

BAR STANDARDS BOARD

REGULATING BARRISTERS

Disclosure of documents in disciplinary proceedings

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 prosecutors on this issue.

2. General

- 2.1. Regulation rE105 of the Disciplinary Tribunal Regulations 2014 (DTRs) imposes a requirement on the BSB to, within 28 days of the serving the charge sheet, serve 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.
- 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. 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. 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.
- 2.4. Plainly, if there is any inconsistency in the witness statement and previous drafts or the complaint form, then such documents should be disclosed.
- 2.5. 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.
- 2.6. 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. rE116.2(h) of the DTRs provide that the Directions Judge may make such directions for matters as he deems expedient to the efficient conduct of the hearing. rE144 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.

3. Reports of the Case Examiner

- 3.1. The Case Examiners' Reports is currently set out in two parts:
- Part one is the **Fact Sheet**, which summarises the relevant facts (any necessary background, the complaint, any response and other evidence);
 - Part two is the **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: if disciplinary proceedings are recommended, the Case Examiner should include **draft charge(s)**; if the Case Examiner recommends dismissal, the Case Examiner should produce a **draft dismissal letter**. The contents of the Analysis

Sheet provide a starting point for discussions at meetings, but does not always reflect the discussions of members at the meeting.

3.2. The general policy on the disclosure of Case Examiners' reports is reflected in the paragraphs below:

- **Case Examiner reports written after 1 May 2013:** It is currently the policy of the Committee to make both parts one and two of the Case Examiner's Report available *on request* to both the complainant (if there is one) and the barrister. However, the draft dismissal letter (should there be one) is **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 paragraph 5 in relation to Data Protection issues).

3.3. **Disclosure prior to Committee consideration:** on occasion complainants or barristers who are the subject of complaints ask for a copy of the Case Examiner's report 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.

4. Professional Conduct Committee Meeting minutes

4.1. 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.

4.2. 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. When disclosing such information, the minutes should be redacted so that other decisions taken by the Committee are not disclosed.

5. Documents subject to legal professional privilege and Committee correspondence

- 5.1. The BSB is not required to disclose confidential documents or correspondence which are subject to legal advice privilege or to litigation privilege.
- 5.2. Legal advice privilege applies to communications undertaken for the purpose of giving or receiving legal advice by a lawyer to Committee members (or the BSB more generally).
- 5.3. Litigation privilege applies to documents and communications created where proceedings are in contemplation and where the dominant purpose is for use in connection with litigation, such as communications with lawyers, with witnesses for the purpose of obtaining evidence, or obtaining information leading to obtaining evidence.
- 5.4. The Committee's policy is that communications between staff and Committee members regarding individual cases or policy matters will otherwise be disclosed judged by the relevance test - ie if they tend to support a defence or may undermine the prosecution case.

6. Data Protection Act issues

- 6.1. 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.

7. Timing of disclosure of unused material

- 7.1. 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 a maximum of three weeks of receipt.