

PCA

POLICE COMPLAINTS AUTHORITY

DISCLOSURE during supervised investigations in cases of grave public or family concern

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1. DEMANDS FOR DISCLOSURE AND THE MOVE TO GREATER OPENNESS

- 1.1 PCA supervised investigations now attract intense and prolonged public and press interest across a broad spectrum of opinion - they are no longer just the concern of activists or campaigners. Greater transparency and improved communication with bereaved families and complainants, at least in the most serious cases, are essential to achieving greater trust and confidence in the system.
- 1.2 Characteristics of the investigative system which are perceived to be its inherent weaknesses - its limited independence of the police, general secrecy and often prolonged timescale - lie behind a lack of trust in the integrity, thoroughness and effectiveness of high profile investigations. In this context, investigators and supervising members in their contacts with families, with community representatives and the press can easily appear - or be made to appear - defensive and unresponsive. If the process is secretive then some might assume there must be a 'cover up'. This may be especially so for complainants and family members demanding early and convincing information as to how, for example, someone has come to die when in the custody of the police. There is a wholly understandable desire to get the facts immediately - to help in the process of coming to terms with what has happened.
- 1.3 Policy and practice is changing to encourage greater openness in the process so as to meet these needs. Firstly, the Home Office Circular Guidance to Chief Police Officers 20/1999 for the first time expects voluntary pre-inquest disclosure by the police of documentary material gathered by an investigation into a death in custody or a death arising from a fatal road crash involving the police.
- 1.4 The aim of this change is summarised by the Home Office thus:
"... disclosure of information held by the authorities in advance of the hearing should help to provide reassurance to the family of the deceased and other interested persons that a full and open police investigation has been conducted..." (Home Office Guidance Paragraph 4)
- 1.5 The presumption should now be one of openness with non-disclosure being exceptional and justified only:
- where prejudice might result to the fairness of any subsequent hearing;
 - material may be sensitive or cause unnecessary distress;
 - to protect third parties interests or where their consent is withheld.

The Home Office guidance stresses that:

"Chief Officers are advised, therefore, that there should be as great a degree of openness as possible, and that disclosure of documentary material to interested persons before the inquest hearing should be normal practice.... In all cases, Chief Officers will want to consider

whether there are compelling reasons why certain documents, or parts of documents, may not be disclosed. But there should always be a presumption in favour of openness.” (Home Office Guidance Paragraph 9)

- 1.6 A draft confidentiality undertaking is annexed to the guidance. In accordance with this, the confidential status of the information will be respected if and when disclosure is provided.
- 1.7 PCA practice has also changed with the introduction in 1999 of a new Supervision Manual of Guidelines for supervising members to use particularly in relation to family and community liaison. This manual encourages earlier and more extensive contacts between PCA supervising Members and families and community representatives. Demands for disclosure are therefore increasing and there is a need for clarity of aim and consistency in practice when responding to these.
- 1.8 Previous PCA experience suggests that some investigating officers may be resistant to an open way of working with a complainant, and the PCA may have to encourage them to adopt this working strategy. Others, though willing to disclose relevant information, may still require guidance as to their authority for doing so and the conditions under which it should be permitted to occur in order to preserve the integrity of the investigation.
- 1.9 In practice the PCA recognises that disclosure during the early stages of a high profile investigation can often be controversial, or at least highly sensitive. Where the investigation produces evidence indicating that police misconduct has taken place - where public concern is often greatest - the possibility of prejudice to criminal or disciplinary proceedings is likely to prevent disclosure. On the other hand, where in the absence of such evidence the PCA responds to demands for disclosure by authorising the release of information, the PCA may subsequently be criticised for appearing to have reached premature conclusions too early into the investigation, in an effort to exculpate police officers under suspicion.
- 1.10 Crime victim and family liaison have been given enormous significance for the police service by the findings and recommendations of the Stephen Lawrence Inquiry report. Investigating officers will now be expected to prioritise such liaison, disclosing where possible information about their investigation to secure and maintain confidence and trust in what they are doing.

2. ILLUSTRATIVE SCENARIOS

- 2.1 The following scenarios illustrate the types of situations which may be encountered by PCA members and investigating officers and the types of information which they may be asked to supply to those with a legitimate interest.

2.2 The death of a person detained in a police station cell

A man is arrested and brought to a police station, presented to the custody officer, searched and detained. Later he is found to have died in the cell. An investigation is started, referred to the PCA which agrees to supervise. Within days the investigating team have secured evidential material which includes the following: local authority CCTV recordings which show the man's arrest; custody suite CCTV recordings showing his arrival in custody, presentation to the custody officer and the authorisation of his detention; a copy custody record; pathologist's post mortem report which is inconclusive as to the cause of death; initial toxicology results from an analysis of the man's blood showing alcohol/drugs levels found; photographs of the cell area in which the man died; the notes made by an FME who saw the man in custody three hours before he died; a copy of the force orders governing visiting to and welfare of vulnerable prisoners. Later a further report is obtained from the pathologist.

At an early meeting with the family, the next of kin asks whether or not there is any information showing he was ill when taken into custody. They have been told that CCTV operates in the police station. The CCTV recordings and custody record show that he did not appear unwell.

Would the showing of the CCTV recording prejudice any later proceedings?

Should the Coroner's permission be first sought and obtained before any recording is shown to the family?

The prisoner would himself have been entitled to a copy of the Custody Record. Should it be supplied to the family and, if so, when?

Is the pathologist's report (in addition to any post mortem report) disclosable?

2.3 The fatal shooting of a person by police

A member of the public makes a 999 call to the police reporting that a neighbour has been seen with a handgun. Armed police attend, see a man in the garden brandishing what appears to be a pistol. They challenge him to drop the 'gun' and when he refuses to do so and appears to point it in their direction, they shoot and kill him. It is quickly discovered that the man was fully deaf and that the gun is a toy gun, though actual size. A PCA supervised investigation is started and within days the man's widow makes a formal complaint of unlawful killing. Within a short time, the investigation team has obtained the following evidential material: tape recording of the 999 call, the toy gun, the officers' pocket note books, the force firearms training manual, statements from eyewitnesses tending to cast doubt on the officers' account.

Soon into the investigation, the PCA receives a detailed request for information from solicitors acting for the next of kin. In nearly 50 itemised questions, the solicitors ask about the specific training and backgrounds of the officers, their work patterns that day, the type of weapons used, National firearms training, what eyewitnesses have been traced and their testimony, etc. They ask to have the officers' notebook entries read to their clients; to receive transcripts of the 999 call and subsequent radio communications with the officers.

Should the PCA and investigating officer make any attempt to answer these specific questions before the inquiry has been completed, conclusions have been reached and the Crown Prosecution Service has made and announced its decision? Should the PCA act only with the agreement of the CPS?

Can a distinction be drawn between evidence such as the tape recording of the 999 call and eyewitness evidence?

2.4 A failed murder investigation

A person's next of kin complains that police officers have incompetently investigated their relative's suspicious death. They claim that he was murdered.

A PCA supervised investigation results in the tracing of a hitherto unidentified witness and compelling new forensic evidence which shows the family's concerns to be justified.

At a meeting with the family, the next of kin asks for details of what the new witness states and for the conclusions found in the new forensic report.

Would the disclosure of the witness statement breach confidentiality and threaten the person's co-operation with the investigation and any later trial?

Would disclosure of the forensic report jeopardise future investigative work and the effectiveness of questioning of the suspects?

2.5 A fatal road traffic incident

Two women are killed when a stolen car being pursued by a police vehicle leaves the road, collides with them as they are waiting at a bus stop, crashes and catches fire. The two male youths in the car are seriously, but not fatally, injured in the crash.

The police car is a traffic vehicle with a provided video system which has recorded the whole pursuit and crash. It shows the police car travelling at speeds frequently over 100mph. A police helicopter camera has also captured the later stages of the pursuit and crash.

The women's families, supported by the local press, blame the police for causing the crash. The PCA supervised investigation comes under pressure to let them see the video recordings of the incident and discover the early findings from the accident investigators' examination of the scene. They also want to have a copy of the ACPO Driving Manual regarding pursuits.

Would allowing them to view the video prejudice later misconduct proceedings if the police officers are found to have ignored required procedure for pursuits?

The police force resists disclosing the material because it is said it will encourage claims for civil compensation from the two injured drivers? Is this consideration more important than disclosure to the family?

2.6 A complaint of corrupt practice leading to a miscarriage of justice

A police informant complains of corrupt practice by a specialist CID squad. A major PCA supervised investigation gets underway and Regulation 9 notices are served on most members of the squad alleging falsehood and serious irregularities in relation to evidence.

The investigation attracts local publicity and a solicitor representing a number of clients convicted and imprisoned on the evidence of these officers seeks from the PCA information which would assist in these clients' appeals to the Court of Appeal.

Do the interests of justice in releasing those wrongly convicted outweigh the interests of the ongoing investigation and the possible prosecution later of the police officers responsible?

The proposed guidance would assist PCA Members to respond appropriately in a wide range of situations including the above.

3. **BENEFITS OF DISCLOSURE**

3.1 Although there may be a presumption that evidence and factual information is and should remain confidential during the investigation process for sound public interest reasons, a number of factors point in the opposite direction. Disclosure during the investigative phase may be justified as follows:

- To aid the investigation itself: limited disclosure of information gathered during the investigation may be essential to encourage the co-operation of witnesses and the flow of information. This may apply to the investigation of criminal or misconduct allegations.
- To retain or increase complainant/family trust in and co-operation with the investigative process: early confidential disclosure of key information may reduce anxiety, confusion or uncertainty helping to

promote a sense that the PCA and investigators respect the concerns, feelings and wishes of those most seriously affected by the incident being investigated. A complainant may wish to have a copy of their own statement supplied to them for the same reason.

- To inform the complainant of progress being made with the investigation.
- To meet obligations to accused officers: prior to any criminal or misconduct interview, it may be necessary to disclose information and evidence to officers to obtain their co-operation during interview and to meet basic requirements of fairness.

4. DRAFT INTERNAL GUIDELINES TO MEMBERS

4.1 Introduction

In the context of the Home Office Guidance on pre inquest disclosure and the issues for the PCA discussed above, the following guidance to PCA Members provides a framework within which Members can work with forces, bereaved families, community representatives and MPs to achieve a degree of consistency on openness during the course of investigations.

The Authority needs to find the right balance between meeting the legitimate interest of complainants in receiving information, and particularly bereaved relatives following a fatal incident involving police officers, and the need to protect the integrity of the investigation and any future trial or hearing.

It is important for Members to bear in mind that each case will be different, and it is impossible to prescribe rules of universal application: each case must continue to be considered on its own merits.

4.2 Liaison with the investigating force

The evidence obtained in the course of an investigation is, in law, the property of the commissioning or home force. The Authority cannot require the force to disclose information. However, both the Authority and the police force share an interest in fulfilling public expectations as to disclosure, and the aim of the Authority should be to effect disclosure, where appropriate, by agreement with the police force. Where there is conflict, the aim must be to resolve that conflict by discussion with the police force. Moreover, where an external investigating officer is appointed, s/he should be involved in these discussions at the outset, so that agreement is reached at the start of the investigation.

4.3 Consultation with CPS/Coroner

Where the case may be referred to the CPS to consider criminal proceedings, or where an inquest is pending, disclosure should not take place without the CPS/Coroner being informed, and their agreement to disclosure obtained.

4.4 **Constraints upon disclosure**

The general rule of confidentiality whilst an investigation is under way is essential for a number of reasons, both legal and practical. If a bereaved family or complainant questions the need for confidentiality, it will be important to explain the following.

Police ownership of the information

The right to disclose or not to disclose information, documents or other material, is currently that of the force commissioning the investigation¹. The PCA does not have any express statutory power to override a *refusal* to disclose.

Information is confidential

Where the investigation is concerned with potential criminal liability then it would appear that all the material obtained must be considered confidential. The principle is that documentary information, witness evidence and answers given to questions during interview have been supplied in confidence². The investigating officer's report is currently also confidential, and should not normally be disclosed.

Statutory restriction on PCA disclosure

Section 80 of the Police Act 1996 prohibits disclosure of information by a member subject to some exceptions, including "to the Secretary of State or to a Member, officer or servant of the Authority or, so far as may be necessary for the proper discharge of the functions of the Authority, to other persons". The Authority is advised that provided the purpose of disclosure of information is furtherance of those benefits set out in section 3 above, then it would fall within the scope of the Authority's functions.

Disclosure may be in contempt of court

An investigation following the death of the person will take place after the inquest has been opened and adjourned. Disclosure might be thought to be in contempt of the Coroner's Court particularly since a coroner will sit with a jury in such a case.

Disclosure might breach Data Protection legislation

Some of the information, which is obtained by the investigation, will be covered by the Data Protection Act 1984. More will be covered by the 1998 Act when this is brought into force.

Disclosure may infringe rights to be established in the Human Rights Act 1998

The Human Rights Act will give new prominence to rights to privacy and to a fair trial. Disclosure in some circumstances may put either of these rights at risk and will therefore have to be justified as necessary and proportionate.

Abuse of process

The PCA and investigators would need to be wise to the possibility of accused officers arguing, perhaps successfully, that criminal or discipline proceedings would not be fair because of prior disclosure of adverse information.

Risk to the effectiveness of the investigation

Disclosure may encourage in the public or particular witnesses the belief that their testimony will not be confidential (at least initially) which will stop the flow of vital information to the inquiry particularly from vulnerable or frightened witnesses. The PCA is therefore not proposing to disclose witness evidence from members of the public other than in summary form where appropriate without identifying the witness.

Risk of misleading information

It may be confusing or distressing to bereaved families to have information which later inquiry shows to be incorrect or unreliable. This should inhibit the disclosure of any factual information which is not bound to be judged reliable at the conclusion of the investigation.

Risk of harm to informants or witnesses or complainants

Some informants or witnesses may be at risk of intimidation, interference or even physical harm if they are associated with the inquiry.

Risk of witness evidence being tainted by prior knowledge of facts

The integrity of evidence given to the investigation may be compromised by witnesses or accused officers having prior knowledge of key facts relevant to the incident, or access to documents which describe these.

4.5 Communication with complainant

Disclosure of information to the complainant or to the family should normally take place at a meeting (as to which see below). If there is any prospect of criminal or disciplinary charges, this - and the possibility of prejudice - should be explained to them in order to ensure that they appreciate the way in which this must inhibit disclosure.

Informality of Meeting

Formality is not necessary when information is being conveyed, though Members should satisfy themselves in advance what information is to be disclosed, and a careful minute should be kept of what was disclosed. Where it is important to have the precise text of the information disclosed, it may be appropriate to prepare a written script in advance to be read aloud.

Provisional Nature of Disclosure

Members should, where appropriate, emphasise that the investigation is incomplete and that such information as has been disclosed is provisional.

Number of Meetings

Members should be prepared to meet the complainant or bereaved family and their solicitor as often as the case demands taking account of the Authority's limited resources. Every case will be different, and it is not possible to prescribe how many meetings should take place or what form they should take. It is however thought very unlikely that the Member can offer more than three meetings.

First meeting

At the first meeting, or as soon as practicable, the complaints process and role of the PCA will be explained (see Supervision Guidance - paragraphs 13.3 to 13.3.7).

Confidentiality Agreement

A written confidentiality agreement will be sought with the complainant or bereaved family at the outset of the investigation or as soon as practicable. If the complainant releases information (for example to the press) in breach of the agreement, disclosure should normally cease.

Information to be disclosed

The custody record and post mortem report (in the case of a death) and other opinion evidence will generally be provided to complainants or bereaved families on the basis of confidentiality. (All this evidence will become available at the inquest in the case of incidents involving the death of a person in police custody.) The same documentary evidence should be provided to the officers in the case by the investigating officer.

If available, a summary of the officers' accounts of the incident (from their IRBs) may be given to the complainant or bereaved family and their solicitor during the first meeting. If these are given, it will be important to explain that there may be other accounts which may contradict these. The IRBs themselves will not be disclosed by the PCA.

No further documents or summaries of evidence will normally be given to complainants or families until just prior to the officer interviews.

Second Meeting

Prior to the officer interviews, a general summary of the evidence would normally be presented to complainants or bereaved families. Names of officers and witnesses would not be provided. Video material may be shown and other evidence explained. It is vital to explain that the investigation is still not complete and further evidence may still emerge which could affect the conclusions of the investigation. Confidentiality therefore remains of the utmost importance.

Third Meeting

If the conclusions of the investigation change in any substantial way as a result of the officer interviews, it may be important to convey such changes to the complainant or bereaved family.

The number of cases for which we can provide this degree of direct family contact will depend upon the willingness of the Home Office to fund additional Members.

4.6 Disclosure to others

No documents or summary of evidence from the investigation shall normally be provided to anyone other than the complainant and his or her family and their solicitor.

If significant untrue rumours enter the public domain, then these should be corrected wherever possible.

MPs will need to be treated as an exception. The supervising Member will discuss with the IO any request from an MP for briefing. Any briefing will be given by the Member in the presence of the IO. The MP must be left in no doubt that what he is told is disclosable to others and may demand his attendance before a court of law or a disciplinary hearing.

4.7 Disclosure outside the guidelines

If a Member plans to disclose information not envisaged in the above guidance this should be discussed with the Deputy Chair.

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1. R v HM Coroner for Hammersmith ex parte Peach (1981) QB 211. Per Lord Widgery (in the Divisional Court) at page 218E:
“...the method of preparation of the statements to which I have already referred indicates that those statements started as police property and, in my judgement, continued as police property and at the present time are police property. I see no way in which anyone other than the police authorities can obtain any sort of legal title to these documents, and therefore prima facie they are not available to be handed over to the applicant. Prima facie the present custodian of the documents, the coroner, could not without breach of confidence or trust show them to the applicant.”
 2. Woolgar v Chief Constable of the Sussex Police and another [1999] 3 All ER 604 (Court of Appeal)