Manitoba ***Guideline No. 2:DIS:1***
Department of Justice
Prosecutions

Policy Directive ***Subject: Disclosure***
Date: March 2008

POLICY STATEMENT:

The guiding principle with respect to Crown disclosure should be full, fair and frank disclosure of the nature and circumstances of the Crown's case, and information in furtherance of, or information that flows directly from the investigation, restricted only by the specific exceptions discussed below in this policy. Full disclosure ensures fairness in the criminal process. The fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction, but the property of the public to ensure that justice is done: *R.* v. *Stinchcombe*[1].

The rules governing the Crown's duty to disclose were clarified and consolidated by the Supreme Court in Stinchcombe. The Crown is required to make timely disclosure of all relevant information – both inculpatory and exculpatory – known to the investigator and the Crown Attorney, whether or not the Crown intends to introduce it in evidence. Relevance was assessed in relation to the charge itself and to the reasonably possible defences. Relevance was defined in terms of its usefulness to the defence. Information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence: *R.* v. *Egger*[2].

Thereafter, the Supreme Court in Dixon[3] reframed the basis of disclosure by stating "the threshold requirement for disclosure is set quite low… The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. This test for disclosure was affirmed by the Supreme Court in R. v. Taillefer; R. v. Duguay.[4]

In the event of doubt with respect to the disclosure of information, the Crown must err on the side of disclosure. Evidence should not be withheld simply on the basis that the Crown Attorney does not believe it to be credible. Credibility is for the trier of fact to determine after hearing the evidence.

---

[1] R. v. *Stinchcombe*, [1991] 3 S.C.R. 326
[2] *R.* v. *Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.)
[3] *R.* v. *Dixon*, [1998]1 S.C.R. 244 (S.C.C.)
[4] *R.* v. *Taillefer; R.* v. *Duguay*, [2003] S.C.J. No. 75 (S.C.C.)

In exercising its disclosure obligations, the Crown must respect the rules of privilege and its duty to protect witnesses from harassment, intimidation and harm. Decisions by a Crown Attorney not to disclose are reviewable by the trial judge.

ADDITIONAL DISCLOSURE

There is no time limit on the Crown's disclosure obligation as it is a continuing obligation. Information coming to the attention of the investigator or Crown Attorney following initial disclosure, that is in furtherance of the investigation or flows directly from it in which there is a reasonable possibility that it is useful to the accused in making full answer and defence must be disclosed in accordance with this directive. The obligation continues beyond conviction and after appeals have been decided or the time for appealing has lapsed. Information coming to the attention of the investigator or Crown Attorney which the Crown believes shows an accused is innocent or which raises a doubt in regards to a conviction, must be disclosed. This point was emphasized in the Driskell Report[5], which referred to The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions[6]:

> The need to disclose extends into appeal periods following conviction. The factual finding of the Marshall Commission demonstrate clearly the need to disclose evidence that Crown counsel realizes raises a doubt about the guilt of someone who has already been convicted, no matter when such evidence comes to Crown counsel's attention…
>
> While the obligation to disclose extends throughout any appellate litigation that follows a conviction, it is not tied to the currency of any appeal period. In a number of recent cases, the disclosure of evidence, whether fresh or otherwise, sometimes even years after all appeal routes had been exhausted and convictions upheld, has led to new trials being ordered, or convictions quashed outright.

WHAT MUST BE DISCLOSED

Upon a request from the defence for disclosure, defence counsel must be provided with the following:

(1) A copy of the charging document.

> Either the information (in Provincial Court) or the indictment (in Queen's Bench).

(2) A summary of the circumstances of the offence.

> This summary will usually be taken from the Court Brief or Police Summary provided to the Crown by the investigating Police Agency, but does not include the Police Investigation Report.

---

[5] P. LeSage, *Report of the Commission of Inquiry into certain aspects of the trial and conviction of James Driskell*, January 2007 (the "Driskell Report")

[6] G. Martin, *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, 1993 (the "Martin Committee Report")

(3) A copy of the accused's criminal record.

(4) A copy of the accused's driving record, where relevant to the specific charges before the Court.

(5) Statements of the Accused.

This includes a copy of any statement made by the accused to a person in authority and recorded in writing, in the case of verbal statements, a written summary of the statement and, in the case of electronic recordings, a copy of the recording, and transcript, when available.

(6) Written or verbal witness statements.

The accused is entitled to have the *text* of written statements made by witnesses to a person in authority, or in the absence of a written statement, a summary of the anticipated testimony of a proposed witness, of any statement made to a person in authority. In addition, copies of, or an appropriate opportunity to privately view and listen to, any audio or videotape of statements made by any witnesses, and transcripts, when available. The nature and circumstances of the case and of the witness statement will guide the Crown in determining which of these alternatives is most appropriate and the scope of any undertakings that should be obtained to protect legitimate privacy interest and/or safety concerns.

As a general rule, the names of witnesses are to be disclosed, but witnesses' addresses and telephone numbers are not to be disclosed. In all cases, the Crown Attorney will be guided by the necessity of protecting witnesses from intimidation or harassment.

(7) Police notes.

Copies of all notes made by members of the investigative agency relating to the offence and the investigation must be disclosed to the defence. Exceptions to this general rule exist with respect to those portions of police notes that would tend to prejudice an ongoing police investigation, reveal confidential investigative techniques used by the police, identify a confidential police informant or compromise a witnesses safety. Notes which contain this type of material, if not already edited by the police, should be edited by blacking out the portions containing such material. Once edited, the notes should be provided to defence counsel.

(8) Copies of forensic, laboratory and other scientific reports should be disclosed as soon as they become available. Crown Attorneys' should be mindful of section 657.3 of the *Criminal Code* which sets out the notice requirements where an expert is to be called as a witness or his/her report is to be tendered as evidence.

(9) Exhibits.

Copies of all documents, photographs, films, audio or videotapes of anything other than a statement of a person, that could reasonably be useful to the accused, where the nature of the exhibits permit, otherwise, an opportunity to inspect will be sufficient.

(10) Copies of criminal records of co-accused(s).

(11) Copy of any search warrant and the information in support, should be disclosed unless it has been sealed pursuant to a court order, and a list of any items seized pursuant to the warrant, subject to the existence of a legal privilege, or concerns regarding the safety or security of a witnesses, or to complete an investigation.

(12) Particulars of any similar fact evidence that the Crown intends to rely on at trial.

(13) Particulars respecting any identification evidence used outside of court to identify the accused, and any information that may bear on the reliability of identification evidence relied on by the Crown.

(14) Any additional information received from a Crown witness during an interview conducted by a Crown Attorney in preparation for trial, such as information that is inconsistent with any prior statements, recantations, drawings and any additional details which supplement a prior statement(s), in which there is a reasonable possibility that the information is useful to the defence.

(15) Interception of Private Communications (Wiretaps). Initial disclosure will consist of a synopsis of all intercepted communications made during the course of the authorization along with a copy of the judicial authorization or consent under which the private communications were intercepted. Additional disclosure will consist of all communications (recordings and transcripts) determined by the investigating officer, in consultation with the Crown Attorney assigned to the case, to be relevant to the case (inculpatory and exculpatory). If defence counsel wish to listen to other intercepted communications included in the synopsis but not deemed relevant and disclosed as above, defence counsel should contact the investigating officers directly to arrange an appointment to do so. If defence counsel requests copies of any such interceptions (recordings and transcripts), that request should be made to the assigned Crown Attorney who will then consider the request. If the Crown Attorney ultimately determines that the conversations are irrelevant and not considered to be reasonably useful to the defence, defence counsel would have to apply to the court to order disclosure. For further information, refer to the memorandum prepared by Gregg Lawlor, dated October 18, 2006 entitled “Interception of Private Communications (Wiretaps) – Disclosure to defence counsel”

(16) All benefits requested, discussed, or provided or intended to be provided for any central witness, at any time, in relation to that central witness, should be recorded and disclosed. This recommendation was made in the Driskell Report[7] and

[7] Supra, note 5

adopted by the Government of Manitoba. It recognizes the suspect nature of the evidence of unsavoury witnesses generally. It does *not* limit this disclosure obligation to only those involving the typical in-custody informer, but applies to any unsavoury witness, whose evidence raises similar concerns. For example, a person who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in -custody informer to falsely implicate an accused in return for benefits[8].

"Benefits" should be broadly interpreted to include any promises or undertakings, between the witness and the Crown, police or correctional authorities, including such things as, but not limited to:

- Bail accommodations
- Dropping or reducing charges
- Modification of sentence
- The point at time in which such charges will be dealt with
- Amelioration of current or future conditions of incarceration
- Financial assistance or reward - payment of monies; lump sum, monthly allowance, other expenses
- Securing employment
- The resolution of pending applications for the return of offence-related property or proceeds of crime under the *Criminal Code* or *Controlled Drugs or Substances Act*
- Receipt of a pardon in exchange for cooperation
- Special privileges while in jail or under the control of the police pursuant to section 527(7) of the *Criminal Code*
- Any other leniency or benefit, including any benefit or consideration sought, promised or conferred beyond the scope of the original agreement to provide information or testimony, whenever it occurs
- The extension of any of the above to any person connected with the witness

Copies of the notes of all police officers and corrections authorities who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by the witness, should also be disclosed.

Such information shall be disclosed, save and except any information which may tend to compromise the safety or security of the witness, by tending to reveal the witnesses identify and/or location of the witness. It would be appropriate to confer with police and correctional authorities prior to making disclosure, to ensure that the safety of the witness is not endangered if disclosure is made before authorities have attended to providing for the witnesses security.

In consideration of the continuing Crown disclosure obligation, any information, relating to such a witness, that would raise doubts in regard to a conviction, or

[8] Kaufman, The Honourable Fred, *Commission on Proceedings involving Guy Paul Morin*, (1998)

show the innocence of the accused, must be disclosed, whenever that information arises.

For further information with respect to in-custody informers, refer to the "Interim In-Custody Informer Policy," 2: INF: 1.

(17) Any other evidence that may assist the defence.

This would include, for example, advising the defence of the identity of witnesses who fail to make an eyewitness identification or of other witnesses whose evidence is generally favourable to the accused, and information that may be used to impeach the credibility of a Crown witness in respect of the facts in issue in the case.

ADDITIONAL DISCLOSURE SUBJECT TO CROWN DISCRETION

Additional material, if requested by the defence, may be disclosed at the discretion of the Crown. Such matters include the following:

(1) Copies of criminal records of witnesses.

Pursuant to section 12 of the *Canada Evidence Act*, a witness may be cross-examined in respect of convictions for offences under any federal statute[9]. Upon request, the criminal records of material Crown witnesses, if the witness' credibility is at issue, should be disclosed. A Crown Attorney has discretion, reviewable by the trial judge, to determine whether information regarding a criminal record of a proposed witness is relevant to that witness' credibility. For instance, a 10-year old criminal conviction for impaired driving would not assist in impeaching the credibility of a witness in an assault trial. On the other hand, convictions for offences of dishonesty will often be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the defence right to test the Crown's case and the credibility of the Crown witnesses.

Only convictions under provincial statute which involve underlying elements of deceit or dishonesty which might reasonably affect the court's assessment of credibility of that witness, need be disclosed.

Findings of guilt under federal or provincial statutes resulting in a discharge, which involves discreditable conduct by the witness that could reflect adversely on credibility, should be disclosed[10].

Concerning the criminal records of youth witnesses, note that, while s. 45.1 of the *Young Offenders Act* requires an application to a judge to

[9] *R.* v. *Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.); *R.* v. *Watkins* (1992), 70 C.C.C. (3d) 341 (Ont. C.A.)
[10] *R.* v. *Cullen* (1989), 52 C.C.C. (3d) 459 (Ont. C.A.)

disclose such information[11], section 125(2)(a) of the *Youth Criminal Justice Act* (YCJA) explicitly gives the Crown the discretion to disclose youth criminal records. Copies of criminal records of youth co-accused will normally be disclosed but will be subject to the applicable legislation (YOA or YCJA).

Pending charges under federal and provincial statutes, generally cannot be the subject of cross-examination of a witness, although it may be permitted where the defence lays a proper foundation establishing the relevance of the proposed line of questioning, such as where the defence intends to show that the witness has a motive to favour the Crown to obtain benefits respecting his/her outstanding charges. The cross-examination is limited. If the information is relevant only to credibility, it is a collateral matter and the defence is bound by the answers provided by the witness, and cannot prove the witnesses misconduct by calling witnesses to contradict that witness[12]. Disclosure of a copy of the information and brief synopsis of the allegations underlying the charge should be provided to the defence.

There are limitations on disclosure of records pertaining to community based approaches such as diversion. If however a charge was stayed or withdrawn because the offender successfully completed the alternative measures requirements, he/she would have had to admit their responsibility and the Crown satisfied that there was sufficient evidence to support the charge. If that "offence" is relevant to the credibility of that witness, information respecting the existence of the charge and the fact it was diverted should be disclosed to the defence, who can then decide to pursue an application under section 717.4(1) (d) (ii) of the *Criminal Code* for access to the information.

(2) Videotaped witness statements of sexual-abuse/child-abuse victims.

A videotaped statement of a sexual-abuse or child-abuse victim will only be disclosed if and when defence counsel completes an undertaking form. See suggested undertaking attached as Appendix 1. If defence counsel is not prepared to comply with the conditions in the undertaking, the Crown should facilitate the viewing of a copy of the videotape by defence counsel at a suitable location such as the Crown's office or a police station.

No copy of a videotaped statement of a sexual-abuse or child-abuse victim will be released to an unrepresented accused unless ordered by the Court. Instead, the Crown will facilitate the viewing of a copy of the videotape by the accused under strictly controlled circumstances at a suitable facility such as the Crown's office or a police station.

---

[11] *R.* v. *Strain* (1994), 91 C.C.C. (3d) 368 (Ont.G.D.)
[12] *R.* v. *Titus* (1983), 2 C.C.C. (3d) 321 (S.C.C.); *R.* v. *Gassyt* [1998] O.J. No. 3232 (Ont. C.A.); *R.* v. *Gonzague* (1983), 4 C.C.C. (3d) 505 (Ont. C.A.)

Special disclosure procedures are in place regarding videotapes which are the subject matter of the charge itself i.e. child pornography, are facilitated through the Police Integrated Child Exploitation (ICE) Unit. Disclosure of child pornographic images is done in two forms: either defence counsel attends the ICE Unit and the images are displayed or ICE Unit delivers a locked computer with a mirrored hard drive from the accused's computer. The latter method is for a limited period of time and is delivered with a trust letter limiting the use of the computer. In neither instance can the images be copies or distributed.

EXCEPTIONS TO FULL DISCLOSURE

Notwithstanding the above, the following are not subject to disclosure:

(1) "Work product privilege" protects information or documents obtained or prepared for the purpose of litigation, either anticipated or actual, and includes but is not limited to:

(i) Interdepartmental memos between Crowns;

(ii) Correspondence to and from the police, excluding replies to Crown requests for pre-charge information;

(iii) CPIC print-outs such as those dealing with warrants, excluding those that only pertain to Court orders (e.g. the Court orders to which the accused was subject);

(iv) Crown legal briefs;

(v) Crown instructions to police; and

(vi) Crown or police opinions about the case, including opinions about the accused, witnesses or the strength of the case.

(2) Information that would tend to jeopardize the safety of a witness or third party.

(3) The identity of a confidential police informant or information that is of such a nature that it would tend to identify the informant as its source.

(4) Information that would tend to prejudice an ongoing police investigation or reveal confidential investigative techniques used by the police. Delayed disclosure may be appropriate in relation to release of such information.

(5) Anything specifically highlighted by the police as something that should *not* be disclosed.

From time to time, the police may indicate that certain information should not be disclosed. Crown Attorneys should be mindful of such warnings,

but should satisfy themselves that there is a legitimate concern justifying the withholding of information.

(6) Information, the disclosure of which would not be in the public interest, including but not limited to information that would tend to jeopardize national defence or security or that would be "injurious to international relations" (see: s. 38 of the *Canada Evidence Act*).

(7) Information that cannot lawfully be disclosed.

(8) Information protected by common-law or statutory privilege that has not been waived or the disclosure of which has not been judicially authorized.

(9) Information that is clearly irrelevant to the prosecution or defence of the given charge.

(10) Third-party reports concerning the victim or witness

(i) Reports covered by s. 278.1 to s. 278.91 of the *Criminal Code.*

These sections apply where the offence charged is sexual in nature. They deal with any record or report for which there is a reasonable expectation of privacy, such as:

- medical records (such as Sexual Assault Protocol Examination Reports);
- psychiatric records (not applicable to accused's own reports);
- therapeutic records (sex abuse counselors, Klinic reports);
- counseling records;
- educational records;
- employment records;
- child welfare, adoption, social-services records (Welfare); and
- personal diaries.

Disclosure of these records can only take place through court order or where the witness to whom the record relates waives the application of sections 278.1 to 278.91 of the *Criminal Code*. Section 278.2(3) requires the Crown to give notice that such a report exists. Even though the Crown does not provide the actual report, he or she must provide notice to the accused that the Crown has it. This can usually be accomplished through reference in the police report (i.e. "Investigators received medical report

dated X by Dr. Y and sent to Crown"). If this isn't present, it must be added, or defence counsel is advised in another manner.

Where the defence applies for disclosure, the witness should be advised that the Crown will provide independent counsel to the witness for the purpose of opposing the defence application. For further information, refer to the memo to Crown Attorneys dated 27 October 1998 and entitled "O'Connor and C-46 Applications – Production of Documents by Third Parties – Consultation with Constitutional Law Branch – Revised Protocol 98/10/26."

(ii) Reports not covered by s. 278.1 to s. 278.91 of the *Criminal Code*

Generally, offences that are not sexual in nature are not subject to sections 278.1 to 278.91. In such cases, records or reports produced by third parties are governed by the disclosure procedures set out in *R.* v. *O'Connor*[13]. For example, see Crown policy No. X relating to disclosure regarding disciplinary matters involving police misconduct.

WHEN DISCLOSURE SHOULD OCCUR

As a general rule, disclosure should occur before the accused is called upon to elect the mode of trial or to plead. As this is a continuing obligation on the Crown, any new evidence that becomes known to the Crown, that could reasonably be useful to the accused in making full answer and defence, in regards to the nature and circumstances of the Crown's case, and information in furtherance of the investigation or that flows directly from it, should be disclosed on a timely basis, without the need for additional requests, regardless when the information is received.

DISCRETION TO DELAY DISCLOSURE

The duty to disclose is generally subject to a Crown discretion to delay disclosure in appropriate cases. Disclosure may be delayed to protect the witness from harassment or injury, to enforce the privilege relating to informants or where there is a substantial risk to the fair administration of the criminal justice system. In rare cases, disclosure may be delayed to complete an investigation. Any decision to limit or delay disclosure should be reviewed by the appropriate director or supervising senior Crown Attorney. Where a Crown Attorney limits disclosure to comply with the rules of privilege, the Crown must advise the defence of the general nature of the undisclosed information, and the reasons therefore.

FORMAT OF DISCLOSURE

Unless defence counsel specifically requests disclosure in a paper form, the Crown may provide defence counsel copies of documents in either a paper format (photocopies) or an electronic format (e.g. by CD-ROM). Where the accused is unrepresented, the Crown Attorney should generally provide copies of such documents in a paper format.

---

[13] *R.* v. *O'Connor*, [1995] 4 S.C.R. 411

DISCLOSURE OF EVIDENCE TO AN UNREPRESENTED ACCUSED

If the accused is not represented by counsel, a Crown Attorney should inform the accused that disclosure is available under this policy.

An unrepresented accused is entitled to the same disclosure as a represented accused. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown based on the facts of the case. For instance, if there are reasonable grounds for concern that leaving disclosure materials with an unrepresented accused would jeopardize the safety and/or privacy interests of any person, the Crown may provide disclosure by means of controlled and supervised, yet adequate and private, *access* to the disclosure materials. Special care may also be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial, e.g. taped private communications, exhibits that could be easily and quickly altered and destroyed.

There should be an endorsement placed on the file concerning the nature, extent and timing of disclosure to an unrepresented accused.

GUILTY PLEA WITHOUT DISCLOSURE

Nothing stated in this policy serves to preclude a guilty plea without disclosure, including situations where the accused simply wishes to dispose of the charge as quickly as possible. Disclosure is not a condition precedent to the entering of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish disclosure before a guilty plea is entered.

INDEXING OF DISCLOSED MATERIALS

Because of the importance of disclosure and the consequences of non-disclosure (in terms, for example of *Charter* relief), it is essential that the Crown develop the necessary tools for ascertaining at any given time what it has or has not received from law enforcement agencies, and what it has or has not disclosed to the accused. Checklists or indexes should be used to monitor the timing and content of disclosure. The Crown should provide a complete and accurate index of the contents of disclosed materials to defence counsel and a copy of the document retained on the Crown file. The Crown also has discretion to require of the defence a written acknowledgement or other appropriate confirmation of the disclosure materials provided. This is important given the possibility of a *Stinchcombe* review of the decisions made by the Crown Attorney on the issue of disclosure.

As the volume of information increases in relation to the complexity of the case, the disclosure process can become cumbersome, particularly in regards to “mega cases”, therefore, it is advisable to review the disclosure obligation with the investigative agency, to establish a disclosure protocol between the law enforcement agency and within the prosecution team, to ensure that effective and efficient management of disclosure occurs.

FLEXIBILITY IN APPLICATION OF DIRECTIVES

Generally, it is recognized that the precise mechanics or procedures for providing disclosure will vary throughout the province and will generally be determined by the local Crown Attorney, in accordance with available resources and the needs of the local defence bar. The directives set forth here are in no way intended to be exhaustive and the withholding or release of additional information in possession of the Crown should be determined based on relevancy and privilege on a case-by-case basis. Changes in legislation or police reporting/investigative procedures may require ongoing revision and adding or subtracting from the lists provided herein. If something appears in a Crown file that is new or different, the best advice is always to consult with a supervising senior Crown Attorney about its disclosure.

RATIONALE:

The purpose of disclosure by the Crown is to ensure the fairness of the trial process. As articulated by the Supreme Court, the Crown must disclose all information in which there is a reasonable possibility of its usefulness to the accused. However, in fulfilling the disclosure obligation, the Crown Attorney must be mindful of the Crown's concurrent obligation to protect witnesses from intimidation and harassment.

Disclosure of the Crown's case can also assist in making more efficient use of court time by resolving non-contentious and time-consuming issues in advance of the trial and encouraging guilty pleas to appropriate charges early in the proceedings.

As emphasized in the Driskell[14] Report, the Crown's disclosure obligation is a continuing obligation, one that applies throughout the prosecution and extends beyond appeal periods, to ensure that justice is accomplished through fairness in the process.

[14] Supra, note 5

Appendix 1.

Manitoba
Criminal Justice Division **Prosecutions**

5th Floor - 405 Broadway
Woodsworth Building
Winnipeg MB R3C 3L6
CANADA

(204) 945-2852
FAX: (204) 945-1260

June 6, 2008

Dear Sir/Madam:

RE:

As counsel for the above noted accused, I have agreed to provide you with a copy of the video-tape as part of disclosure.

Therefore, I am prepared to release the video-tape in question to you on the following strict trust conditions:

1. That the tape is to be kept in your personal possession;
2. That no copy is to be made of this tape;
3. That the tape is to be returned directly to the writer upon the expiration of the appropriate appeal period, or earlier as may be agreed upon by yourself and the writer;
4. That should you be discharged by your client, the video-tape will be immediately returned to the writer.

If you are unable to accept any of the above conditions, the video-tape must be returned to the writer forthwith.

Yours truly,

Crown Attorney

enclosure - videotape