



The Attorney General of the
Falkland Islands

AGG23

**THE ATTORNEY GENERAL'S
JOINT DISCLOSURE
PROTOCOL FOR
GOVERNMENT
DEPARTMENTS**

Law and Regulation Directorate
Attorney General's Chambers
PO Box 587, Stanley, Falkland Islands, FIQQ 1ZZ

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1. Introduction

For the purposes of the Protocol it is to be noted that the Falkland Islands Government is a unitary authority for which the Attorney General acts in all legal matters. The Attorney General endeavours to utilise lawyers acting in child protection matters (hereinafter called ‘Child Protection’) who are separate and distinct from lawyers acting in criminal prosecution matters (hereinafter called ‘Prosecution’). However on occasions it will be unavoidable that one lawyer will be required to act in both capacities. In such circumstances the lawyer will notify all parties to the proceedings and prepare a full audit trail of all decision making relating to disclosure which will be overseen by the Attorney General in person in order to ensure that no conflicts of interest arise.

2. Scope

This protocol will apply to cases involving criminal investigations where there is either an alleged child victim or child witness aged under 18 at the time of the alleged offending and/or Family Court proceedings concerning a child (aged under 18).

3. Aims and Objectives

To provide early notification to FIG departments with a possible interest that a criminal investigation has commenced and provide details and a timescale of any ensuing prosecution.

To provide early notification to FIG departments with a possible interest that a family proceedings investigation has commenced and to provide details and a timescale of any ensuing family court proceedings.

To facilitate timely and consistent disclosure of information and documents from the police and Prosecution into the Family Court System.

To facilitate timely and consistent disclosure of information and documents from the Family Court System to the police and/or Prosecution.

To provide a timely and expeditious process for FIG departments to respond to a request from the police for material held by the department which would assist a criminal investigation.

To provide for timely consultation between Prosecution and the relevant FIG Department Head where the department holds material which satisfies the test in the Ordinance for disclosure to the defence.

To provide a standard process for applications by the police and/or Prosecution for the permission of the Family Court for disclosure of material relating to Family Court Proceedings.

To provide a standard process for applications for disclosure of material relating to criminal proceedings into the Family Court System.

Part A: Where an investigation or proceedings are taking place within the Family Court System

4. Notification

As soon as reasonably practicable the Team Leader of the Social Work Department (SWD) and/or Child Protection will notify the police and/or Prosecution in writing of the contemplation or existence of Family Proceedings, using Form A (see Annex A).

Where criminal proceedings have been commenced (or are contemplated), the police will immediately forward a copy of Form A to Prosecution. Prosecution will give due priority to making charging decisions in cases involving Family Court Proceedings.

Where the information or documents sought does not relate to an ongoing criminal investigation, the police will ensure the provision of information to the SWD and/or Child Protection as appropriate; complete and return the reply section of Form A.

It is to be understood by all Parties that the Protocol should be used proportionately and is designed to facilitate only requests for material held by the police relevant to the central issues in the case. Requests for disclosure should not be drawn any wider than is absolutely necessary and only relevant material should be disclosed. The disclosure request to the police must be focussed and identify the documents which are really needed.

Where a criminal investigation has commenced, the police will, subject to paragraph 5 below, provide to the SWD details of the criminal investigation using the second part of Form A.

If a suspect is charged with a relevant criminal offence, the police will contact the SWD at the point of charge, providing details of offences, custody status of defendants, bail conditions and court timescales.

In the event that the suspect(s) is/are not charged, the police in consultation with Prosecution will provide the SWD and/or Child Protection with reasons why there will be no prosecution¹.

¹ Decisions to prosecute are made in accordance with the AG’s Code for Prosecutors

If criminal proceedings continue, Prosecution will, as soon as reasonably practicable, provide to SWD and/or Child Protection details of each case management hearing² in the criminal court³ together with details of the future timetable of the criminal proceedings and details of any directions relevant to the SWD or to concurrent Family Proceedings.

Within 2 working days of receipt, Child Protection will forward the details to the Family Court where applicable.

5. Voluntary disclosure by police/Prosecution to the SWD

Where criminal proceedings have been commenced (or are contemplated), the police will consult with Prosecution as soon as possible before a decision is made on whether to disclose police material to the SWD and/or Child Protection.

Within any timescale specified by the SWD/Child Protection, the police/Prosecution will provide the material which can be disclosed to the SWD and/or Child Protection with a completed copy of the second part of Form A.

SWD and/or Child Protection will agree that the police material will only be disclosed to the professionals and parties in the Family Proceedings (unless the permission of the court is obtained to disclose material to others).

Visually recorded interviews (Achieving Best Evidence interviews) will not be released to SWD and/or Child Protection except against a written undertaking in order to prevent the unauthorised use of the evidence. Form F (at Annex F) should be used for this purpose. In many cases a transcript or written summary of the interview will be sufficient.

Unless disclosure is required to ensure the immediate safety of a child, the police will not disclose material where to do so might prejudice the investigation and/or prosecution (or where on the grounds of confidentiality it is necessary to obtain the consent of persons providing statements). However, redacted disclosure should be made wherever possible. The police will indicate on Form A the approximate date on which disclosure can be made and the police (in consultation with Prosecution) must provide detailed reasons on that form as to why any material is being withheld.

Alternatively, Prosecution can indicate that disclosure will be made in the event that Child Protection obtains a Family Court order stating that the material is not to be disclosed to named individual(s) (typically, suspects and/or witnesses in the criminal proceedings). Such a court order should also be obtained where possible in the event that disclosure is made to ensure the immediate safety of a child.

² Case management hearings in the criminal court are known as the Preliminary Hearing

³ this protocol covers all criminal proceedings in all criminal tribunals, the Summary Court, Magistrate’s Court and Supreme Court

The Family Court may request disclosure from SWD of material held by them and relating to the criminal case. Again, SWD will notify Prosecution (or the police if criminal proceedings have not commenced) as soon as reasonably practicable. Where the police and/or Prosecution object to disclosure, they will make appropriate and timely representations to the Family Court explaining why such disclosure might be capable of prejudicing the criminal proceedings.

6. Family court proceedings: orders for disclosure against the police/Prosecution

SWD and/or Child Protection will notify as soon as possible the police and Prosecution of any application to the Family Court (whether by SWD or any other party) for disclosure of prosecution material. SWD and/or Child Protection will notify the police and/or Prosecution of the date and time of the Family Court hearing at which disclosure will be determined.

Where directed, Prosecution will attend the Family Court hearing to explain the implications for a criminal trial when orders for disclosure are being considered by the court. In any event, Prosecution will provide written representations to the Family Court and to Child Protection where disclosure is opposed (explaining why disclosure might reasonably be considered capable of prejudicing the investigation and/or prosecution). Prosecution may request that the Family Court hear representations in the absence of the parties to the family proceedings if to do otherwise may prejudice the police investigation or prosecution.).

Child Protection will ensure that any order against the police and/or Prosecution is served within 2 working days of the date of the order on the police and/or Prosecution.

The police and Prosecution will comply with any court order.

Part B: Disclosure from FIG/Family Court System into the Criminal Justice System

7. Notification

Following the commencement of an investigation the police will notify SWD in writing.

If Family court proceedings are also contemplated SWD will confirm this with police/Prosecution and give details of all parties (and legal representatives where known).

Prosecution will give due priority to making charging decisions in cases where Family court proceedings are being/have been commenced.

8. Police request for disclosure

Following the commencement of the investigation, the police will provide to SWD and any other relevant FIG Department Head the Request for Disclosure Form B (at Annex B).

Form B must be as prescriptive and detailed as possible and necessary for the pursuit of reasonable lines of enquiry. The form will include reasonable timescales for the police to be given access to relevant material, but the presumption will be that the FIG department will deal with any request from the police as expeditiously as possible so as to not to jeopardise the criminal investigation. Timescales will be case-specific taking account of the stage/nature of the investigation and/or prosecution.

The Request Form must list

- what material it is believed the department holds
- the reasons why access to the material is sought
- the known or suspected issues in the case
- what will happen to the material if it is released
- that the Department Head should indicate whether they consider the material to be sensitive and the reasons for that view
- what will happen if the material is not released

9. Disclosure to the police

All FIG Departments

Upon receipt of Form B, the Department Head will, as expeditiously as possible, designate an officer to identify and collate relevant material as appropriate to assist the criminal investigation.

A schedule will be prepared listing the material in the possession of the department, and indicating whether or not the department considers the material to be sensitive. If the department is in possession of material which it does not intend to release this must also be listed with the reason why it is not being made available to the police. Such a course should be exceptional because all FIG departments recognise that the material will be regarded as sensitive by the police and Prosecution and that it will not be disclosed to the defence without further consultation with the department or order of the court.

Within the timescales agreed between the department and the police, the police will examine and review the material collated. The venue of the review will be determined by agreement. The police may make notes and/or take copies of the material. The material will not be disclosed to the defence without further consultation with the department or order of the court.

Where further relevant material comes to light after the police examination of the material, the Department Head will contact the police and/or Prosecution to arrange an examination of the new material by the police.

Similarly, where new issues arise in the criminal case (e.g. following the receipt of the defence statement), the police/Prosecution will submit a further Form B request to the department requesting access to material not previously examined.

Disclosure by SWD

In addition to the above in the case of SWD/Child Protection will ensure that documents and information relating to Family Court proceedings are not included in the files to be examined by the police. Where there are documents and information relating to Family Court proceedings, the SWD/Child Protection will provide a list of that material without describing what it is, in order for Prosecution, if appropriate, to apply to the Family Court for disclosure (e.g. by providing a copy of the redacted court index).

SWD can disclose to the police documents which are lodged at court, or used in the proceedings, which already existed (e.g. pre-existing medical reports). Similarly, the text or summary of the whole or part of an approved judgment given in the Family Court proceedings can be included in the files to be examined by the police, if for the purposes of criminal investigation.

This does not prevent SWD providing to the police documents or information relating to Family Court proceedings where disclosure is for the purposes of child protection and not for the purposes of the criminal investigation.

Where such material is disclosed the police cannot make onward disclosure of any documentation or information contained therein for the purpose of the investigation or prosecution without the express permission of the Family Court (for the avoidance of doubt, this will include disclosure to Prosecution).

Where, in exceptional circumstances, the SWD is not able to include other material (not relating to Family Court proceedings) in the files to be examined by the police, it will notify the police in writing of the existence of this material.

10. Applications by Prosecution to the family court for disclosure of material relating to family proceedings

All such applications (including those pre-charge on behalf of the police) will be made by Prosecution.

Applications by Prosecution must specify the purpose and use to which the material is intended to be put and should seek leave to share the material with the police and with the defence and to use the material in evidence at the criminal proceedings.

The application must be served on all parties to the Family Proceedings.

The application will be determined at a hearing at the Family Court.

Where it is practicable to seek prior written consent to disclosure from all parties to the Family Proceedings, Prosecution should do so. Application should then be made in writing to the Family Court seeking a consent order.

Alternatively (and whenever this is possible), Prosecution will ask Child Protection to request that the Family Court considers the issue of disclosure to the Prosecution at the next hearing. In this way, the Family Court will be in a position to make any orders as appear appropriate without the need for Prosecution to make application.

When requesting the Family Court to make an order in accordance with this paragraph, Child Protection will put the other parties to the proceedings on notice; and will provide the court with details of the officer to whom disclosure is to be made and the purpose for which it is to be made.

11. Text or summary of judgment in family proceedings

Where there is in existence a judgment of the Family Court which appears to be relevant to concurrent criminal proceedings (e.g. a fact-finding judgment) Child Protection will forward to Prosecution copies. The judgments may be appropriately redacted.

Where Child Protection is not in possession of such a judgment s/he will notify Prosecution in order that the judgment can be obtained directly from the Family Court.

Where it appears to Child Protection during a hearing that the judgment will be relevant to the criminal proceedings, Child Protection will request that the Family Court expedites the preparation of the judgment for release to Prosecution.

12. Disclosure by Prosecution to the defence

The Ordinance requires the prosecution to disclose to the defence any relevant material (including sensitive material) that could reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for the accused (the “disclosure test”). Where appropriate, application can be made to the criminal court to withhold sensitive material which satisfies the disclosure test on the grounds of public interest immunity (PII application).

PII applications to the criminal court for the withholding of sensitive material should be rare. Fairness ordinarily requires that all relevant material which weakens the prosecution case or strengthens that of the defence should be disclosed. There is no basis for making a PII application except where the prosecutor has identified material that fulfils the disclosure test, disclosure of which would create a real risk of serious prejudice to an important public interest.

All sensitive material obtained from a department will be listed by the police on the sensitive disclosure schedule MG6D. The lists of material not disclosed by the department to the police will also be included.

In the case of material obtained by the police in accordance with the above must not be disclosed to Prosecution. The police will reveal the existence of the material on the MG6D (without describing it). As appropriate, Prosecution will seek the permission of the Family Court to access such material.

Prosecution will review the material in accordance with its statutory duties and under the Attorney General's Guidelines on Disclosure. Only relevant material which might undermine the prosecution case or might reasonably assist the defence case will fall to be disclosed. There will in no circumstances be “blanket” disclosure to the defence.

Where a department document has not been made available to the police on the basis of confidentiality (e.g. consent has not been obtained from the person to whom the document relates), Prosecution will consider whether it is appropriate to seek access to such material by means of a witness summons in the criminal court.

Where in these circumstances application is made by Prosecution for a witness summons, Prosecution will serve the application on the criminal court and the Department Head, identifying the Department Head as the person who is required to produce the document(s). In addition, Prosecution will serve the application on the person to whom the confidential document relates.

Where any material reviewed by Prosecution falls within the statutory disclosure test Prosecution will complete and send Form C (at Annex C) to the Department Head, within 2 working days of review setting out the reasons why the material falls to be disclosed. Prosecution will provide proposals for the editing or summarising of the material for the purposes of disclosure to the defence. Where no material falls for disclosure, Prosecution will inform the Department Head that this is the case.

Within 5 working days of receipt of that notification, the Department Head has the opportunity to make any representations in writing to Prosecution on the issues of disclosure, using Form D (at Annex D). This will include objections to disclosure on the basis that the person to whom the material relates has not consented.

13. Public Interest Immunity (PII) Application

If the Department Head does not agree to disclosure of material to the defence, Prosecution must negotiate with the Department Head to explore whether disclosure can be made in edited form or by summarising in another document the issues arising in the material. Whilst recognising that the prosecution must always comply with its statutory duty of disclosure, the sensitivity can often be removed in this way. PII applications in the criminal court will be rare. Departmental material relating to a child is not automatically a “class” of material to which PII applies. Depending on the sensitivity of the material, it may be that the public interest in the prosecution of crime overrides the interests of confidentiality. In highly exceptional cases, Prosecution may need to make disclosure to the defence of the edited/summarised document without the consent of Department Head.

If a PII application is appropriate, Prosecution will make a PII application to the criminal court as soon as reasonably practicable. Prosecution will notify the Department Head of the date and venue of the PII application and inform them of their right to make representations to the criminal court.

Where PII is sought on the basis of lack of consent from the person to whom the confidential document relates, Prosecution must in accordance with the Criminal Procedure Rules notify the person to whom the document relates (as above, notification of date and venue of PII application and the interested person’s right to make representations to the court).

Annexes

Annex A: Form A
Notification of Family Investigation/Proceedings:
request for disclosure of police information

<p><u>FORM A</u> <u>NOTIFICATION OF FAMILY INVESTIGATION/PROCEEDINGS:</u> <u>REQUEST FOR DISCLOSURE OF POLICE INFORMATION</u></p>	
<p>REQUEST FOR INFORMATION</p>	
Person Requesting Information	<p>Name:</p> <p>Job Title:</p> <p>Telephone Number:</p> <p>Email:</p>
Date of Request	
Court name:	
Case No:	
Name of all parties to Proceedings and legal representatives:	
Next hearing date:	
<p>Advance notice of family proceedings and any request [for information][to indicate availability of] information should be made as soon as possible and at least 10 working days before the relevant directions hearing date</p>	
Date Information is required by:	
	<p>Information should be received at least 5 clear working days before the hearing date</p>
Purpose of the Information	

INFORMATION REQUESTED ABOUT THE FOLLOWING PERSON(S):		
1. Name (Alleged perpetrator/s):	DoB:	Address:
2. Name of other party/parent (if applicable):	DoB:	Address:
3. Names(s) of relevant child(ren):	DoB:	Relationship to alleged perpetrator:
1.	1.	1.
2.	2.	2.
3.	3.	3.
4. Brief details (including date and place) of the circumstances of the incident(s) in respect of which family proceedings are being taken /contemplated:		
Brief Details (Including Date And Place) Of The Specific Incident(S) Upon Which Information Is Sought:		
Nature of the documents, records or other evidential material requested and its relevance to the civil/family proceedings (List documents with as much particularity as possible e.g. father’s interview, mother’s statement, sister’s video interview, etc)		
Proposed directions for disclosure likely to be made including the date by which actual documents will be required): (list directions or attach draft order for directions)		

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Has a date has be fixed for a full hearing?
Officer(s) likely to be required to give evidence? if so please list which officers

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POLICE REPLY

[This form should be completed in accordance with the FIG protocol on disclosure]

Police information will not be disclosed unless there are important considerations of public interest to justify departure from the general rule of confidentiality. These considerations include the protection of vulnerable members of society. The information below is provided on the strict understanding that such information is only for the current proceedings. It will be treated as confidential and will not be used for any other purpose.

Disclosure available? (Police list each above) <i>Police to mark each one that is available now and for those that are not give date when will be available</i>
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Disclosure not available? (Police list each above) <i>Police to mark each one that is available now and for those that are not give date when will be available or reason it is not available</i>
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Name/Rank of Officer/Prosecutor completing: Email: Date:

**Annex B: Form B
Notification of Police investigation/Criminal proceedings:
request for disclosure**

FORM B			
<u>NOTIFICATION OF POLICE INVESTIGATION/ CRIMINAL PROCEEDINGS:</u>			
<u>REQUEST FOR DISCLOSURE</u>			
1. The Police are conducting a criminal investigation into allegations made against the following individuals:-			
NAME:			
ADDRESS:			
DATE OF BIRTH:			
2. The circumstances of the allegations are as follows: (Attach case summary, key witness statements, expert reports as appropriate)			
3. Details of child/ children involved in the allegations			
Name			
Address			
Date of Birth			
Relationship to offenders(s)			
Victim or Witness			
Social Worker			
Schools Attended (with dates)			
4. I believe that your Department may hold the following material relating to the alleged offender(s) or the above child/ children which may be relevant to my investigation. [Describe material in precise detail, specify relevant time periods, relevant addresses, schools attended etc]			

Any material obtained by us will be treated as sensitive and dealt with in accordance with Criminal Procedure and Evidence Ordinance 2014. In accordance with paragraph 3.5 of the Disclosure Code, we are under a duty to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. Such lines of enquiry include seeking access to the above material which you may hold. Our investigation might be prejudiced or delayed if we are not allowed access to the material. In accordance with the FIG Disclosure Protocol we request that arrangements are made for us to examine the above material. Any material relating to Family Court Proceedings must not be made available except with consent of the court or in accordance with Family Procedure Rules 2010.

5. In the circumstances of this investigation, it is important that arrangements are made for us to examine the material by:
[Date]

Stage reached in investigation:

Contact details for Prosecutor:

Officer:

Date:

Email:

DEPARTMENT HEAD REPLY

[This form should be completed in accordance with the FIG protocol on disclosure]
If the department is in possession of material which it does not intend to release this must also be listed with the reason why it is not being made available to the police. Such a course should be exceptional; all FIG departments recognise that the material will be regarded as sensitive and that it will not be disclosed to the defence without further consultation with the department or an order of the court.

The Department is in possession of the following material which can be examined:
(List)

The Department is in possession of the following material which cannot be examined: (List separately stating the reason for withholding disclosure)

Arrangements for the examination of the material can be made by contacting:

Name:

Tel:

Email:

Completed by :

Date:

Tel:

Email:

Annex C: Form C

Notice to FIG Department from Prosecutor that material satisfies disclosure test

NOTICE TO FIG DEPARTMENT FROM PROSECUTION THAT MATERIAL SATISFIES DISCLOSURE TEST		
You will be aware that the police have recently examined material held by the(<i>insert department name</i>)Department in the following proceedings:-		
	NAME	DATE OF BIRTH
Lead Defendant		
Lead Child		
I have received the material in accordance with Part 14 of the Criminal Procedure and Evidence Ordinance 2014. Please note that in accordance with section 216, the following material falls for disclosure to the defence because it is capable of undermining the prosecution case or assisting the case for the accused.		
Document Reference	Description	Reason why disclosable
I would be grateful if you would indicate in respect of each item listed above whether a) you have no objections to disclosure, b) you have no objections to disclosure subject to appropriate editing, c) you object to disclosure (in which case I will not make disclosure subject to any Court order).		
I would be grateful if you could reply by:		
Prosecutor:	Name:	
	Telephone:	
	Fax:	
	Email:	
Date:		

Annex D: Form D
Notice from FIG Department: representations on disclosure

NOTICE TO PROSECUTOR FROM FIG DEPARTMENT: REPRESENTATIONS ON DISCLOSURE	
I thank you for your notice datedindicating that certain (<i>insert Department name</i>) Department material satisfies the test for disclosure in section 216 Criminal Procedure and Evidence Ordinance 2014.	
I have the following representations in respect of proposed disclosure to the defence. (Indicate in respect of each item a) that disclosure is agreed b) that disclosure is agreed subject to editing (specify where appropriate) c) that disclosure is not agreed, with reasons e.g. absence of consent from person to whom document relates)	
a) Disclosure is agreed	
Item	Comment
b) Disclosure is agreed subject to editing	
Item	Comment
c) Disclosure is not agreed	
Item	Comment
Name: Telephone: Email	

Annex E: Form E
Video recorded evidence of a child confidentiality undertaking

UPON {Legal Practitioner Name} acknowledging his/her obligations under Section 231 Criminal Procedure and Evidence Ordinance 2014 and undertaking that s/he will

- 1 Not cause or permit any further copies to be made of the recording(s)
- 2 Keep the recording in a locked, secure container when not in use or in transit
- 3 Release the recording only to:
 - (1) The Advocate instructed in the case
 - (2) Any expert authorised by the court to prepare a report for use by the court
 - (3) Any other person only with the leave of the court
- 4 Use his/her best endeavours to ensure that the recording is kept within the personal custody of a single adult when in transit and not to deliver the recording to the Post Office or any commercial carrier unless delivery is to any person referred to in paragraph 3 who is based overseas
- 5 In the event that a person referred to in paragraph 3 is based overseas, to ensure that delivery of the recording is only by means of either personal delivery by a single adult or by secure, registered and tracked postal service or commercial carrier
- 5 Require any person to whom the recording is released to sign an undertaking in the same terms as this undertaking; to complete the log below and send a copy to the Attorney General.
- 6 Use his/her best endeavours to obtain the return of the recording to his/her personal possession within 28 days of its release to any person
- 7 Permit his/her client to view the recording only at his/her professional premises and in his/her presence
- 8 Permit other parties to the proceedings to view the recording only in the presence of that party’s legal advisor at the professional premises of one of the parties’ legal advisor
- 9 Return the recording to the Attorney General’s Chambers , forthwith upon his/her ceasing to be instructed in this matter and in any event on closure of the case
- 10 Keep a written record of the name of any person allowed access to the recording and the date of such access

Schedule of persons that have viewed the recording in accordance with this undertaking

Description of recording and ID no.	By whom	In the presence of (if applicable)	Date seen /released	Date returned	Undertaking given

Signed: Date:

Taped returned to custody of the Attorney General’s Chambers/ securely destroyed on

Signed: Date:

Further copies of this document and information about alternative languages and formats are available from the Law and Regulation Directorate.

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This Document is also available online at: <http://www.fig.gov.fk/legal/>

Document Control

Document Reference: AGG23: The Attorney General’s Joint Disclosure Protocol for Government Departments

Edition and Issue Date: 2nd Edition, June 2018

Ownership and Review: The Attorney General is the document owner for this document and the next scheduled review date is June 2019

Simon Young
Attorney General