
Disclosure

Alberta Crown Prosecution Service - Practice Protocol

EFFECTIVE: September 21, 2022

This Practice Protocol provides prosecutors with guidance and direction in relation to the principles and considerations that must be applied when exercising their disclosure obligations.

Background

Prosecutors have a constitutional and ethical duty to disclose to accused persons all relevant, non-privileged information in the prosecutor's possession or control, whether inculpatory or exculpatory, related to the offences charged in a timely and fair manner.¹ There are limited exceptions to the general disclosure rule.

Prosecutors are not ordinary litigants; as representative 'Ministers of Justice' and officers of the court, they have overriding obligations to the administration of justice. The administration of justice requires that the prosecution treat all accused persons, complainants, and witnesses fairly. This requires thoughtful consideration as to the content and manner of disclosure. Accused persons and defence counsel also have an obligation to be reasonably diligent in their pursuit of disclosure.²

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Upon request by the accused or defence counsel, all information in the possession of the prosecutor, whether inculpatory or exculpatory, that could be used in meeting the case for the prosecution, advancing a defence, or otherwise determining how to conduct a defence, must be disclosed to the accused person or defence counsel in a timely and fair manner. The prosecutor is not obliged to disclose information that is clearly irrelevant, privileged, or otherwise protected by court order, statute, or common law. Police have a corresponding legal duty to provide the fruits of their investigation related to the charges against the accused, whether inculpatory or exculpatory, to the Alberta Crown Prosecution Service (ACPS) in a timely manner.

Prosecutors have a discretion as to the manner and timing of disclosure in order to prevent harm to anyone or prejudice to the public interest. Prosecutors must be prepared to justify their disclosure decisions as having been made in a principled and reasonable manner. Prosecutorial disclosure decisions relate to a constitutional duty that is subject to judicial review.

¹ *R v Stinchcombe*, [1991] 3 S.C.R. 326; *Law Society of Alberta Code of Conduct*, "Duty as a Prosecutor" (5.1-4)

² *R v Barbour*, 2017 ABCA 231

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Prosecutors must exercise special care to ensure that unrepresented accused persons are notified that disclosure materials are available upon request. If an unrepresented accused person wishes to enter a plea prior to receiving disclosure (e.g. in custody at a first appearance wanting to plead guilty), the prosecutor, duty counsel, any officer of the court, or the court itself should first confirm that the accused person has been made aware of the availability of a disclosure package.

Information to Disclose

Relevant information that is commonly disclosed includes:

- The charging document and the case summary as prepared by police;
- The statements, notes, and any reports relevant to the offences charged. This should include the statements of the accused, co-accused, and witnesses, together with the notes and reports of officers involved;
- Criminal records of the accused, co-accused and any material witnesses, subject to any statutory restrictions in the *Criminal Records Act* or the *Youth Criminal Justice Act*;
- Expert reports including forensic, medical, and lab reports;
- Copies, photographs, or other reproductions of seized evidence;
- Audio or video recordings made of any part of an investigation; this may include audio or video recordings of an arrest, if relevant;
- Search warrants, authorizations to intercept communications and related documents (after unsealing orders are completed and proper redaction is done to satisfy statutory concerns and protect privileged information, if required);
- Witness benefits, i.e., any known special benefit or reward such as immunity from prosecution or reduced sentences. This does not include the payment of usual and ordinary expenses such as those related to required out-of-jurisdiction witness travel, accommodation, expert fees, or financial benefits received pursuant to the *Victims of Crime and Public Safety Act*;
- Records relating to findings of serious misconduct by police officers involved in the investigation against the accused, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact the case against the accused;³
- Relevant portions of covering letters or emails sent to prosecutors that accompany disclosure materials;

³ *R v McNeil*, [2009] 1 S.C.R. 66

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- Any additional relevant information that comes to the attention of the prosecutor, including any additional relevant statements made by witnesses to police and/or the prosecutor; and
- If relevant material is lost or destroyed by the police or the ACPS, then any related known circumstances and explanation must be disclosed to the accused.

This list is not exhaustive, as relevant disclosure will depend on the circumstances of the particular charges against the accused person.

The ACPS may receive material that seems to be similar to, or the same as, material previously provided. Even though this material may be substantively redundant, it must still be disclosed.

Duty to Inquire

Prosecutors are required to make reasonable inquiries when notified of potentially relevant material in possession of police or other government entities. However, prosecutors are not required to make inquiries where there is no reasonable foundation to do so, and must remain cognizant of the restrictions on disclosure of private records as set out in ss. 278.1 – 278.91 of the *Criminal Code*.

Prosecutors must be aware that an accused may request copies of third party records that are not in the possession or control of the prosecutor, such as counselling records, child welfare records, medical records, or reporter's notes. A prosecutor cannot disclose material that they do not have or are unable to obtain. If police or other government entities decline to provide additional material, the accused should be advised so that the accused may determine whether to seek a court order related to the material requested. While an accused is entitled to full disclosure, the accused also has an obligation to be reasonably diligent in making full answer and defence, including whether or not to bring a court application for production of third party records, as may be permitted by statute or case law.⁴

Exceptions to Duty to Disclose

Prosecutors are duty-bound to protect privileged information and must be aware of judicial and statutory restrictions on their duty to disclose. As well, prosecutors are not required to disclose clearly irrelevant information. Examples of information that must not be disclosed without a court order include, but are not limited to, the following:

⁴ *R v Barbour*, 2017 ABCA 231

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- Privileged information (including information that may identify a confidential informer, or information subject to solicitor-client or work-product privilege);
- Confidential information that may prejudice an ongoing police investigation or investigative technique;
- Private records in cases involving sexual offences that are protected by ss. 278.1-278.91 of the *Criminal Code*. Prosecutors are obligated to notify the accused if the prosecutor has received any of those records, but prosecutors are prohibited from disclosing the contents of those records in the absence of an informed waiver or court order;⁵
- Any information protected by court order (e.g., sealing orders) or statutory disclosure restrictions (e.g., ss. 37-39 of the *Canada Evidence Act* and ss. 117 – 127 of the *Youth Criminal Justice Act*).

Information to Protect

Examples of information that must be protected by the ACPS include the following:

- Material that may be the subject matter of the offence itself (e.g., where it is an offence to make, access, possess and/or distribute such material);
- Personal or identifying information such as date of birth, phone numbers, addresses, email addresses, or banking information;
- Private information that may jeopardize the safety or security of a victim, witness or another person, including in relation to protection from harassment or threats; and
- Material that may contain sensitive information or information that would breach a person's privacy, such as a recording of a sexual assault or irrelevant medical information.

If the ACPS receives a document that contains relevant information that is privileged, private or sensitive, a new version of the document with the information removed should not be requested. Instead, the information should be redacted from the document with an explanation as to why it was redacted. If the prosecutor believes a redacted version of a document may identify a confidential informant, they must discuss the appropriate form of disclosure with the police and their Chief Prosecutor.

Vetting and redaction of protected material is a joint responsibility of the police and the ACPS. Police should provide initial screening to identify materials that fall within permissible exclusions for disclosure, with ACPS having the ultimate responsibility for deciding what may

⁵ *R v Quesnelle*, [2014] 2 S.C.R. 390; s. 278.2 of the *Criminal Code*

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not be disclosed. If vetting and redaction cannot adequately protect privacy and safety interests, controlled access, trust conditions, or a court order may be required.

When prosecutors are uncertain as to their disclosure obligations, including what information to protect, they should consult with their Chief Prosecutor for further direction.

Manner and Timing of Disclosure

In general, disclosure materials should be made available to the accused person or defence counsel in a timely and fair manner, upon request, after charges have been laid. The prosecutor has discretion as to the manner of providing the disclosure material (e.g. whether in electronic or hard copy format, as well as the means of the accused's access to the disclosure materials) so long as the disclosure material is reasonably accessible to allow for full answer and defence.

In all cases, the ACPS provides disclosure materials only for the purpose of making full answer and defence in the prosecution of the particular charges against the accused and not for any other purpose. Defence counsel, as officers of the court, also have professional and ethical obligations related to their use of disclosure materials, including an implied undertaking to the court to use the disclosure materials only for the purpose of the specific prosecution and not for any other ulterior or collateral purpose.⁶ If an accused person or defence counsel will not accept disclosure on these conditions, the prosecutor will provide private access to disclosure materials in controlled conditions.

Where required to protect sensitive material (such as material that may constitute the offence itself or material that may be harmful to a person's safety, security, or privacy), the prosecutor will facilitate:

- Controlled and supervised access to the sensitive disclosure material by the accused or defence counsel at a secure and private location; or
- Impose special trust conditions to protect the sensitive material, where the accused has defence counsel, and where that is an appropriate alternative to controlled access.

If the accused or defence counsel brings a disclosure application in court related to the sensitive material, prosecutors should seek special conditions to protect the sensitive material against use for anything other than full answer and defence, as part of any court order.

In rare and limited circumstances, there may be a lawful reason for a prosecutor to delay the disclosure of some relevant information to the accused; however, this must never be done for

⁶ *R v Little*, 2001 ABPC 13



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tactical reasons and must only be done with the approval of the prosecutor's Chief Prosecutor, with timely related notice to the accused. As soon as the reason for delaying disclosure of the relevant information ceases to exist, the information must be disclosed promptly.

Ongoing Disclosure Obligation

At all times, prosecutors must avoid wrongful non-disclosure and ensure timely compliance with the ongoing constitutional duty to disclose all relevant, non-privileged information to accused persons.⁷ This duty continues throughout the trial process and any appeal process. Even after any appeal process, where there is subsequent ACPS discovery of new relevant evidence post-conviction, not previously disclosed, the ongoing prosecutorial disclosure duty continues and may have relevance for a potential section 696.1 *Criminal Code* ministerial review.

⁷ *Henry v British Columbia (Attorney General)*, [2015] 2 S.C.R. 214