one) and the barrister on request.

4. Documents subject to legal professional privilege and Committee correspondence

4.1. The BSB is not required to disclose documents or correspondence which is subject to legal professional privilege (LPP). Such privilege does not apply to communications with Committee members or advice given by Committee members. However, the Committee’s policy is that the communications between staff and Committee members regarding individual cases or policy matters will not be disclosed. It is essential that the Committee and staff are able to communicate in an open and uninhibited manner in order to ensure that complaints are properly processed and assessed.

4.2. Communications between the BSB’s prosecutors and the BSB, whether Committee members or staff, are subject to LPP and should not be disclosed unless by order of the Directions Judge, Tribunal or court. Such communications are also exempted from disclosure under the Data Protection Act (see paragraph 16). It is good practice for staff to stamp any documents on file which are subject to LPP as “privileged” so that anyone unfamiliar with the file will be aware of the restriction on disclosure.

5. Data Protection Act issues

5.1. The approach outlined above should be taken in relation to all issues of disclosure during the course of the disciplinary process. However, the BSB is required under the Data Protection Act 1998 to disclose applicable personal data in response to a Subject Access Request. This means that personal data in the possession of the BSB, except that which is subject to an exemption under the Act, must be disclosed. This requirement applies to all documents that fall within the DPA including the full Case Examiners’ Report. However, the requirement is limited to disclosure of personal data only and therefore it is not necessary to disclose the full contents of documents that the Committee considers should not be disclosed. The Manager of the Operational Support Team handles all Subject Access Requests and will discuss with staff the extent of any disclosure where a Request has been made. Exemptions under the DPA include, but are not limited to, legal professional privilege and disclosure of data that could prejudice performance of regulatory activities.

6. Timing of disclosure of unused material

6.1. As stated above (paragraph 2.5.), the obligation to disclose “unused materials” is an ongoing one. However, any relevant documents arising from the investigation which the
BSB is not relying on 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 prosecutor. 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 three weeks of receipt.

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