



**Te Tari Ture
o te Karauna**
Crown Law

Disclosure

Te tūhura

As at 1 January 2025

Introduction | Ngā kupu whakataki

1. Defendants in criminal prosecutions are entitled to disclosure; this is an aspect of the right to a fair trial under s 25(a) of the New Zealand Bill of Rights Act 1990. The Criminal Disclosure Act 2008 (CDA) determines what must be disclosed.

Glossary | Kuputaka

2. In this guideline:
 - 2.1 A *prosecuting agency* is the agency prosecuting the defendant (on its own behalf or on behalf of the Crown) and that holds the file or files relating to the prosecution.
 - 2.2 The *person managing disclosure* is the person designated by the prosecuting agency as being responsible for managing disclosure on its behalf under the CDA.¹ Usually, this will be an investigator (such as the officer in charge), rather than the person who appears in court.
 - 2.3 The *prosecutor* is the person representing the prosecuting agency in the criminal proceeding.

Scope | Te korahi

3. This guideline covers disclosure obligations in criminal proceedings, and applies to all prosecutors and prosecuting agencies. It explains who has obligations under the CDA, and sets out the key principles that apply. It also notes the potential for information requests under the Official Information Act 1982 (OIA) and Privacy Act 2020.
4. Non-party disclosure is addressed in a separate guideline.

Guideline | Te aratohu

5. All prosecutors and persons managing disclosure are expected to be familiar with the CDA, any judicial practice notes relating to disclosure and any legally privileged advice regarding disclosure from Crown Law. Prosecuting agencies and Crown Solicitors should have policies, forms and/or checklists in place to support best practice that fulfils obligations under the CDA and the expectations in this guideline.

Principles guiding disclosure

6. Disclosure is a core aspect of criminal prosecutions. It is not a tick-box exercise, and should be engaged in thoughtfully to protect fair trial rights. Disclosure turns on the concept of “relevance” which needs to be assessed on the facts of each individual case.

¹ The Criminal Disclosure Act 2008 (CDA) refers to this person as the “prosecutor” (see definition of “prosecutor” in s 6 of the CDA). For consistency with the rest of the guidelines and to aid understanding, this guideline instead uses the term “prosecutor” in the sense that it is most commonly understood; the person who appears in court to conduct the prosecution.

7. It is a cooperative exercise, requiring proactive engagement and communication by the prosecutor and the person managing disclosure.

Disclosure obligations: who does what?

Prosecuting agency

8. The prosecuting agency is ultimately responsible for ensuring disclosure obligations are met.

Person managing disclosure

9. The person managing disclosure (on the prosecuting agency's behalf) should:
 - 9.1 provide all relevant material to the prosecutor;
 - 9.2 keep records of what has been disclosed and what withheld, when and how that was communicated to the defendant, and why relevant information was withheld; and
 - 9.3 seek advice from the prosecutor before disclosing sensitive information – for example, information that may be privileged or disclose the identity of an informant.

Prosecutors

10. Prosecutors have complementary obligations to the prosecuting agency and the person managing disclosure. Any lawyer conducting a prosecution has a duty to the court to protect the fairness of the trial, and a professional duty to comply with obligations concerning disclosure.²
11. This does not mean prosecutors should independently review every disclosure decision made. Rather, prosecutors should take reasonable steps to ensure that disclosure has occurred, for example by:
 - 11.1 proactively satisfying themselves that the prosecuting agency (including the person managing disclosure) is aware of its disclosure obligations under the CDA, and has met them;
 - 11.2 offering advice on whether contentious or sensitive material should be disclosed; and
 - 11.3 passing on to the person managing disclosure any requests for disclosure and any information the prosecutor receives directly that may need to be disclosed.

When must disclosure occur?

12. Disclosure should always be provided to the defendant as soon as practicable.

² Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008, r 13.12(a).

13. Initial disclosure³ should ideally be provided at or before the defendant’s first appearance and must be provided within 15 working days of the commencement of the proceeding.⁴ Disclosure before the defendant’s first appearance assists the defendant to enter a plea.
14. After a not guilty plea, full disclosure⁵ must be provided as soon as reasonably practicable. Full disclosure has two parts:
 - 14.1 First, all relevant information must be provided to the defendant unless there is a basis to withhold it (see “what must be disclosed” below).
 - 14.2 Second, the person managing disclosure is also required to disclose whether any relevant information has been withheld, and the reason for that (see “what can be withheld” below).

When does the ongoing disclosure obligation end?

15. Disclosure obligations continue until the proceeding has ended. They apply even on appeal, although a more limited pool of information will be “relevant” by this stage having regard to the grounds and issues on the appeal.
16. Full disclosure is therefore not a one-off event, but an ongoing process. When new and relevant information comes to light, the person managing disclosure is required either to disclose it, or to explain to the defendant that it has been withheld. If changed circumstances mean information that was previously assessed as irrelevant has become relevant, or there are no longer grounds for withholding the information, the person managing disclosure must disclose it.

Disclosure just before trial or during trial

17. Disclosure just before or during trial is especially likely to impact fair trial rights. It also creates risks for the prosecution – evidence may be excluded; the trial may be adjourned or a mistrial declared, impacting witnesses, victims, their whānau and the defendant; costs may be ordered against the prosecution; or in extreme cases, the defendant may apply for the charges to be stayed.
18. The person managing disclosure should therefore ensure that defendants have received disclosure as soon as practicable after the defendant has pleaded not guilty, so that the defendant has sufficient time to prepare their defence well in advance of the trial.

What must be disclosed?

19. Relevant information must be disclosed if the CDA does not provide a reason to withhold it. Information is “relevant” if it “tends to support or rebut, or has a material bearing on, the case against the defendant.”⁶ The person managing disclosure should discuss with the prosecutor if it is unclear whether particular information is “relevant”. A good working rule for these discussions is: “If in doubt, disclose”.

³ As defined in s 12(1) of the CDA.

⁴ CDA, s 12(4). This section also elaborates on different dates in the circumstances specified in that subsection.

⁵ As defined in s 13(2) of the CDA.

⁶ CDA, s 8.

20. There are no categories of information that are inherently non-disclosable.
21. Some kinds of information should always be proactively considered for disclosure. The High Court Practice Note⁷ provides a helpful checklist of potentially relevant information. For example:
 - 21.1 Do prosecution witnesses have any convictions that affect their credibility?
 - 21.2 Have any prosecution witnesses received a sentencing discount, or other incentive, for their willingness to give evidence?
 - 21.3 Are there individuals that the prosecution will not call as witnesses, but who can say something relevant? If so, the defendant should be given the individual's name, address (if disclosure is authorised under s 17 of the CDA), and any witness statement the individual has given.
22. Sometimes information may need to be disclosed even if there are grounds to withhold it. Under the CDA, a defendant can ask the court to order disclosure if the public interest in disclosing the information outweighs the interests protected by withholding it.

What can be withheld?

23. Relevant information can only be withheld on one of the grounds in the CDA. For example, there will be good reason for withholding disclosure where the identity of an informant is at stake. The person managing disclosure should also withhold information that is legally privileged. The person managing disclosure should have early discussions with the prosecutor about what should be disclosed if the information is contentious or difficult, such as information about informants.
24. The person managing disclosure must create a schedule that records the existence of any withheld information and the reason it has been withheld.
25. The person managing disclosure should be aware that a change in circumstances may impact the decision to withhold information.

Requests under the Privacy Act 2020 or Official Information Act 1982

26. Sometimes individuals will request information connected to a criminal prosecution under the Privacy Act or OIA. If the request comes from a defendant, it may be refused if the defendant could have asked for the same information under the CDA.⁸
27. The OIA applies to public prosecuting agencies, but not to Crown Solicitors – although Crown Solicitors may choose to help prosecuting agencies respond to an OIA request.
28. The Privacy Act applies to both prosecuting agencies and Crown Solicitors.

⁷ 2023 Practice Note: Criminal Disclosure in High Court Trials, HCPN 2023/1.

⁸ Official Information Act 1982, s 18(da)(i), Privacy Act 2020, s 53(g)(i).

Other relevant guidelines | Ētahi atu aratohu e whai pānga ana

Non-party disclosure | Te tūhura i hunga kē

Decisions to prosecute | Te whakatau ki te aru

Inmate admissions | Ngā whāki ā-mauhere

Witness anonymity orders | Ngā whakatau whakaū i te matatapu o te kaiwhāki

Immunities | Te kahu ārai

The relationship between prosecutors and investigators | Te hononga i waenga i te kaiaru me te kaitūhura