



Bar Council response to the Home Office consultation on Police requests for Third Party Material

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation on Police Requests for Third Party Material.¹
2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The Bar Council welcomes the opportunity to respond to Section 1 of the Consultation, titled, 'Questions for law enforcement, prosecutors and defence lawyers' and Section 3 'Questions for all respondents'.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094754/Police_requests_for_third_party_material_July_2022.pdf

Section 1: Questions for law enforcement, prosecutors and defence lawyers

Question 1 – What kind of material do you think constitutes third party material?

- a. Medical records
- b. Mental health records
- c. Counselling/therapy notes
- d. Independent sexual violence/domestic violence advisor notes
- e. Employment records
- f. Local authority records
- g. Education records
- h. Prison records
- i. Closed Circuit Television recordings ('CCTV')
- j. Other, please specify

Response

There is a distinction between (i) third party material sought in order to obtain evidence to be served and relied upon by the prosecution, and (ii) third-party material sought in order to discharge the prosecution's statutory disclosure obligations. Different powers, duties, and practical logistics will impact on the different categories of requests. The questions in Section 1 do not draw that distinction. The list does not include banking or financial records which are central to the investigation/prosecution of most frauds.

As to disclosure, third party material is defined in paragraph 26 of the Attorney-General's Guidelines on Disclosure 2022 (effective from 25 July 2022) as:

... material held by a person, organisation, or government department other than the investigator and prosecutor, either within the UK or outside the UK.

Paragraph 2 of the A-G's Guidelines provides that "the roles, responsibilities and terminology used in [the AG's Guidelines] therefore mirror the definitions given in the CPIA 1996 and its Code of Practice ('CoP'), the latter having the force of secondary legislation (SI 2020/1330) to which any person charged with the duty of conducting a (criminal) investigation must have regard (s.26(1) CPIA 1996).

The CoP (paragraph 2.1(7)) defines 'material' as:

... material of any kind, including information and objects

Paragraph 18 of the A-G's Guidelines and paragraph 2.1(8) of the CoP define 'relevant material' as follows:

Material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case

These are long-standing definitions incorporated in previous versions of the A-G's Guidelines and the CoP, with which investigators and prosecutors are familiar. Each of the categories of material listed in Q1 is capable of amounting to third party material. It is not helpful to seek to prescribe an exhaustive list.

Question 2 – About whom is third party material typically requested?

- a. Victim
- b. Witness
- c. Suspect

Response

Third party material is routinely sought directly or indirectly about all three named categories (victim, witness, and suspects).

Question 3 – In what types of investigations do you request third party material?

- a. Rape and Sexual Offences (RASO)
- b. Domestic Abuse
- c. Child Sexual Exploitation
- d. Assault or Violent Crimes
- e. Homicide
- f. Economic Crime
- g. Drug trafficking
- h. Acquisitive crime
- i. Modern slavery
- j. Other (please specify)

Response

Since the Bar Council represents practitioners who prosecute and defend across the full range of criminal offences, all the identified categories are the subject of third-party material requests.

Question 4 – We understand that requests for third party material can be a particular issue in Rape and Sexual Offence (RASO) investigations. In your experience, in roughly what proportion of RASO investigations.

- a. <25%
- b. 26-50%
- c. 51-75%
- d. 76-100%

Response

The Bar Council has no empirical data on which to respond, but anecdotally the practitioners who have contributed to this response estimate it is 76-100%.

Question 5 – Why is the third party material requested?

- a. To support or refute a reasonable line of enquiry
- b. It is routine request/internal policy to do so in certain types of investigation
- c. Asked to do so by a supervisor or colleague
- d. Asked to do so by the CPS or other external party
- e. Other/additional information

Response

As barristers, apart from potentially the rare occasions when we are retained on a direct access basis, we do not make requests for third party material, but routinely advise our instructing solicitors (prosecution and defence) to do such whether by approaching the party who possesses the material to supply it on a voluntary basis or by compulsion. The prosecution has a disclosure duty to pursue all reasonable lines of enquiry, which includes enquiries which may point away from the guilt of the defendant. Some enquiries are routine (for example, banking evidence in a fraud, mobile telephone data in cases of serious violence or drug trafficking, or

counselling/GP notes where they are likely to include evidence of recent complaint of sexual offences).

In RASO cases these enquiries are routine in order to support or refute a reasonable line of enquiry. Prosecutors take great care to review material and ensure that only material relevant to an actual issue in the case is shared with the defence. It can be important to refute any potential theoretical or speculative line of enquiry (or cross examination) by undertaking third party enquiries. In this way they can be an important part of the investigative process even though they do not result in material actually being disclosed to the defence.

Question 6 – How do you decide what and how much material to request from third parties? Select one response and include additional information if needed.

- a. All potentially useful material is requested in case it is needed**
- b. Lines of enquiry are considered, and specific material is requested to support or refute them**
- c. Other/additional information**

Response

The three options provided do not reflect the reality of a criminal investigation/prosecution. The decision to obtain third party material on the part of the prosecution is frequently determined within the statutory disclosure framework. The use of language such as “potentially useful material” is not helpful. The Home Office will be well aware of that framework and is directed in particular towards paragraphs 26-54 of the AG’s Guidelines 2022.

Question 7 - In your view, what are unnecessary and disproportionate requests for third party material driven by?

- a. Police lack the necessary training and expertise**
- b. Police predict that the CPS will require a lot of third party material and therefore request an unnecessary/disproportionate amount**
- c. The CPS ask for an unnecessary/disproportionate amount of third party material via the police**
- d. Defence lawyers ask for an unnecessary/disproportionate of third party material via the police**

- e. **Requests take a long time to be fulfilled and so all possible material is requested in case it is needed**
- f. **Requests are always necessary and proportionate**
- g. **Other/additional information**

Response

Depending on the case, each of sub-paragraphs a-e could apply.

In RASO cases specifically, because the majority of allegations arise from incidents which occur in private between two individuals, often who are not known to one another, issues of credibility and previous history will usually need to be explored. Requests for this information can appear speculative, but can reveal information which is pertinent to both the enquiry and any prosecution which follows, and this is an important safeguard for ensuring fair trials and reliable convictions.

Question 8 - On average, how long does it take to issue a request for third party material?

Response

Unfortunately that question is simply too broad to be meaningfully answered. The time taken to obtain the material depends on a variety of factors, such as (i) the stage in the investigation when the material is sought (ii) whether the material is provided voluntarily or under compulsion; (iii) the type and quantity of material sought; (iv) any relevant court orders as to the timing; (v) challenges to compulsory provision of material; (vi) questions of legal professional privilege; and (vii) the physical location of the material.

Question 9 – Does this differ by type of investigation?

- a. **Yes**
- b. **No**

Response

Yes

Question 10 – If YES, please specify average time spent on issuing a request for third party material for:

- a. Rape and Sexual Offenses (RASO)**
- b. Domestic Abuse**
- c. Child Sexual Exploitation**
- d. Assault or Violent Crimes**
- e. Homicide**
- f. Economic Crime**
- g. Drug trafficking**
- h. Acquisitive crime**
- i. Modern slavery**
- j. Other/Additional information**

Response

See Question 8 above.

Question 11 – In your experience, do third parties from whom you have requested information generally:

- a. Fail to provide the requested material**
- b. Provide only what is requested**
- c. Provide more than what was requested**
- d. Ask you to attend premises to search for relevant material**
- e. Other/additional information**

Response

Whilst again this will depend on a whole range of factors, it is the responsibility of the law enforcement agency (and where relevant the court authorising the request) to ensure that the request is focussed and specific. For example, not simply asking for the download of information over a wide date range irrespective of the period of offending.

Question 12 – In your experience, does the quantity of third party material requested affect the amount of time taken for the material to be returned?

- a. Yes, if more material is requested it will take longer to receive it**

- b. No, the amount of material requested is not related to the amount of time it might take to receive it**
- c. Other/additional information**

Response

Yes - if the type of material sought requires a subjective evaluation of its relevance.

Question 13 – In your experience, do third parties generally return requests for material within a satisfactory timeframe (i.e. to ensure timely progression of the investigation)?

- a. Yes**
- b. No**
- c. Other/additional information**

Response

Certain compulsory measures to obtain information can include a time limit for the return of the material sought. If the material is being sought post charge, then a court order should be effective in speeding the process up. However in practice, orders made in criminal courts are routinely breached without procedural consequence (in contrast to civil proceedings, interlocutory costs sanctions are almost never imposed). Witness summonses are often issued to local authorities in respect of material which might be relevant to domestic/child abuse allegations, pursuant to local courts' protocols, which can achieve timely provision of the material.

Question 14 – Why do you think it can take a long time for some third parties to respond to requests for third party material?

- a. It is not a priority for them to do so**
- b. They are unfamiliar with these types of requests and do not know how to handle them**
- c. They do not have a dedicated member of staff or team to handle these requests**
- d. The requests from police are not clear, and do not provide specific information needed to process the request**

e. Other/Additional information

Response

Reasons vary. Many institutions – banks, mobile phone companies, local authorities – have dedicated departments which deal with both voluntary requests and requests under compulsion. Other organisations can be inefficient or under-resourced, and the material is often archived. If there is any question of legal professional privilege or doctor-patient confidentiality, that can delay matters considerably.

In RASO cases there can be a delay in obtaining counselling or therapy notes because some (by no means all) such practitioners do not understand the reason and purpose behind such requests and are reluctant potentially to damage any therapeutic relationship with a witness / complainant by complying.

Question 15 – How far do you agree with the following statements:

- a. Delays in returns for third party material is a significant single factor in slowing down an investigation.**

Response

Agree

- b. When third party material is requested early in an investigation, it is less likely to cause a delay.**

Response

Agree

Question 16 – Aside from ensuring that requests for third party material are necessary and proportionate, is there any other action – legislative or non-legislative – you would like to see to improve the timeliness of returns for third party material?

Response

Where relevant, the enforcement of court orders. Enforcement options could in theory include:

- i. costs sanctions against third parties who fail to provide material in timely fashion;
- ii. “unless” orders, which bring proceedings to a halt if investigators / prosecutors have been dilatory in pursuing disclosure obligations;
- iii. guillotines for service of evidence sought to be relied upon.

Each of these enforcement options has advantages and disadvantages, but as with any procedural regime, meaningful sanctions for breaches of court orders (or statutory timetables) are required if the regime is to be effective.

Section 3: Questions for all respondents

Question 24 – Please state how much you agree or disagree with the following:

- a. **Engaging in Early Advice with the Crown Prosecution Service in rape cases helps to ensure requests for third party material are necessary and proportionate, in pursuit of a reasonable line of enquiry.**

Response

Agree

- b. **There should be a statutory duty on policing to only request third party material that is necessary and proportionate, in pursuit of a reasonable line of enquiry for an investigation.**

Response

Disagree – there is no need for any statutory duty which departs from that which already exists (see Question 1 above)

- c. There should be a statutory duty on policing to provide full information to the person about whom the third party material is being requested. This could include details about the information being sought, the reason why and how the material will be used, and the legal basis for the request.**

Response

Agree – the attendant privacy issues can be addressed.

- d. There should be a statutory duty on policing, in their requests for information to third parties, to be clear about the information being sought, the reason why, how the material will be used and the legal basis for the request.**

Response

Disagree – third parties holding information do not need this level of explanation as to why such information is requested and to provide them with it risks both data protection issues in relation to the explanation provided and further delay if the third party seeks to take issue with the explanation.

- e. There should be a code of practice to accompany the duties outlined in points b - d to add clarity on the expectations on policing and promote consistency in practice.**

Response

Agree – this would indeed promote consistency in practice.

Question 25 – Please provide further details for your answers and response to the policy proposals outlined in questions 15 b-e.

[No response]

Question 26 – Are there any other actions – legislative or non-legislative - you would like to see to reduce the number of disproportionate and unnecessary requests for third party material?

[No response]

Bar Council²

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For further information please contact

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² Prepared by the Law Reform Committee