

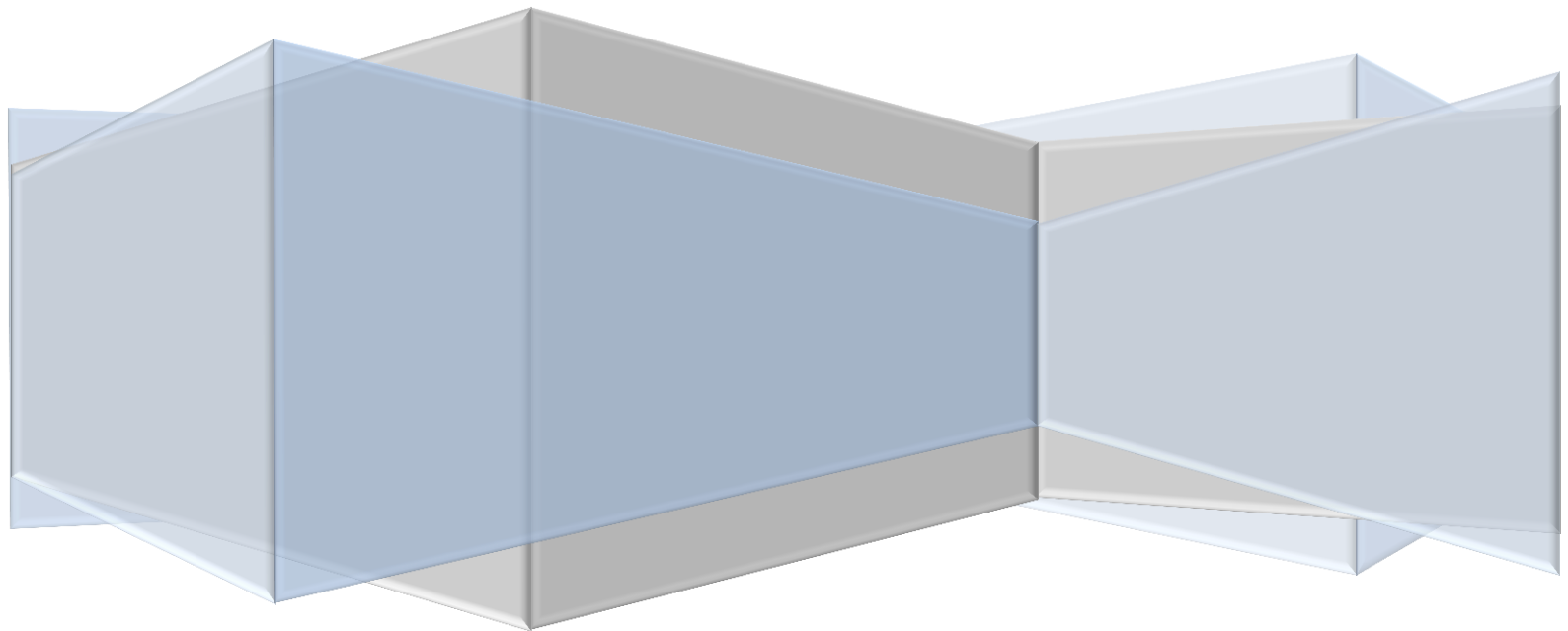


Department of
Justice

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Statutory Disclosure Guidance for Chief Officers

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Statutory guidance to chief officers of police on providing information for inclusion in enhanced criminal record certificates

PURPOSE OF THIS GUIDANCE

1. The review of the criminal records regime conducted by Mrs Sunita Mason in Northern Ireland, the Government's Independent Advisor for Criminality Information Management, recommended a statutory code of practice should be introduced for police to use when disclosing police information within the criminal records process.¹ The Minister for Justice accepted this recommendation and included in the Justice Act (Northern Ireland) 2015 provision for guidance to be published.
2. This guidance is issued under section 113B(4A) of the Police Act 1997 ('the Act') in order to assist chief officers of police in making appropriate, proportionate and consistent decisions in providing information from local police records for inclusion in enhanced criminal record certificates [ECRCs].
3. The guidance flows from Section 113B(4) of the Act. This requires police to disclose information on an ECRC. Section 113B(4) of the Act, as amended, states:-

“Before issuing an enhanced criminal record certificate the Minister of Justice must request any relevant chief officer to provide any information which –

(a) the chief officer reasonably believes to be relevant for the purpose described in the statement under subsection (2), and

(b) in the chief officer's opinion, ought to be included in the certificate.”

¹ <http://www.dojni.gov.uk/index/public-consultations/current-consultations/a-managed-approach-report-sunita-mason.pdf>

4. Section 119(2) of the Act states that the chief officer shall comply as soon as practicable with a request under section 113B.

STATUS OF THIS GUIDANCE

5. This guidance is issued under section 113B(4A) of the Act, which states that:-

‘the Department may from time to time publish guidance to chief officers as to the exercise of functions under subsection (4); and in exercising functions under that subsection a relevant chief officer must have regard to any guidance for the time being published under this subsection’

6. As Mrs Mason noted in her report, having regard to this guidance does not mean fettering chief officers’ discretion to make whatever decisions they consider appropriate within the constraints of the law. Chief Officers will, however, be expected to have due regard to the principles set out in this guidance and be able to justify any departure from the principles on a case by case basis.
7. This guidance sits alongside the Quality Assurance Framework (QAF) which is a set of processes and more detailed guidance covering the disclosure of local police information under the Act, drawn up by the Association of Chief Police Officers (now National Policing Chiefs Council) and the Criminal Records Bureau (now the Disclosure and Barring Service). In considering ECRC applications referred from AccessNI, therefore, chief officers should also have regard to the QAF in carrying out functions under section 113B(4) of the Act. The QAF is available on the Home Office website.²
8. This guidance applies primarily to the Police Service of Northern Ireland who provide the majority of information to the Department of Justice for disclosure by AccessNI. However, it equally applies to any relevant chief officer exercising functions under section 113B(4) of the Act, in respect of AccessNI applications referred to their force, regardless of the geographical location of

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353036/QAF_v9_OV1_Overview_of_QAF_Process_September_2014.pdf

the body for which they are responsible. This includes those treated as chief officers under section 113B(10) and (11) of the Act.

9. Under section 117A of the Act, both chief officers and the Independent Monitor must have regard to this guidance in carrying out functions arising from disputes about the inclusion of information in certificates, provided in accordance with section 113B(4) of the Act.

PRINCIPLES TO BE APPLIED

10. In deciding what, if any, information should be provided for inclusion in an ECRC, and in providing that information, chief officers should apply the following principles:

Principle 1: There should be no presumption either in favour of or against providing a specific item or category of information

11. Every piece of information should be assessed on its individual merits. Information should not be included (or excluded) because it is of a certain type.

Principle 2: Information must only be provided if the chief officer reasonably believes it to be relevant.

12. The word 'relevant' should be given its natural meaning, expressed as pertinent to, connected with, or bearing upon, the subject in question. Information must only be provided if the chief officer reasonably believes it to be relevant. It should not be disclosed on the basis that, although there is no apparent reason to believe that it is relevant, it could conceivably turn out to be. Forming a reasonable belief that information is relevant is a higher hurdle than merely considering that it might be, or could possibly be, relevant.
13. The most important factors which should be taken into account in considering relevancy are set out below. However, this is not an exhaustive list and other factors may come into play in individual cases.

Information should be reasonably believed to be relevant to the purpose for which the certificate is being sought

14. The prescribed purposes are set out in regulation 9 of the Police Act 1997 (Criminal Records) (Disclosure) Regulations (Northern Ireland) 2008, as amended.
15. Chief officers should address the purpose for which the certificate is being sought in considering issues of relevancy. What may be relevant to an application connected with caring for children or vulnerable adults may not be relevant where the applicant is, say, seeking a licence for handling or storage of controlled drugs and vice versa.
16. Linked to this test, chief officers should consider the extent to which information from local records is relevant in the sense that it provides background and context in relation to a conviction or other disposal retained in central records which will automatically be included on the ECRC. For example, it may be relevant to disclose the circumstances in relation to a theft offence where the individual is seeking to work with adults in a care setting or in his/her home. In some circumstances information relating to a third party, or simply the fact that a third party is linked to the address where work with children will be undertaken at that address, may also be considered relevant to the prescribed purpose.

Information should be viewed as sufficiently serious

17. There are no hard or fast rules to apply in this area, but chief officers should consider whether a specific piece of information is of sufficient gravity to justify its inclusion. It will be disproportionate to disclose information if it is trivial, or simply demonstrates poor behaviour, or relates merely to an individual's lifestyle.
18. There is some relationship here to the purpose for which the certificate is being sought. A relatively minor piece of intelligence with a clear relationship to that purpose might reasonably be viewed as relevant, while something more serious with no such relationship might not. In some cases it might be reasonable to view information linked to an isolated incident or allegation less seriously than information linked to a sequence. For example, a single allegation of violent behaviour might be less relevant than a whole series of allegations. Clearly there will be occasions where the nature of a single incident or allegation is such as to require disclosure.
19. Legislation was introduced in April 2014 in Northern Ireland that changed the definition of a "relevant matter" in Part V of the Police Act 1997 (known as the "filtering scheme"). This enables the Department to ensure that offences that

are regarded as serious or where there has been violent or sexual offending or where offences are related to drugs, robbery or drink driving these will always be disclosed on an ECRC. Some old and minor convictions and cautions are, however, filtered or removed from a certificate where these are no longer regarded as a “relevant matter” within the legislation. Chief officers’ should only in exceptional circumstances consider including information in an ECRC that has been filtered in this manner. Where police do disclose filtered information, the chief officer must ensure there a clear and specific explanation as to why this information has been disclosed.

Information should be sufficiently current

20. The age of the information, coupled with the age of the applicant at the time and their conduct in the intervening period, are factors which should be taken into account. The older the information the more difficult it will be to form a reasonable belief that it is relevant. An offender who was under 18 at the time of their offence or where their behaviour first brought them to the attention of police, may have matured now and pose a greatly reduced risk or no risk at all to vulnerable groups, especially where there is no further evidence of offending or inappropriate behaviour. However, there are other factors, especially seriousness, which may mean that even very old information may reasonably be believed to be relevant. The currency of information should be considered together with the applicant’s specific circumstances.

Information should be sufficiently credible

21. This will always be a matter of judgment, but the starting point will be to consider whether the information is from a credible source. Chief officers should consider whether there are any specific circumstances that lead them to consider that information is unlikely to be true or whether the information is so without substance that it is unlikely to be true. In particular, allegations should not be included without taking reasonable steps to ascertain whether they are more likely than not to be true.

Information may be explanatory

22. Information may be disclosed that can clarify the circumstances behind a specific conviction or non-court disposal. For example a conviction or a caution for aggravated assault may arise from an automatic charge because the victim was a young female. However, the applicant as the perpetrator may also have been a young female at that time and the assault may be of a less serious nature. Clarification of some cautions and convictions can provide

useful information to registered bodies to enable them to fully consider the degree of risk that an applicant may pose.

Principle 3: Information should only be provided if, in the chief officer's opinion, it ought to be included in the certificate

23. Having formed what they regard as a reasonable belief that the information is relevant, the chief officer must then consider whether it ought to be included in the certificate. There are two key areas to be considered under this heading, as set out below.

The impact of disclosure on the private life of the applicant

24. The words 'ought to be included' should be read and given effect in a way which is compatible with the applicant's right to respect for their private and family life under Article 8 of the European Convention on Human Rights. Disclosure of information on ECRCs as a result of decisions made by chief officers will fall within the scope of Article 8. That being the case, it will, in virtually every case, involve an interference with the applicant's private life; this may include the impact on the applicant in terms of their prospects of being selected for the role in question. Therefore chief officers must ensure that the disclosure of such information is justified in every case.
25. Firstly, this requires establishing whether there is a legitimate aim pursued by the disclosure; this might be the legitimate aim of crime prevention and/or the protection of the rights and freedoms of others and/or ensuring public safety. Every case should be evaluated on its own facts.
26. If there is a legitimate aim pursued, the next step is to consider whether the disclosure of the information is necessary to pursue that aim including consideration of whether there are any other realistic and practical options to pursue that aim. If disclosure is considered necessary to pursue that aim then the question becomes one of proportionality. In practice this will involve weighing factors underpinning relevancy, such as seriousness, currency and credibility against any potential interference with privacy. All decisions must be proportionate. This means that the decision is no more than necessary to achieve the legitimate aim and that it strikes a fair balance between the rights of the applicant and the rights of those the disclosure is intended to protect. It is essential, therefore, that the reasoning in reaching a decision is fully and accurately recorded in each case.

27. Where the information relates to a period of time when the individual was under 18, chief officers should take into account that this could have a significant detrimental effect on that individual's private life. Chief officers will wish to consider whether such disclosure is in the best interests of the young person in question, balancing this against the requirement to ensure that vulnerable groups, including children, are afforded appropriate protection.

Adverse impact of disclosure on the prevention or detection of crime

28. There will be exceptional cases in which the specific circumstances will require the chief officer to consider whether the value of disclosing information in terms of public protection might be outweighed or undermined by an adverse impact on the prevention or detection of crime.
29. For example, the applicant might be the subject of an ongoing police investigation and disclosing certain information might compromise that by alerting them to the police interest.
30. In the exceptional cases where the chief officer concludes that information should not be disclosed to the applicant for such reasons, they should consider alternative ways of dealing with the public protection issues that would otherwise be addressed via disclosure on an ECRC. This may, for example, involve providing information to an employer or potential employer in confidence, using the police's common law powers to act to protect the public. Alternatively, the police may decide to increase monitoring and observation of the applicant's activities to reduce risks to vulnerable groups or individuals.

Principle 4: The chief officer should consider whether the applicant should be afforded the opportunity to make representations

31. In any case where a chief officer is minded to provide information for inclusion in a certificate, or is uncertain whether to do so, he/she should consider whether the applicant should be offered the opportunity to make representations before the information is submitted. Some of the factors relevant to this consideration are:-
 - is there doubt as to whether the purpose for which the certificate is being requested, while eligible for an ECRC, actually requires the disclosure of this specific information?

- has the applicant ever had a fair opportunity to answer an allegation, particularly where the information relates to a time the applicant was under 18?
 - is there doubt that an allegation could be substantiated?
 - is there any doubt as to whether factual information is correct or remains valid?
 - is it questionable whether disclosure of this information would represent a disproportionate interference with the applicant's private life?
32. The chief officer should ask him/herself whether it is obvious that nothing the applicant might say by way of representations could rationally or sensibly influence their decision. Only in cases where there is no room for doubt that the information should be disclosed should a decision to disclose be taken without first giving the applicant an opportunity to make representations.

Principle 5: There should be a sufficient and clear audit trail to record the decision making process and support quality control

33. There should be a clear audit trail running through the decision making process. The reasons for key decisions within that process should be adequately documented, together with the identity of those responsible for them. This will underpin quality control processes which chief officers should ensure are applied on a regular and systematic basis.
34. It will also be critical to enabling effective review processes where specific decisions are challenged.

Principle 6: Decisions should be made in a timely manner

35. Decisions about whether to provide information for inclusion in a certificate should be made as quickly as possible. It is the chief officer's responsibility to ensure there are no unnecessary delays. Chief officers should be aware that delays feed through into important decisions affecting both the applicant and, potentially, the protection of the public.

Principle 7: Information for inclusion should be provided in a meaningful and consistent manner, with the reasons for disclosure clearly set out

36. Neither the applicant nor the employer or other body to whom they may wish to show the certificate should be left to speculate as to the reasons why information has been included. Both the reasons and the information itself should be set out in a clear and meaningful way and in a consistent format. A recommended template is included in the QAF.
37. The wording should be clear, concise and unambiguous. It should be written in plain English and be easy to read and understand. Police jargon should be avoided and the text should stick to the facts, offering no opinion, assumption or supposition. Personal opinions as to an applicant's suitability for a prescribed purpose should not be included.
38. The information should be self-contained and stand on its own merits. It should not, for example, cross-reference to other material which is not available as part of the disclosure or to information contained in a previous disclosure.

Principle 8: Any delegation of the chief officer's responsibilities should be appropriate and fully documented

39. The chief officer should consider whether any aspects of the decision making process are to be delegated. Delegation of some elements of decision making is inevitable due to the sheer volume of cases to be considered, but the chief officer must retain overall responsibility for the process and may introduce appropriate levels of delegation depending on the type of information to be disclosed, and whether the information relates to a time when the person was under 18. Any delegation should recognise the importance and complexity of the process and the chief officer should be satisfied that the police officer or member of civilian staff to whom the delegation is made is entirely suitable for the task in terms of skills, training and experience. Where delegation occurs, the chief officer should ensure that the delegate has regard to this statutory guidance. Any decision to delegate should be documented and signed off by the chief officer.

HEALTH INFORMATION

40. On its own, information relating to physical health or mental health is unlikely to be appropriate for disclosure.
41. A joint Home Office/Department of Health review of the operation of sections 135 and 136 of the Mental Health Act 1983, published in 2014, raised concerns that chief officers are sometimes disclosing information relating to mental health when it is not relevant or proportionate. While this review did not cover Northern Ireland, clearly these concerns equally could apply here. Disclosure of information relating to mental health is a sensitive issue for people who have encountered the police and requires careful consideration. The long-term effects of disclosure of experiences of mental health problems can be very damaging to the individuals concerned, impacting on their private lives and employment prospects. Additionally, it can be very difficult to judge whether an episode of mental ill health in itself is relevant to an application for a job or voluntary activity.
42. The fact that a person is or has suffered mental illness may only be disclosed where there are additional factors that make such a disclosure relevant. A person with mental ill health may experience a specific episode that brings them into contact with the police. Such an episode may lead to detention. The fact of detention under sections 135(1) or 136 of the Mental Health Act 1983, or its equivalent in Northern Ireland, sections 129(1) or 130 of the Mental Health (Northern Ireland) Order 1986 is unlikely, in itself, to be sufficient to justify disclosure. Sections 135(1) and 136 or 129(1) or 130 of the Northern Ireland Order provide the police with powers to remove a person to a place of safety when the person is believed to be suffering from a mental disorder and is in need of care or control. Such a detention under the Mental Health Act or the Northern Ireland Order does not constitute a criminal investigation and should therefore be treated with great caution when considering relevance for disclosure.
43. A key consideration for the chief officer is the person's behaviour during the course of the incident. For example, if police records show that the person's behaviour presented a particular risk of harm to others (which may include threats or physical violence), and the chief officer believes that the users of the certificate should be aware of that risk (for example, a risk to children or vulnerable people), then the chief officer might consider the information to be relevant to the purposes of the application and that it ought to be disclosed. Repeat incidents of such behaviour may also be a factor.

44. As stated at paragraph 19 of this guidance, the age of the information – i.e. how long ago the incident took place – is another important factor when considering how relevant the information is to the application. If the chief officer reasonably believes the information is relevant to the application, they should consider giving the applicant the opportunity to make representations about their current state of health before making a final decision on disclosure.
45. If the chief officer decides to disclose information relating to an episode of mental ill health, the certificate should provide sufficient explanation to ensure the prospective employer or voluntary organisation will clearly understand the relevance of the information to the application. Please see paragraphs 35 to 37 for further guidance on completing the certificate.
46. More detailed guidance on information relating to mental health is provided in the QAF.

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