

Supporting Document 1

Home Office Circular 53/2005

MONEY LAUNDERING: THE CONFIDENTIALITY AND SENSITIVITY OF SUSPICIOUS ACTIVITY REPORTS (SARs) AND THE IDENTITY OF THOSE WHO MAKE THEM

Summary

The Proceeds of Crime Act 2002 requires banks and other businesses in the regulated sector to report knowledge or suspicion of money laundering to SOCA. These reports are commonly known as Suspicious Activity Reports (SARs). Disclosure of SARs in certain circumstances might cause a real risk of serious prejudice to an important public interest. Where disclosure is likely to be ordered in such a case, the prosecution has to carefully weigh the options as to whether it should proceed with the prosecution or withdraw proceedings. The personal safety of the reporter, and the interests of the disclosing institution, should disclosure become necessary, will be among a number of considerations taken into account on a case by case basis, but depending upon the circumstances of the case, may not be sufficient to prevent disclosure of the reporter's identity.

Procedure to be followed

1. The following is the standard procedure to be followed by the police, other law enforcement agencies (LEAs) and the Serious Organised Crime Agency (SOCA) in relation to the disclosure under the Criminal Procedure and Investigations Act 1996 (CPIA) of SARs. The staged process should be for each item of unused material:

- is it 'relevant'?
- is it potentially 'sensitive' or non-sensitive?
- does the 'disclosure test' apply?
- is a 'PII application' necessary?

2. 'Relevant': Under the statutory CPIA Code of Practice, investigators must retain material which they obtain in the course of a criminal investigation and which may be relevant to the investigation. The content of the SAR will frequently be relevant to an investigation. Retained material which may be relevant to an investigation must be revealed to the prosecutor on a schedule of non-sensitive or sensitive material. The schedule of non-sensitive material will also be revealed to the defence

3. Potentially 'sensitive': Under paragraph 6.12 of the CPIA Code of Practice, in order to be 'sensitive', an item of unused material must pose a 'real risk of serious prejudice to an important public interest'. The risk must be real, not fanciful, and any consequent prejudice, serious. Examples of sensitive material may include, depending on the circumstances, material given in confidence. Whilst the SAR regime in itself is in the public domain, individual SARs are given in confidence on the grounds that, for example, in certain instances criminal offences attach to "tipping off" third parties as to their existence or contents. The safety of the reporters is a prime consideration. Under

paragraph 6.12 of the Code of Practice, another example of material which may be sensitive is material relating to identity of persons supplying information to the police who may be in danger if their identities are revealed.

4. 'Disclosable': Any specific item listed on either schedule can only be disclosed to the defence if it meets the disclosure test: 'there is something that might reasonably be considered capable of undermining the prosecution case against the accused or of assisting the case for him'. This means that items meeting the 'sensitive' test, but not meeting the 'disclosure' test, remain hidden and undisclosed to the defence. Items meeting the disclosure test will need a PII hearing.

5. PII Applications: The House of Lords judgement in the case of H&C, in February 2004, gives helpful guidance on potential PII applications and must be read and understood by all of those involved in the criminal prosecution process. Relevant extracts are printed at Appendix A. A key point is that it reinforces the CPIA disclosure test; there is no duty to disclose material that is neutral or that is damaging to the defendant: *'if material does not weaken the prosecution case or strengthen that of the defendant there is no requirement to disclose it'*.

6. In the majority of cases involving suspicious financial activity the relevant material (such as a bank statement) is adduced in evidence as a result of production orders. Any underlying SAR may tend to strengthen the prosecution case or be neutral, in which case there is no requirement to disclose it. It should not be assumed, however, that documents that indicate some suspicion can only damage a defendant's case, as the basis for suspicion could in some circumstances assist a defendant's case. SARs that are inconsistent with the subsequent evidence uncovered may well assist the defence. Moreover it may be possible to disclose the SAR in a redacted form or by admissions (and thereby avoid the need for a PII application.) Each one will need to be considered on its own facts and checked carefully against the subsequent evidence.

7. Therefore, where a SAR is regarded by an investigator as relevant to an investigation, the disclosure officer should consider, on a case by case basis, whether the SAR (or parts) is (are) sensitive (in the sense that its disclosure would give rise to a real risk of serious prejudice to an important public interest) and whether, accordingly, it should only be revealed to the prosecutor on a schedule of sensitive material. Careful consideration must also be given to disclosing items meeting the disclosure test: whether it (or parts) undermine(s) the prosecution case or assists the accused. In rare cases a PII application may be necessary.

All SARs to be considered individually

8. The recipient of the information is usually SOCA in the first instance. They may then further disseminate the information to the police or other LEA. The police or other LEA may also receive the information directly from the reporter.

9. In all circumstances, prior to disclosure being considered to any defendant, the relevance and sensitivity of the content of the SAR, including the identification of the reporter, must be assessed.

If disclosure is believed necessary, contact SOCA in writing

10. In the circumstances when the police or other LEAs are seeking disclosure of a SAR held by SOCA then the request is to be made following the three step format below.

11. If the police or other LEA disclosure team believe, in discussion with the prosecution (as necessary) that the SARs (or other SOCA material) should be disclosed, whether at the initial disclosure stage or under the continuing prosecution duty, then they should write to the Assistant Director, UK Financial Intelligence Unit (UK FIU) , SOCA stating:

- a the nature of the case being prosecuted;
- b the issues in the case in respect of which the SARs are believed to be relevant;¹
- c what material and/or information is believed to be held by SOCA;²

SOCA will respond

12. The decision on relevance is for the prosecution disclosure team but SOCA does reserve the right to make representations. Therefore if SOCA is not satisfied that the identified SAR or other material should be released (whether on the grounds that it is not relevant to the investigation, fails to meet the disclosure tests or, if it does, runs the risk of prejudice to a wider public interest) then it will seek legal advice. If that legal advice recommends that material is not to be released or further information is required before a decision on its disclosure can be made, then SOCA will make representations to the prosecutor.

Disclose by redaction or admissions

13. It is not necessary for disclosed material to remain in the form in which it was originally or derivatively recorded. In some cases it may be possible to disclose a SAR in redacted form, or by admissions.

Assess risk if further detail relevant (or identifiable)

14. It is essential that the police, or other LEA, should consult with the reporter before a decision is made which would have the effect of identifying him/her.

15. If the source branch or person, or a third-party is itself relevant, or if despite redaction the source would nevertheless be evident then a risk assessment must be made of the real risk of harm to that person from that particular defendant or organisation:

- a. the police, or other LEA, are responsible, in consultation with the reporter, for the assessment of the threat i.e. the capability of the criminal organisation; and,

¹ It may be that the relevant fact is only that a SAR had been made and not the content of the SAR

² This may include, if relevant, auxiliary material generated by SOCA in relation to the SAR(s).

b. the police, or other LEA, are responsible, in consultation with the reporter, for the assessment of the vulnerability of the reporter to that threat.

If the assessment is that there is insufficient reason for concern then the full details will be disclosed. However, the risk assessment should be reviewed by the prosecutor before details are disclosed.

In cases of real risk, apply for PII

16. SARs are to be treated in the same way as any other intelligence material gathered during the course of an investigation. It is therefore vital that the reader is aware of the relevant legislation and current guidelines and applies those principles to the treatment of SARs. Relevant material is set out in the extract from the Attorney General's Guidelines on page 5.

17. If the combined assessment is that a real risk exists then application for PII must be made on the grounds of a real risk of serious prejudice to an important public interest (bearing in mind the fundamental human right to life). The Judge will then balance that against the right to a fair trial and it must be expected that *the public interest in the fair administration of justice will always outweigh the public interest in protecting the identity of intelligence sources, where the withholding of such information is likely to deny the defendant an opportunity to cast doubt on the case against him.*

18. In such a rare and unfortunate situation the prosecutor must decide whether to withdraw from the prosecution or to proceed with the case and ask the police, or other LEA, so far as is practicable, to act to ensure the safety of the disclosing person(s).

Use of SARs in Civil Proceedings

19. Police and other law enforcement agencies should be aware that SARs may be used in civil proceedings. With the exception of cash forfeiture proceedings in the Magistrates' Court the use of SARs in civil proceedings is covered by Part 31 of the Civil Procedure Rules. The basic provision in most civil proceedings is that each party has to disclose the past or present existence of (a) the documents on which he relies and (b) the documents which adversely affect his or another party's case. These documents may then be inspected by the other side. However, in some circumstances a party can apply for an order allowing him to withhold disclosure on the ground "that disclosure would damage the public interest" (rule 31.19). The court has to weigh the public interest in the administration of justice and the Article 6 right to a fair trial against the public interest in the proper functioning of the public service, including that of law enforcement agencies (which may also raise ECHR rights, e.g. the Articles 2 and 8 rights to life and respect for private life, in the case of informers).

20. In cases of civil recovery proceedings under the Proceeds of Crime Act 2002, the Assets Recovery Agency recognises the difficulties that might arise if the identity of the person making the disclosure were to be revealed. The Agency will take all possible steps to protect the identity of the person in such circumstances, and will follow the guidance as closely as possible in relation to notifying and discussion with the disclosing agency.

Extract from Attorney General's Guidelines

Background

Although the following does not specifically mention Suspicious Activity Reports, SARs are to be treated in the same way as any other intelligence material gathered during the course of an investigation. It is therefore vital that the reader is aware of the relevant legislation and current guidelines and applies those principles to the treatment of SARs. The guidelines include paragraph 7 of the attached Home Office Circular.

Legal Environment

The following is an extract from the Attorney General's Guidelines on the Disclosure of Information in Criminal Proceedings 2005 that underpins the law enforcement approach to disclosure:

'Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed under article 6 of the European Convention on Human Rights. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial.'

Fairness does, however, recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm.'

Below are extracts from the House of Lords Appellate Committee who, in February 2004, reported comprehensively on issues relating to the application of the Criminal Procedure and Investigations Act 1996 (CPIA) and Public Interest Immunity³.

"Para 17. The Criminal Procedure and Investigations Act 1996 gave statutory force to the prosecution duty of disclosure⁴, but changed the test. Primary disclosure must be made under section 3(1)(a) of any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused. Secondary disclosure under section 7(2)(a) is to be made, following delivery of a defence statement, of previously undisclosed material which might be reasonably expected to assist the accused's defence."

³ Regina v. H (Appellant); Regina v. C (Appellant) (Conjoined Appeals). 12th Report 2004

⁴ The 1996 Act has been amended by Part 5 of the Criminal Justice Act 2003 with effect from 4 April 2005, but the changes do not affect the substance of the H&C judgement. The main change is the abolition of the old "primary" and "secondary" prosecution tests and their replacement with a single objective prosecution disclosure test which applies both at the initial prosecution disclosure stage and subsequently. The new test requires the disclosure (subject to Public Interest Immunity considerations) of any previously undisclosed material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

"Para 35. If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it.⁵ For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court."

"Public interest immunity

Para 18. Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

" Para 36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(1) What is the material which the prosecution seek to withhold?⁶ This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below) be ordered.⁷

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered?⁸ If No, full disclosure should be ordered.

⁵ In the majority of cases involving SARs, the material is adduced in evidence as a result of Production Orders and so the underlying SAR tends to strengthen the prosecution case or be neutral.

⁶ For the purposes of this paper, the material may be part or all of a SAR.

⁷ A SAR may undermine the prosecution case or assist the defence case if, for example, the text within the SAR names a person other than the defendant as the directing mind behind the reported activity; or the SAR may report the customer's explanation for the funds that is later consistent with the stated defence at trial.

⁸ For example, full disclosure would include the identity of the person making the SAR who may thereby be endangered, this goes to the public interest in safeguarding persons from harm.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question⁹ and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review."

⁹ For example, by editing parts of the SAR.