



*Policy Directive*

*Subject: Disclosure*

*Date: May 2001*

---

**POLICY STATEMENT:**

The guiding principle with respect to Crown disclosure should be full, fair and frank disclosure of the nature and circumstances of the Crown's case, restricted only by the specific exceptions discussed below in this policy. The fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction, but the property of the public to ensure that justice is done: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

This duty of full disclosure requires the Crown to make timely disclosure of all relevant information – both inculpatory and exculpatory – known to the investigator and the Crown Attorney. For the purposes of these directives, relevance is to be defined in terms of its usefulness to the defence. Information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence: *R. v. Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.). In the event of doubt with respect to the relevance of information, the Crown must err on the side of disclosure: *Stinchcombe*.

**WHAT MUST BE DISCLOSED**

Upon a request from the defence for disclosure, defence counsel must be provided with the following:

- (1) A copy of the charging document.

Either the information (in Provincial Court) or the indictment (in Queen's Bench).

- (2) A summary of the circumstances of the offence.

This summary will usually be taken from the Court Brief or Police Summary provided to the Crown by the investigating Police Agency, but does not include the Police Investigation Report.

- (3) A copy of the accused's criminal record.

(4) A copy of the accused's driving record, where relevant to the specific charges before the Court.

(5) Statements of the Accused.

This includes: a copy of any statement made by the accused to a person in authority and recorded in writing, in the case of verbal statements, a written summary of the statement and, in the case of electronic recordings, a copy of the recording. With respect to electronic recordings, if a transcript has been provided by the police, the Crown should also provide a copy of this transcript to the defence.

(6) Written or verbal witness statements.

The accused is entitled to have the *text* of written statements made by witnesses, or in the absence of a written statement, a summary of the anticipated testimony of a proposed witness. As a general rule, the names of witnesses are to be disclosed, but witnesses' addresses and telephone numbers are not to be disclosed. In all cases, the Crown Attorney will be guided by the necessity of protecting witnesses from intimidation or harassment.

(7) Police notes.

The Crown must disclose police notes to the defence. Exceptions to this general rule exist with respect to those portions of police notes that would tend to prejudice an ongoing police investigation, reveal confidential investigative techniques used by the police or identify a confidential police informant. Notes which contain this type of material, if not already edited by the police, should be edited by blacking out the portions containing such material. Once edited, the notes should be provided to defence counsel.

(8) Copies of forensic and scientific reports as soon as they become available.

(9) Exhibits.

Defence counsel should be permitted access to photographs, films and any other exhibit that the Crown intends to tender as evidence. Where the nature of the exhibits permit, the Crown should provide copies; otherwise, an opportunity to inspect will be sufficient.

(10) Any other evidence that may assist the defence.

This would include, for example, advising the defence of the identity of witnesses who fail to make an eyewitness identification or of other witnesses whose evidence is generally favourable to the accused.

- (11) Information that a witness or witnesses have received a reduced charge or immunity from prosecution in exchange for testimony. For further information with respect to in-custody informers, refer to the “Interim In-Custody Informer Policy,” 2:INF:1
- (12) Copies of criminal records of co-accused(s).

### **ADDITIONAL DISCLOSURE SUBJECT TO CROWN DISCRETION**

Additional material, if requested by the defence, may be disclosed at the discretion of the Crown. Such matters include the following:

- (1) Copies of criminal records of witnesses.

Crown counsel have the discretion, reviewable by the trial judge, to determine whether information regarding a criminal record of a proposed witness is relevant to that witness’ credibility. For instance, a 10-year old criminal conviction for impaired driving would hardly assist in impeaching the credibility of a witness in an assault trial. On the other hand, convictions for offences of dishonesty will often be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the defence right to test the Crown’s case and the credibility of the Crown witnesses.

Concerning the criminal records of youth witnesses, note that, while s. 45.1 of the YOA requires an application to a judge, s. 125(2)(a) of the forthcoming *Youth Criminal Justice Act* (YCJA) explicitly gives the Crown the discretion to disclose youth criminal records. Copies of criminal records of youth co-accused will normally be disclosed but will be subject to the applicable legislation (YOA or YCJA).

- (2) Videotaped witness statements of sexual-abuse/child-abuse victims.

A videotaped statement of a sexual-abuse or child-abuse victim will only be disclosed if and when defence counsel completes an undertaking form. See suggested undertaking attached as Appendix 1. If defence counsel is not prepared to comply with the conditions in the undertaking, the Crown should facilitate the viewing of a copy of the videotape by defence counsel at a suitable location such as the Crown’s office or a police station.

No copy of a videotaped statement of a sexual-abuse or child-abuse victim will be released to an unrepresented accused unless ordered by the Court. Instead, the Crown will facilitate the viewing of a copy of the videotape by the accused under strictly controlled circumstances at a suitable facility such as the Crown’s office or a police station.

## **EXCEPTIONS TO FULL DISCLOSURE**

Notwithstanding the above, the following are not subject to disclosure:

- (1) “Work product”, including but not limited to:
  - (i) Interdepartmental memos between Crowns;
  - (ii) Correspondence to and from the police, excluding replies to Crown requests for pre-charge information;
  - (iii) CPIC print-outs such as those dealing with warrants, excluding those that only pertain to Court orders (e.g. the Court orders to which the accused was subject);
  - (iv) Crown legal briefs;
  - (v) Crown instructions to police; and
  - (vi) Crown or police opinions about the case, including opinions about the accused, witnesses or the strength of the case.
- (2) Information that would tend to jeopardize the safety of a witness or third party.
- (3) The identity of a confidential police informant or information that is of such a nature that it would tend to identify the informant as its source. In some cases posing particular safety concerns, the Crown Attorney has the discretion to employ special measures such as delayed disclosure.
- (4) Information that would tend to prejudice an ongoing police investigation or reveal confidential investigative techniques used by the police.
- (5) Anything specifically highlighted by the police as something that should *not* be disclosed.
 

From time to time, the police may indicate that certain information should not be disclosed. Crown Attorneys should be mindful of such warnings, but should satisfy themselves that there is a legitimate concern justifying the withholding of information.
- (7) Information the disclosure of which would not be in the public interest, including but not limited to information that would tend to jeopardize national security or that would be “injurious to international relations” (s. 38 *Canada Evidence Act*).
- (8) Information that cannot lawfully be disclosed.

- (9) Information protected by common-law or statutory privilege that has not been waived or the disclosure of which has not been judicially authorized.
- (10) Information that is clearly irrelevant to the prosecution or defence of the given charge.
- (11) Third-party reports concerning the victim or witness
  - (i) s. 278.1 to s. 278.91 C.C.

These sections apply where the offence charged is sexual in nature. They deal with any record or report for which there is a reasonable expectation of privacy, such as:

- medical records (such as Sexual Assault Protocol Examination Reports);
- psychiatric records (not applicable to accused's own reports);
- therapeutic records (sex counsellors, Klinik reports);
- counselling records;
- educational records;
- employment records;
- child welfare, adoption, social-services records (Welfare); and
- personal diaries.

Disclosure of these records can only take place through court order or where the witness to whom the record relates waives the application of sections 278.1 to 278.91. Section 278.2(3) C.C. requires the Crown to give notice that such a report exists. Even though the Crown does not provide the actual report, he or she must provide notice to the accused that the Crown has it. This can usually be accomplished through reference in the police report (i.e. "Investigators received medical report dated X by Dr. Y and sent to Crown"). If this isn't present, it must be added.

Where the defence applies for disclosure, the witness should be advised that the Crown will provide independent counsel to the witness for the purpose of opposing the defence application. For further information, refer to the memo to Crown Attorneys dated 27 October 1998 and entitled "O'Connor and C-46 Applications – Production of Documents by Third Parties – Consultation with Constitutional Law Branch – Revised Protocol 98/10/26."

- (ii) Reports not covered by s. 278.1 to s. 278.91 CC

Generally, offences that are not sexual in nature are not subject to sections 278.1 to 278.91. In such cases, records or reports produced by third parties are governed by the disclosure procedures set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411.

### **WHEN DISCLOSURE SHOULD OCCUR**

As a general rule, disclosure should occur before the accused is called upon to elect the mode of trial or to plead.

There is a continuing obligation on the Crown to disclose any new relevant evidence that becomes known to the Crown, without the need for a further request from defence counsel for disclosure. Evidence does not become irrelevant simply on the basis that the Crown Attorney does not believe it to be credible. Credibility is for the trier of fact to determine after hearing the evidence.

### **DISCRETION TO DELAY DISCLOSURE**

The duty to disclose is generally subject to a Crown discretion to delay disclosure in appropriate cases. Disclosure may be delayed to protect the witness from harassment or injury, to enforce the privilege relating to informants or where there is a substantial risk to the fair administration of the criminal justice system. In rare cases, disclosure may be delayed to complete an investigation. Any decision to limit or delay disclosure should be reviewed by the appropriate director or senior Crown Attorney.

### **FORMAT OF DISCLOSURE**

Unless defence counsel specifically requests disclosure in a paper form, the Crown may provide defence counsel copies of documents in either a paper format (photocopies) or an electronic format (e.g. by CD-ROM). Where the accused is unrepresented, Crown counsel should generally provide copies of such documents in a paper format.

### **DISCLOSURE OF EVIDENCE TO AN UNREPRESENTED ACCUSED**

If the accused is not represented by counsel, Crown counsel should inform the accused that disclosure is available under this policy.

An unrepresented accused is entitled to the same disclosure as a represented accused. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown counsel based on the facts of the case. For instance, if there are reasonable grounds for concern that leaving disclosure materials with an

unrepresented accused would jeopardize the safety and/or privacy interests of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, *access* to the disclosure materials. Special care may also be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial, e.g. taped private communications, exhibits that could be easily and quickly altered and destroyed, etc.

It is generally a good practice to place an endorsement on the file concerning the nature, extent and timing of disclosure to an unrepresented accused. This is especially important given the possibility of a *Stinchcombe* review of the decisions made by Crown counsel on the issue of disclosure.

### **GUILTY PLEA WITHOUT DISCLOSURE**

Nothing stated in this policy serves to preclude a guilty plea without disclosure, including situations where the accused simply wishes to dispose of the charge as quickly as possible. Disclosure is not a condition precedent to the entering of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish disclosure before a guilty plea is entered.

### **INDEXING OF DISCLOSED MATERIALS**

Where the volume of material to be disclosed requires it, the Crown should provide a complete and accurate index of the contents of disclosed materials.

### **FLEXIBILITY IN APPLICATION OF DIRECTIVES**

Generally, it is recognized that the precise mechanics or procedures for providing disclosure will vary throughout the province and will generally be determined by the local Crown Attorney, in accordance with available resources and the needs of the local defence bar. The directives set forth here are in no way intended to be exhaustive and the withholding or release of additional information in possession of the Crown should be determined based on relevancy and privilege on a case-by-case basis. Changes in legislation or police reporting/investigative procedures may require ongoing revision and adding or subtracting from the lists provided herein. If something appears in a Crown file that is new or different, the best advice is always to consult with a senior Crown Attorney about its disclosure.

### **RATIONALE:**

The purpose of disclosure by the Crown is to ensure the fairness of the trial process. As articulated in *Stinchcombe*, disclosure by the Crown must allow the defence to adequately prepare its defence, advise the defence of the case which must be met and ensure the defence is not taken by surprise. However, in fulfilling the disclosure obligation, the Crown Attorney must be mindful of the Crown's concurrent obligation to protect witnesses from intimidation and harassment.

Disclosure of the Crown's case can also assist in making more efficient use of court time by resolving non-contentious and time-consuming issues in advance of the trial and encouraging guilty pleas to appropriate charges early in the proceedings.

## **Appendix 1.**

# **Manitoba**

---

Criminal Justice Division

Prosecutions

5th Floor - 405 Broadway



Woodsworth Building  
Winnipeg MB R3C 3L6  
CANADA

(204) 945-2852  
FAX: (204) 945-1260

April 13, 2004

Dear Sir/Madam:

**RE:**

As counsel for the above noted accused, I have agreed to provide you with a copy of the video-tape as part of disclosure.

Therefore, I am prepared to release the video-tape in question to you on the following strict trust conditions:

1. That the tape is to be kept in your personal possession;
2. That no copy is to be made of this tape;
3. That the tape is to be returned directly to the writer upon the expiration of the appropriate appeal period, or earlier as may be agreed upon by yourself and the writer;
4. That should you be discharged by your client, the video-tape will be immediately returned to the writer.

If you are unable to accept any of the above conditions, the video-tape must be returned to the writer forthwith.

Yours truly,

Crown Attorney

/rr

enclosure - videotape