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| <b>Title:</b>             | <b>Disclosure of documents in disciplinary proceedings</b> |                             | <b>Ref:</b>     | LED13 |
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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 prosecutors on this issue.

## 2. General

- 2.1. Regulation rE103 of the Disciplinary Tribunal Regulations 2017 (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 and file the same with BTAS. 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 report, 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 those who reported the conduct /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. If there is any inconsistency in the witness statement and previous drafts or the original report, then such documents should be disclosed.
- 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 (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 been 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 the appointed representative 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. rE129 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. rE165 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. Independent Decision Panel (IDP) Reports**

- 3.1. **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 fact sheet prepared for consideration by an IDP in advance of consideration of the case by the IDP. Reports should not be disclosed at this stage.

- 3.2. **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 it. If a matter is referred to a Tribunal then the IDP report would not ordinarily be relied on as evidence in the case but should be included in any schedule or bundle of unused material sent to the respondent. Where there are multiple respondents the Case Officer will need to consider if any redactions are appropriate (for example where a report contains sensitive or confidential information, which will usually be noted as such). See section 6 below for guidance on redacting.
- 3.3. The person who reported the concern to the BSB may ask for a copy of the IDP report. Subject to the necessary redactions for confidential/ sensitive information, this can be disclosed. From time to time, requests for the report 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. Any decision to disclose the IDP report to somebody other than the subject or person who made the original report should be authorised by a manager.

#### **4. Disclosure of documents subject to legal professional privilege**

- 4.1. The BSB is not required to disclose confidential documents or correspondence that are subject to legal advice privilege or to litigation privilege.
- 4.2. 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.
- 4.3. 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 lawyers, with witnesses for the purpose of obtaining evidence, or obtaining information leading to obtaining evidence.
- 4.4. 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, with 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 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.

- 4.5. Regardless of privilege, communications between staff and PCC or IDB members, or 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 prosecution case.

## **5. How to redact Information**

- 5.1. **Redaction:** Once the final decision has been taken to redact any information for the purpose of disclosure, this should be done using the specialist software provider or a black marker pen if the Case Officer does not have access to specialist software. If the latter method of redaction is used, those doing the redacting should ensure that this is done carefully. Staff should not use electronic means other than the specialist software to block out text, as some methods are not effective and the information can potentially be revealed if sent electronically. Therefore, all redactions should be made manually or using the specialist software package to mitigate this risk.
- 5.2. Since it is possible to read through marker pen, only photocopies of manually redacted papers should be sent to the person in question. Photocopies should be made on a dark setting as it is sometime possible to 'see through' the marker pen on pages photocopied on a lighter setting.
- 5.3. In all cases, the original copies of the redacted information should be retained on the case file.

## **6. Data protection issues**

- 6.1. The approach outlined above should be taken in relation to all issues of disclosure during the course of the disciplinary process.
- 6.2. However, the BSB is required under the Data Protection Legislation (which includes the Data Protection Act 2018, the General Data Protection Regulation and any replacement legislation concerning data protection) to disclose applicable personal data in response to a Subject Access Request.
- 6.3. 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 full Case Examiner's Report (for older cases).
- 6.4. 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.

- 6.5. The Head of Operational Support handles all Subject Access Requests and will discuss with staff the extent of any disclosure where a Request has been made.
- 6.6. 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.

## 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 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.

## 8. Cases previously decided by the Professional Conduct Committee (PCC:)

- 8.1. 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 recommends 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.

8.2. 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 6 in relation to Data Protection issues).

8.3. 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 is one) and the barrister on respective request. When disclosing such information, the minutes should be redacted so that other decisions taken by the Committee are not disclosed.