



AFP
AUSTRALIAN FEDERAL POLICE

ISP-S-5

Investigations Standards and Practices

Standard for Disclosure

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PUBLISHED PURSUANT TO THE

FREEDOM OF INFORMATION ACT 1982
(COMMONWEALTH)

INFORMATION PUBLICATION SCHEME (IPS)

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FOREWORD:

This standard has been developed by the Investigation Standards and Practices (ISP) portfolio in conjunction with AFP Legal. This standard draws on the experience of a diverse group of Detectives and AFP appointees. Due to the nature of the standard, members of the Commonwealth Director of Public Prosecutions (CDPP) also provided their insight and perspective. This instrument is supported by the Commissioner as the AFP Standard for Disclosure.

The purpose of this standard is to describe a critical component of investigation management that is information management. Information management is essential in ensuring that all relevant information is retained in a format which best supports investigations and judicial proceedings. This standard provides the essential components of information management which either must or should be undertaken to meet our ongoing duty of disclosure.

If a component must be undertaken, the activity is required due to the severity of consequence associated with not undertaking or as a result of judicial expectations and is conducted in line with relevant legislation and governance. Deviation from this is a decision that needs to be fully examined, explained and recorded.

If a component should be undertaken, the activity is regarded as the recommended course of practice. Deviation from this is a decision and should be recorded.

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INTRODUCTION

Whilst this standard makes specific reference to Commonwealth prosecutions, it supports information management in investigations for State and Territory offences.

The information management practices in this standard supports civil and administrative investigations conducted by the AFP as well as investigations working not only towards a prosecution but an outcome of prevention, disruption or inquiry.

The duty of disclosure is consistent across all Australian jurisdictions and the Commonwealth. All material relevant to an investigation is disclosable.

Protection from disclosure requires careful consideration, lawful justification and accountability in decision making.

The duty of disclosure

The CDPP *Statement on Disclosure in Prosecutions Conducted by the Commonwealth* sets out the duty of disclosure in cases prosecuted by the Commonwealth.¹

The need to ensure that the accused receives a fair trial is the ultimate criterion for determining what material should be disclosed by the prosecution.

In order to ensure that the accused receives a fair trial, he or she must have adequate notice of the evidence to be adduced as part of the prosecution case.

In addition to fulfilling any local statutory obligations relating to disclosure, the prosecution must disclose to the accused any material which:

- *Can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or*
- *Might reasonably be expected to assist the accused in advancing a defence; or*
- *Might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.*

At common law there is no distinction between the prosecuting agency and the investigative agency. The courts generally regard the investigative agency and the prosecuting agency as "the prosecution". Consequently, the CDPP largely depends on the investigative agency to inform it of the existence of material which should be disclosed to the defence, whether the investigative agency holds it or is aware it is held by a third party including a Commonwealth, State or Territory agency, private entity or individual.

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The duty of disclosure is ongoing throughout the prosecution process and continues after trial and the conclusion of any appeals. A failure to disclose may result in a miscarriage of justice.

¹ Extracts from the CDPP *Statement on Disclosure in Prosecutions Conducted by the Commonwealth*, (April 2017), pages 3 and 4.

SCOPE

This standard applies in respect of investigations conducted by AFP investigators. AFP appointees other than police officers who are charged with the duty of conducting an investigation or supporting an investigation are subject to this standard, and should take the provisions into account in applying their own operating procedures.

DEFINITIONS

Must	An activity that is required by legislation or governance or best practice supported by case law. Deviation from this is a decision that needs to be fully examined, explained and recorded.
Should	An activity that is regarded as the recommended course of practice. Deviation from the standard is a decision and should be recorded.
Investigation	Investigations are an objective search for the truth by the discovery and presentation of evidence in an exhaustive, comprehensive and organised manner.
Investigator	An investigator is any AFP police officer involved in the conduct of an investigation.
AFP appointee	An AFP appointee is a person appointed or engaged under the <i>AFP Act</i> who is subject to AFP professional standards, security requirements and governance instruments. AFP appointees include AFP employees, AFP special members, secondees and contractors.
Material	Material is material of any kind, including information and objects, which is obtained or inspected in the course of an investigation and which may be relevant to the investigation. This includes material coming into the possession of investigators and material generated by them.
Relevant to an investigation	Material may be relevant to an investigation if it appears to an investigator that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case.
Case Officer	The Case Officer is the investigator that manages the case file. This makes them the hub of all coordination in the investigation and the person most familiar with the case and investigative progress. They oversee all investigative inquiries and investigator deployment.

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Disclosure Coordinator	The Disclosure Coordinator is responsible for coordinating and overseeing the recording and handling of all disclosable material throughout the course of the investigation. During the conduct of any judicial action, the Disclosure Coordinator will work with the prosecutors to ensure that appropriate material is adequately disclosed and to advise the application of protection from disclosure.
Senior Investigating Officer	A Senior Investigating Officer leads a designated investigation and makes critical case management decisions at the outset and throughout the progress of the investigation. The Senior Investigating Officer takes prime responsibility for the investigation outcome.
Superintendent	The Superintendent sets the strategic direction of an investigation and ensures the direction is adhered to. The Superintendent is the principal advocate for the investigation when engaging senior management and other AFP business areas to secure appropriate resources or any issues arising that require senior executive action.
Prosecutor	The prosecutor is the authority responsible for the conduct, on behalf of the Crown, of criminal proceedings resulting from a specific criminal investigation.
Sensitive Capability	Any AFP capability that has key inputs (people, processes or tools) that are not generally known to the public and the public knowledge of which is likely to impair the AFP's ability to effectively perform its functions. ²
Handovers	This refers to the manner in which the responsibility for an investigation passes from one investigator to another. The initial investigator must record the full extent of their actions. The point of handover should be explicit and documented. Investigators must ensure that all available information about the conduct of an investigation has been fully communicated to any new investigator. This will ensure that all investigative opportunities are progressed.

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² Definition sourced from the AFP Capability Protection Framework

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UNDERPINNING PRINCIPLES

All investigators and AFP appointees participating in an investigation have a responsibility for carrying out the duties outlined in this standard. In particular, the duties associated with information management; recording, retaining, registering and reviewing material.

The functions of the investigator, the Case Officer and the Disclosure Coordinator must be separate. Whether they are undertaken by one or more persons will depend on the dimensions of the investigation. Where they are undertaken by more than one person, close consultation between them must occur for the effective performance of the duties outlined in this standard.

The Superintendent or Senior Investigating Officer (SIO) where one is appointed, must ensure that in every investigation the identity of the Case Officer of an investigation and the Disclosure Coordinator is recorded. The Superintendent or SIO must ensure that Disclosure Coordinators have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively.

The Disclosure Coordinator or Case Officer of an investigation may delegate tasks to another investigator or AFP appointee participating in the investigation. However, the Disclosure Coordinator or Case Officer must remain responsible for ensuring that these tasks have been carried out and for accounting for the practices followed in the investigation.

In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. Pursuing or not pursuing a line of inquiry is a decision and should be recorded.

If the Disclosure Coordinator or Case Officer of an investigation for any reason no longer has responsibility for the functions falling to them, the Superintendent or SIO where one is appointed, must assign someone else to assume that responsibility. That person's identity must be recorded.

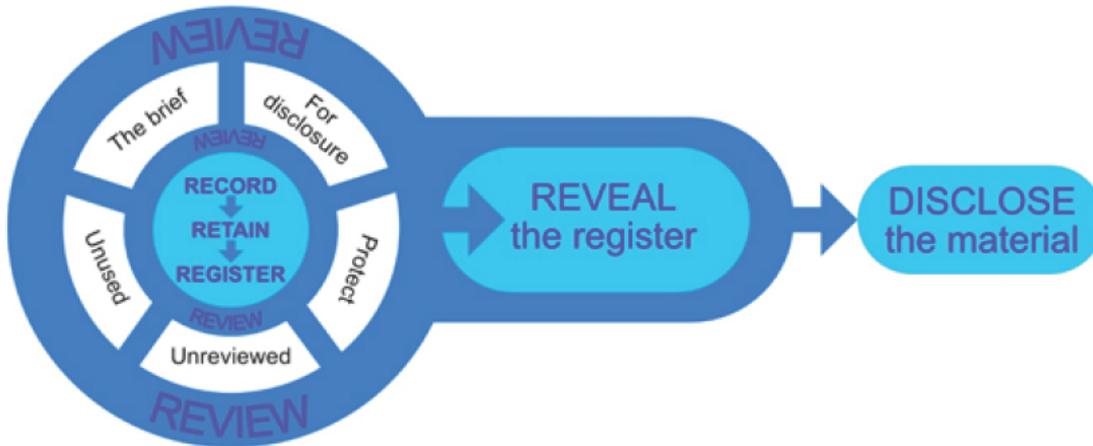
An outgoing Case Officer or Disclosure Coordinator must provide a written or verbal handover to an incoming Case Officer or Disclosure Coordinator. The occurrence of a handover must be recorded.

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REQUIREMENTS

A critical component of investigation management is information management. There are a number of duties related to information management for the purpose of an investigation. They are the duties to record, retain, register, review, reveal and disclose material:



The **duty to record** relates to documenting information obtained, material seized and investigative activity.

The **duty to retain** relates to retaining the material in an identifiable and retrievable location, complying with legislation and maintaining the integrity of the record.

The **duty to register** relates to there being a master register as to the existence of all material along with identifiers such as location, owner and value of the material.

The **duty to review** relates to the appraisal of material for such purposes as generating lines of inquiry, inclusion in the brief of evidence, revealing the existence of the material to the prosecutor, disclosing the actual material to the prosecutor, seeking protection from disclosure to the defence or making a decision not to review the material.

The **duty to reveal** relates to making the prosecutor aware as to the existence of the material.

The **duty to disclose** relates to the production of the material to the prosecutor.

Disclosure must be planned for and addressed in the investigation plan. Disclosure must be planned for and managed from the commencement of the investigation.

The duty to record

Material provided to an investigator or AFP appointee that is relevant to an investigation must be recorded by the investigator or AFP appointee.

Material seized by an investigator or AFP appointee must be recorded.

The investigative activity from which material is obtained or generated must be recorded by the investigator or AFP appointee.

Material should be recorded at the time it is obtained or inspected.

The absence of information can be relevant to an investigation. If relevant to the investigation, it must be recorded (an example might be a number of people present in a particular place at a particular time who state that they saw nothing unusual).

If investigative activity relevant to an investigation is not recorded in any form, the Case Officer must ensure it is recorded. The Case Officer of an investigation may delegate this task to another investigator or AFP appointee participating in the investigation (an example might be where material is obtained by an investigator without any records generated as to how that material came into their possession).

Where it is not practicable to retain the initial material, its contents must be transferred to another format and recorded.

All material recorded must be:

- Accurate;
- Sufficiently descriptive;
- Retrievable (whether in writing, electronically, on video or audio tape);
- Contemporaneously made;
- Attributed a time and date;
- Recorded in a format consistent with the investigation plan; and
- Made available to the Case Officer and Disclosure Coordinator to inspect on request.

The duty to retain

An investigator or AFP appointee must retain material obtained or generated in an investigation relevant to the investigation. Example material includes:

- Crime reports and referrals;
- Notebook and diaries;
- Decisions and decision logs;
- Briefings including options, recommendations and responses;
- Custody records;

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- Material obtained under the execution of a police power such as seizures, telecommunication interception material, tracking device, listening and optical device material and documents;
- Operational forms completed to justify the execution of a police power or fulfil a legislative obligation, affidavits and search warrants;
- Records which are derived from recordings of telephone conversations (for example 000 calls) containing descriptions of an alleged offence or offender;
- Final versions of witness statements (and draft versions where their content differs from the final version);
- Interview records (written records and audio or video tapes of interviews with witnesses or suspects);
- Communications between the investigator and experts such as forensic scientists, reports of work carried out by experts and schedules of scientific material prepared by the expert for the investigator;
- Communications between the investigator and support capability members, reports of work carried out by support capability members and schedules of material prepared by such members for the investigator;
- Any material casting doubt on the reliability of a witness; and
- Any material that points away from the accused and support a defence.

Where material has come into possession by consent or in the exercise of a power of seizure or legal notice, the duty to retain must be subject to the provisions under which the material was obtained.

Material should be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original, if:

- the original is perishable;
- the original was supplied to the investigator rather than generated by them and is to be returned to its owner; or
- The retention of a copy rather than the original is reasonable in the circumstances.

If the Case Officer of an investigation becomes aware of material previously examined but not retained that becomes relevant to the investigation, they must take steps to obtain it or ensure that it is retained for further inspection or for production in court.

The duty to retain material does not extend to items which are purely ancillary to such material or duplications and where there is no independent significance (for example, duplicate copies of records or reports).

Material relevant to the investigation must be retained until a decision is made whether to institute proceedings against a person for an offence. Where timeframes and obligations

are applicable as a result of executing a power of seizure, an investigator must comply with these requirements.

If a criminal investigation results in proceedings being instituted, material must be retained at least until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case.

Where the accused is convicted, all material which is relevant to the investigation must be retained at least until all legislated obligations cease.

The duty to register

Material relevant to an investigation, which has been recorded and retained, must be registered on a register by the investigator or AFP Appointee.

The investigator or AFP appointee must apply a classification to the material entered and described in the register:

- Retained material which will form part of the prosecution case (the brief);
- Retained material that meets the requirements of the *CDPP Statement on Disclosure* (for disclosure);
- Retained material where protection from disclosure to defence is sought (protect);
- Retained unused material (unused); or
- Retained unreviewed material (unreviewed).

The register must be:

- Maintained as a master register with reference to other information repositories (such as forensics and support capability); and
- Consistent in the use of naming conventions.

Records in the register must:

- Be clear as to the nature of the material;
- Contain sufficient detail to enable the Case Officer to identify further avenues of inquiry and task additional investigative activity;
- Contain sufficient detail to enable the Disclosure Coordinator to review the material;
- Identify the repository in which the material is retained;
- Identify the owner of the material;
- Be created contemporaneously;
- Have a classification attributed to the material; and
- State the date, justification and person who attributed or changed the classification of the material.

For some inquiries it may not be practicable to list each item of material separately. For example, there may be many items of a similar or repetitive nature. This should be listed in a block and described by quantity and generic title. Any items among a block of material which holds a different classification must be listed and described separately.

The duty to review

The Case Officer must conduct a review of the register to identify further avenues of inquiry, in accordance with the milestones described in the investigation plan.

The Disclosure Coordinator must continually ensure that material is registered separately on the register and can be uniquely identified.

The owner of material must allow the Disclosure Coordinator or Case Officer to inspect the material on request, except where such an inspection would be unlawful. A request, decision to decline a request or the occurrence of the inspection of material must be recorded.

The owner of the material must provide the material to the Disclosure Coordinator or Case Officer on request, except where the provision of such material would be unlawful. A request, decision to decline a request or the provision of material must be recorded.

The Disclosure Coordinator must review the register throughout the investigation in order to manage disclosure. Triggers for such review include:

- A routine described in the investigation plan;
- Milestones as described in the investigation plan;
- A change in investigative strategy;
- A change of Case Officer or Disclosure Coordinator;
- The need to obtain advice from the CDPP;
- Arrest and/or charging of a defendant; and
- Entering of a plea by a defendant.

As part of this review, The Disclosure Coordinator must maintain the classification or change the classification of material entered and described in the register.

The Disclosure Coordinator must ensure each entry is clear as to the nature of the material. The description must contain sufficient detail to enable the prosecutor to decide whether to inspect the material before deciding whether or not it should be disclosed to defence.

If a defence statement is provided, or details of the issues in dispute are known, the Disclosure Coordinator must review all unused material, material where protection from disclosure to defence is sought and the justifications for all unreviewed material.

On request by the prosecutor, the Disclosure Coordinator should review the classification of material requested to be reviewed.

A review of the material by the Case Officer or Disclosure Coordinator must be recorded.

The decision to maintain or change a record's classification must be recorded.

The duty to reveal and disclose

The duty to reveal and disclose is ongoing throughout any court proceedings. Any new material coming to light must be treated in the same way as earlier material.

In circumstances where there is no material on the register for a classification, the Disclosure Coordinator must notify the prosecutor of this in writing.

A request by the prosecutor to disclose material to defence classified as the brief, for disclosure or unused material must occur by providing a copy or by allowing them to inspect the material.

If material which the defence has been allowed to inspect consists of information which is recorded other than in writing, whether it should be given to the accused in its original form or in the form of a transcript is at the discretion of the Disclosure Coordinator. If the material is transcribed, the Disclosure Coordinator should ensure that the transcript is certified as a true record of the material which has been transcribed.

The milestones and timeframes for revealing the register and disclosing material to the prosecutor should be in accordance with State/Territory law, practice and court directions for the production of a brief of evidence.

Material which will form part of the prosecution case

The register of material which will form part of the prosecution case must be revealed to the prosecutor by the Case Officer.

The material which will form part of the prosecution case must be disclosed to the prosecutor by the Case Officer.

On request by the prosecutor, the register of material which will form part of the prosecution case must be revealed or disclosed to the defence by the Case Officer.

Material that meets the requirements of the CDPP Statement on Disclosure

The register of retained material that meets the requirements of the *CDPP Statement on Disclosure* must be revealed to the prosecutor by the Case Officer.

The material which meets the requirements of the *CDPP Statement on Disclosure* must be disclosed to the prosecutor by the Case Officer.

On request by the prosecutor, the register of material which meets the requirements of the *CDPP Statement on Disclosure* must be revealed or disclosed to the defence by the Case Officer.

Material where protection from disclosure to defence is sought

The register of retained material where protection from disclosure to defence is sought must be revealed to the prosecutor by the Disclosure Coordinator.

On request by the prosecutor, the register of material where protection from disclosure to defence is sought must be revealed to the defence by the Disclosure Coordinator.

Against each record, the Disclosure Coordinator must state the grounds for the protection being claimed, such as:

- Disclosure would give rise to a risk of serious prejudice to an important public interest (public interest immunity);
- Disclosure is precluded by statute; or
- Legal professional privilege (LPP), including legal professional privilege belonging to the prosecution.

The Disclosure Coordinator must state the reason for their belief that a protection applies.

A public interest immunity (PII) claim includes circumstances where it would:

- Create prejudice to an ongoing investigation;
- Place a confidential source at risk;
- Reveal police methodology that is not publically known;
- Disclose external agency (domestic and foreign) material where that agency claims PII; or
- Compromise national security.

The Disclosure Coordinator must engage AFP Legal and the owner of the material to make a claim for protection.

The AFP has an endorsed Capability Protection Framework. This framework must be used when managing the use and disclosure of sensitive capabilities.

Where any investigator or AFP appointee involved in the investigation and the Case Officer considers the material so sensitive that its revelation to the prosecutor by means of an entry on the register is inappropriate, the existence of the material must be revealed to

the prosecutor separately.

The investigator or AFP appointee who knows the details of the sensitive material must be responsible for informing the prosecutor. The Disclosure Coordinator must ensure the notification by this person occurs as soon as is reasonably practicable after the brief containing the prosecution case is sent to the prosecutor. The occurrence of the notification to the prosecutor must be recorded.

On request, the Disclosure Coordinator must allow the prosecutor to inspect material where protection from disclosure to defence is sought, to assess for themselves whether it is fair for the prosecution to proceed. A request, a decision to decline a request or the occurrence of an inspection of the material must be recorded.

If a court rules that the interests of the defence outweigh the public interest in withholding disclosure, the Disclosure Coordinator must disclose the material to defence if the case is to proceed.

Unused material

The register of retained unused material must be revealed to the prosecutor by the Disclosure Coordinator.

On request by the prosecutor, the register of retained unused material must be revealed to the defence by the Disclosure Coordinator.

If the prosecutor requests to inspect material on this register, the Disclosure Coordinator must allow for the inspection. A request and the occurrence of the inspection of the material must be recorded.

If the prosecutor requests for material described in this register to be disclosed, the Disclosure Coordinator must disclose the material. A request and the provision of material must be recorded.

If the material on this register is recorded other than in writing, whether it should be given to the prosecutor in its original form as a whole, or by way of relevant extracts recorded in the same form, or in the form of a transcript, is a matter for agreement between the Disclosure Coordinator and the prosecutor.

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Unreviewed material

The register of retained unreviewed material must be revealed to the prosecutor by the Disclosure Coordinator.

On request by the prosecutor, the register of retained unreviewed material must be revealed to the defence by the Disclosure Coordinator.

Against each record, the Case Officer must provide a justification as the basis for the material having been retained and not reviewed. The record must contain the date of any reviews of this decision.

If the prosecutor requests to inspect material described in an entry on this register or that the material be disclosed, the Disclosure Coordinator must review the material. The Disclosure Coordinator must apply a classification and reveal or disclose the material accordingly.

Certification by the Disclosure Coordinator

The Disclosure Coordinator must certify to the prosecutor that, to the best of their knowledge and belief, there is:

- No material that meets the requirements of the *CDPP Statement on Disclosure*; or
- Material that meets the requirements of the *CDPP Statement on Disclosure*; and/or
- Material where protection from disclosure to defence is sought.

The Disclosure Coordinator must sign and date the disclosure certificate.

Third Parties

If the Case Officer of an investigation believes that other persons may be in possession of material that may be relevant to the investigation, and if this has not already been obtained, they must task the Disclosure Coordinator to inform them of the existence of the investigation and invite them to retain the material.

The Disclosure Coordinator must inform the prosecutor in writing of such requests, whether such material has been obtained or where it can be obtained from.

The Disclosure Coordinator is not required to make speculative inquiries of other persons. The Case Officer or Disclosure Coordinator must believe that they hold material relevant to the investigation.

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Disclosure Coordinator

The Disclosure Coordinator is responsible for a range of duties including:

- Examining and reviewing material retained during the investigation;
- Revealing the existence of material to the prosecutor and certifying that this has been done;
- Seeking protection from disclosure for material subject to statute, a claim of PII or a claim of LPP; and
- Disclosing material or facilitating the prosecutor to inspect material.

The Disclosure Coordinator's duties are ongoing throughout the investigation, prosecution and conclusion of any appeals. This means that the Disclosure Coordinator is required to conduct an ongoing review of the material throughout the prosecution and, where appropriate, provide the prosecutor with updates as to the register.

Disclosure Coordinators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant to an investigation.

Disclosure Coordinators should inspect, view or listen to all material relevant to the investigation that has been retained.

REFERENCED DOCUMENTS

The following documents, in whole or in part, are normatively referenced in this document and are indispensable for its application.

- *The AFP Investigations Doctrine*
- *The AFP Senior Investigating Officer Guide*
- *The CDPP Statement on Disclosure in Prosecutions Conducted by the Commonwealth*
- *The AFP Capability Protection Framework*

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