

My ref: ADM/5011
Your ref: n/a

26 June 2019

Niamh McKeague
Head of Legal Affairs
Garda Síochána Ombudsman Commission
150 Abbey Street Upper
Dublin 1, D01 FT73

Re: Non Party Disclosure Protocol

Dear Ms. McKeague,

I enclose of copy of the Protocol signed by Ms. Justice Mary Ellen Ring and the Director dated the 11th of June 2019.

Many thanks for all your work on updating the Protocol.

Regards,



Elizabeth Howlin
Head of Directing Division

Protocol

between

The Garda Síochána Ombudsman Commission (GSOC)

and

The Director of Public Prosecutions (DPP)

on the

**Non-Party Disclosure of Evidence to the Defence
in Criminal Proceedings**

where GSOC has not sent a file to the DPP

CONTENTS

1.	Parties to the Protocol	Page 3
2.	Purpose	Page 5
3.	Disclosure	Page 5
4.	Non-Party Disclosure	Page 6
5.	Application of Protocol	Page 7
6.	Protective Measures agreed with the DPP	Page 8
7.	Guidance on Making Non-Party Disclosure	Page 10
8.	Date of Effect	Page 12
9.	Review	Page 12

1. PARTIES TO THE PROTOCOL

The Garda Síochána Ombudsman Commission

- 1.1 The Garda Síochána Ombudsman Commission ('GSOC') is an independent statutory body operating pursuant to the Garda Síochána Act, 2005. Its objectives are:-
- a) to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations concerning the conduct of members of the Garda Síochána ('the Gardaí'); and
 - b) to promote public confidence in the process for resolving those complaints.
- 1.2 GSOC is independent in the performance of its functions, which include investigating complaints made by members of the public concerning the conduct of members of the Gardaí. It also investigates matters referred to it by the Garda Commissioner including instances where the conduct of a member of the Gardaí may have resulted in the death of, or serious harm to, a person, having regard to the requirements of Article 2 of the European Convention on Human Rights.
- 1.3 GSOC may send an investigation file, in appropriate cases, to the Director of Public Prosecutions ('the DPP') together with any recommendations that appear to GSOC to be appropriate, as well as providing the DPP, at her request, with any other information relating to an investigation that appears to her to be necessary for performing her functions under the Prosecution of Offences Act, 1974.
- 1.4 The Garda Síochána Act, 2005 stipulates that if a complaint has been made to GSOC concerning the conduct of a member of the Gardaí, the member may not be charged with an offence relating to that conduct except by or with the consent of the DPP.

The Director of Public Prosecutions (DPP)

- 1.5 The office of the DPP was established by the Prosecution of Offences Act, 1974. The DPP is independent in the performance of her functions. She enforces the criminal law in the courts on behalf of the People of Ireland, directs and supervises public prosecutions on indictment in the courts, and gives general direction and advice to the Gardaí in relation to summary cases and may also give specific directions where appropriate. The Chief Prosecution Solicitor provides a solicitor service, within the Office of the DPP, to act on behalf of the DPP in all courts in Dublin. Local State Solicitors who work on contract for the DPP, provide this service outside Dublin.
- 1.6 The principal function of the DPP is to decide whether or not to prosecute a person for a criminal offence and to ensure the proper conduct of public prosecutions.
- 1.7 The DPP works closely with the Gardaí and other specialised investigating agencies including GSOC, the Revenue Commissioners, the Competition and Consumer Protection Commissioner, the Health and Safety Authority, the Office of the Director of Corporate Enforcement, the Environmental Protection Agency as well as other state agencies and local authorities. Whilst the views and recommendations of these agencies may be considered, the DPP is independent of the investigating agency concerned in making prosecution decisions.
- 1.8 The Office of the DPP is not an investigative agency and has no role in relation to the investigation of offences other than to provide advice to investigators on legal issues as the need arises. For further information, please see '*Guidelines for Prosecutors*' at www.dppireland.ie.

2. PURPOSE

- 2.1 This Protocol is intended to reflect a shared understanding of, and to promote consistency of practice between the parties in relation to, the non-party disclosure of relevant material (held by GSOC) to the Defence in criminal proceedings and in relation to making such material available to the DPP, as the prosecuting authority, and to assist her Office with regard to its continuing general duty to disclose as discussed below.

3. DISCLOSURE

- 3.1 The Prosecution has a duty in law to disclose to the Accused any relevant material in its possession or procurement, and over which the investigative agency is not asserting privilege, whether or not the Prosecution intends to rely on the evidence. 'Relevant material' includes any material which "*could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things*" as held by the Supreme Court in **DPP v Special Criminal Court** [1999] 1 IR 60 at page 71. This material has to be disclosed so that the Accused can receive a fair trial in accordance with his rights under the Constitution. If there is a dispute between the Prosecution and the Defence, as to whether material held by the DPP shall be disclosed to the Defence, the trial judge can review the material and decide the issues in dispute. This can arise where the Defence challenges:

- the assertion of privilege by the investigative agency; or
- the assertion that evidence in the DPP's possession or procurement is not relevant.

The Prosecution is under no obligation to disclose irrelevant material to the Defence. If the material is irrelevant, in the sense that it is not relied

on by the Prosecution and does not appear to assist the Defence, then it is neither appropriate nor necessary to disclose it. However, as a general guideline if it is reasonably possible that something is relevant and if there is no other obstacle to disclosure the balance is in favour of disclosure. It must be borne in mind that the Prosecution may not be aware that a particular Defence will be put forward by the Accused. In cases of doubt concerning either relevance or a competing claim of privilege the Prosecutor should consider seeking a ruling from the court.

3.2 Sometimes relevant material will be in the possession of non-parties to the criminal prosecution. The DPP will then have to engage with these parties to establish whether they are willing or able to hand over the material – this is sometimes referred to as “non-party” or “third party disclosure”.

3.3 For further information on disclosure please see *Chapter 9* of the DPP’s ‘*Guidelines for Prosecutors*’ at www.dppireland.ie.

4. NON-PARTY DISCLOSURE

4.1 The Prosecution bears the responsibility for disclosure to the Accused of all relevant material within its possession or procurement. The final decision about what must be disclosed lies with the court and not the Prosecution. Non-parties, such as GSOC in a case investigated by the Gardaí, have no standing to argue disclosure before the trial court and are not represented in the trial procedure.

4.2 Frequently, the issue of what to do about relevant material in the possession or procurement of a non-party arises. This has been explored by the Irish courts on a number of occasions. As the law now stands, a non-party cannot be compelled to hand over such material to the prosecuting authority. If, however, relevant material exists which the

Defence is not allowed to see, a fair trial cannot take place and the courts will stop the prosecution.

5. APPLICATION OF PROTOCOL

5.1 In practice, both GSOC and the Gardaí may conduct an investigation into the same, or a related, set of circumstances. Those investigations may or may not result in a prosecution.

5.2 There are broadly four circumstances in which GSOC would hold materials that are potentially relevant to a current prosecution, commenced on foot of a Garda investigation (either following a direction by the DPP or taken by the Gardaí under delegated authority pursuant to section 8 of the Garda Síochána Act, 2005):

- i. Where GSOC is conducting an investigation;
- ii. Where GSOC has concluded an investigation but does not submit a file to the DPP;
- iii. Where GSOC has carried out an investigation and a file is sent to the DPP but no prosecution is directed on foot of that file;
and
- iv. Where GSOC has carried out an investigation, a file is sent to the DPP and a prosecution is directed on foot of that file.

This protocol applies only in relation to the first and second of these circumstances.

5.3 In any case in which GSOC has carried out or is carrying out an investigation and has not sent a file to the DPP, it is agreed between the parties that GSOC will use its best endeavours, subject to its statutory

duties, to disclose to the DPP, material within its possession or procurement that is potentially relevant to a prosecution.

Where such materials have been disclosed to the DPP by GSOC, it is agreed that it is a matter, in the first instance, for the DPP to determine the relevance of these materials, subject to the adjudication of the court where necessary.

6. PROTECTIVE MEASURES AGREED WITH THE DPP

6.1 The DPP acknowledges that, in carrying out its investigative function, GSOC will receive information furnished by, or on behalf of, a complainant that it considers ought to be regarded as confidential and ought not to be used in support of a prosecution against the complainant or any of the complainant's associates. Likewise, GSOC acknowledges that evidence obtained by it, as a result of its investigation, may be relevant to a proper consideration by the DPP as to whether a prosecution ought to be continued against the complainant or any of the complainant's associates having regard to the Guidelines for Prosecutors.

6.2 The DPP acknowledges the private and, at times, sensitive nature, of the material forwarded to it by GSOC which it may seek to disclose to the Defence. The DPP also acknowledges that GSOC holds such material as a consequence of its statutory obligation to investigate complaints and to promote public confidence in the process of resolving such complaints. Accordingly:

- i) The DPP confirms that her prosecutors will use the material provided to them by GSOC only for the purposes of assessing the strength of the case or where meeting disclosure obligations;
- ii) The DPP agrees to conduct a careful consideration of the relevance of the information contained in the material disclosed by

GSOC and to indicate to GSOC any material that has been identified as being relevant for disclosure to the Defence prior to such disclosure;

- iii) GSOC commits to reviewing the material identified as being relevant for disclosure by the DPP and to notifying the DPP where privacy issues requiring redaction arise or where privilege is being asserted;
- iv) Where GSOC assert a legally recognised privilege in respect of any material that the DPP has identified as being relevant for disclosure, the DPP agrees to hold such material on a confidential basis for the purpose of informing the accused's legal representatives of its existence and presenting to the court the arguments in favour of non-disclosure on the grounds of the privilege.

6.3 It is acknowledged that GSOC do not have standing to argue issues of disclosure before the trial court. If the court does not recognise the privilege, the DPP will consult with GSOC further.

6.4 The DPP will require the defence to furnish appropriate undertakings in relation to the material, in particular,

- It is to be retained in the custody of those legal representative at all times;
- It is to be copied and used as necessary by the solicitor and/or counsel for the purpose of the trial;
- The material is to be accessed or used by any accused or witness only under the supervision of the appropriate solicitor and/or counsel;
- No accused or witness is to be permitted to take copies of this material into their sole custody and outside the supervision of the appropriate solicitor and/or counsel

unless directed by Order of the Court and on prior notice to GSOC;

- At the conclusion of all criminal proceedings (including any appeal) the disclosed material is to be recovered from its recipients and returned to the ODPP for secure storage.

6.5 Where an accused person who is not legally represented requests disclosure of material covered by this protocol, the DPP will apply to the court for directions on how the disclosure should be made and the safeguards which should be put in place to protect, as far as possible, the privacy and confidentiality of the material. Notice of such an eventuality will be given to GSOC.

7. GUIDANCE ON MAKING NON-PARTY DISCLOSURE

7.1 This protocol will engage when GSOC receives a written request for non-party disclosure from the Defence and/or the DPP or, in any case where GSOC undertakes an investigation and becomes aware of a possible related Garda prosecution.

7.2 In any case covered by this Protocol GSOC will forward to the Directing Division of the DPP's Office, a ***Non-Party Disclosure File detailing the following information (where known/applicable):***

1. Where the prosecution is taking place;
2. When the matter is next before the court;
3. What the prosecution is for;
4. Who the prosecuting garda member is;
5. Who the legal representatives for the accused is; and
6. The status of the GSOC investigation.

7.3 This file will contain a list of all material held by GSOC and, where practicable, two copies of all such material with the exception of material that has been furnished directly to the Defence.

- 7.4 The DPP acknowledges that this evidence/material is being passed to the DPP by GSOC for the purposes of disclosure to the defence and not for use by the prosecution. In cases prosecuted on indictment the evidence/materials may be disclosed by the Directing Officer in the DPP's Office to the prosecuting Solicitor, the State Solicitor and Counsel. The evidence/materials will not be disclosed to the investigating Gardaí.
- 7.5. Where the Gardaí are prosecuting in the District Court without reference to this Office pursuant to the delegated authority under section 8 of the Garda Síochána Act 2005, the DPP will not disclose evidence/materials received from GSOC to the prosecuting guard. The necessary disclosure will be made via the State Solicitor or the Solicitors Division.
- 7.6 This is without prejudice to the right of GSOC to transmit evidence to the DPP as per the terms of paragraph 7.8 below. Where such evidence is of a nature as could prompt the DPP to reconsider the merit in pursuing a prosecution, fairness and the promotion of confidence in the criminal justice system would also justify use for that purpose.
- 7.7 GSOC will advise the Accused that evidence has been passed to the Office of the DPP to consider its relevance for non-party disclosure to the Defence. Having regard to the terms of section 6 (2) of the Prosecution of Offenders Act, 1974, GSOC will further advise the Defence that they are entitled, should they so wish, to forward any materials furnished to them by GSOC to the DPP for the purpose of influencing the making of a decision by the DPP to withdraw a prosecution, or any particular charge, against them in criminal proceedings.
- 7.8 GSOC recognises that cases could arise where this Protocol engages and, on the facts of an individual case, the harm in not transmitting evidence to the DPP for the assistance of the Prosecution would greatly outweigh the potential detriment to the interests of the Accused and/or

independence of GSOC. In that regard GSOC has the statutory power to provide evidence as appropriate to the DPP. In such cases consideration will be given, inter alia, to the need to ensure the fair administration of justice, the seriousness of the charges alleged against the Accused as well as GSOC's objective of fairness and the promotion of public confidence.

Each case will be dealt with by GSOC on its individual merits.

8. DATE OF EFFECT

8.1 This Protocol will have effect from the date of its signing unless and until it is revoked by the parties or either party withdraws from it.

9. REVIEW

9.1 This memorandum will be reviewed by the parties in June 2020 and thereafter at regular intervals as may be agreed.

Agreed this 11th day of June, 2019

Ms. Justice May & Ben King
Commissioner

Clair Coytus
DPP