

[REDACTED]

**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE SECURITY SERVICE
&**

CROWN OFFICE AND PROCURATOR FISCAL SERVICE (COPFS)

1. Introduction

1.1 Recognising that there is a separate and distinct legal system in Scotland and that the Law Officers – the Lord Advocate and the Solicitor General – are the Ministers responsible for the unitary prosecuting authority the Crown Office and Procurator Fiscal Service (COPFS), and building on the existing positive working relationship between COPFS and the Security Service, this Memorandum of Understanding (MoU) has been agreed.

1.2 Its aim is to identify and provide 'best practice' guidance in relation to the respective roles and responsibilities of the Security Service and COPFS in relation to Security Service material which may be relevant to prosecutions conducted by COPFS to ensure effective decision making processes, proper revelation and secure handling.

1.3 COPFS is responsible for the prosecution of all criminal offences in Scotland. Section 12 of the Criminal Procedure (Scotland) Act 1995 empowers the Lord Advocate to direct the police regarding the reporting of cases to the Procurator Fiscal for consideration of prosecution. Section 17 of the Police (Scotland) Act 1967 provides that, in relation to the investigation of offences, the Chief Constable shall comply with such lawful instructions as he may receive from the prosecutor. COPFS is also responsible for the investigation of sudden and/or suspicious deaths.

1.4 The COPFS Counter Terrorism Co-ordinator (CTC) has responsibility for co-ordinating all counter terrorism prosecutions and investigations carried out by COPFS. In all cases in which the CTC and the Security Service engage there will be a lawyer with developed vetting clearance appointed by CTC to liaise with the Security Service. This MoU will be shared with the appointed lawyers and with other partners such as police forces on a case by case basis.

1.4 The CTC and the Security Service will ensure that all relevant staff are familiar with this MoU.

1.5 The CTC and the Security Service will review the working of this MoU annually. Either party may request a review of the provisions of this MoU earlier.

2. Roles and responsibilities

Security Service:

2.1 The Security Service's functions are set out in the Security Service Act 1989 (SSA). They are the protection of national security, to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands, and to act (when tasked) in support of law enforcement agencies in the prevention and detection of serious crime.

2.2 The Service's counter-terrorism operations are conducted under its function to protect national security.

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2.3 The SSA restricts the Service's ability to obtain and disclose information. In particular, the Service is permitted to disclose information only to the extent necessary for the proper discharge of its statutory functions, for the purpose of the prevention or detection of serious crime, or for the purpose of any criminal proceedings.

2.4 The Service is under no legal obligation to conduct its operations in accordance with evidential procedures or to release its material for use in evidence. However, in cases in which the Service believes that criminal prosecution would present an effective means of disrupting the activities of its targets, thereby protecting national security, it may collect and handle material in a manner intended to preserve the possibility of making that material available for evidential use by COPFS.

2.5 In respect of counter terrorism operations, the SSA provides for the possibility of releasing material for evidential use by COPFS where and to the extent that the disclosure in question is judged necessary for the protection of national security and/or for the purpose of criminal proceedings.

2.6 The SSA also provides the statutory basis for making material available to the prosecution (COPFS prosecutor and/or prosecution counsel) for examination to assess whether anything contained within it could reasonably be expected to undermine the prosecution case or assist the defence case and, in respect of material or information meeting that disclosure threshold (and where an order under section 145 or 146 of the Criminal Justice and Licensing (Scotland) Act 2010 is not applied for), for disclosing that material or information to the defence.

2.7 Within the Service's Legal Adviser's Branch (LA Branch), [REDACTED] are the "relevant MI5 lawyers" lawyers with responsibility for advising intelligence desk officers and agent handlers on operational activities. In particular, they will advise on evidential and disclosure matters and in particular on the implications for future criminal proceedings of Service activity.

COPFS and the CTC

2.8 COPFS is responsible for prosecuting all criminal offences in Scotland.

2.9 The CTC leads for COPFS in CT policy, investigations and prosecutions. The CTC is supported by a team of legally qualified advisers in the COPFS Policy Unit and senior staff selected for the CT/Major Incident Response Team. The CTC receives reports on all CT investigations in Scotland regardless of the lead Force.

2.10 All COPFS reviewing lawyers appointed by the CTC for working with the Service are required to have DV clearance.

Best Practice guidance

3. Pre charge consultation

3.1 The nature of COPFS's work means that the COPFS reviewing lawyer is almost always involved at an early stage of the investigation. The early formation of a prosecution team working together presents the best opportunity for the intelligence case to be taken into account in the final case that is presented to the jury. In larger cases Security Service lawyers may be invited to attend meetings of the prosecution team as necessary to inform the team about national security matters.

[REDACTED]

[REDACTED]

3.2 The Security Service has an interest in most terrorism/OSA prosecutions; many are the result of close collaboration between the Security Service and the specialist police units. In these cases, a large amount of the material gathered will ordinarily be "owned" by the Security Service and it will be responsible for decisions about disclosure and evidential use. Where this is not the case, the Security Service will agree the position with the police and advise the COPFS reviewing lawyer accordingly. It will be important to establish at an early stage which organisation owns particular material.

3.3 In terrorism/OSA cases where it is not obvious that there is a Security Service interest the CTC will contact the following Security Service Legal Adviser's Branch's lawyers on [REDACTED] to ascertain whether there is any such interest:

or

[REDACTED] "contact details of relevant MI5 lawyers"

3.4 In all cases in which the Service holds material of potential relevance to the criminal proceedings, the matter will be assigned to a specific Security Service lawyer who will take responsibility for the case from the Service's perspective. Where necessary, the COPFS reviewing lawyer should hold a conference with the relevant Security Service lawyer and the senior investigating police officer in order to discuss the legal issues and risks relevant to each organisation that are likely to arise in the case.

3.5 Where the Security Service lawyer is aware of Security Service material or information that could impact on the prosecution case, these should be raised with the COPFS reviewing lawyer at an early stage. Where reasonably practicable, underlying intelligence material should be made available for review at the conference and/or an oral briefing of the intelligence case provided. It is important that any prosecution case reflects the intelligence picture accurately; this minimises the potential for sensitive unused material to create problems for the management of the prosecution at a later stage.

3.6 Where Security Service material goes to a fact in issue that cannot be evidenced by other means the COPFS reviewing lawyer may seek to rely upon this material as evidence provided that the Service judges its use would benefit national security (see Part 5 below).

3.7 Other issues likely to be discussed are:

- If it is a joint operation with the police which organisation owns relevant intelligence material?
- Warrantry - whose and for what purpose obtained?
- [REDACTED]

3.8 A note will be kept of all discussions and agreements reached at this conference. If the meeting is held at Thames House it will be the responsibility of the Security Service lawyer to prepare and circulate this note; if the meeting is held at COPFS offices, the COPFS reviewing lawyer will be so responsible.

4. Disclosure ("revelation") exercises

4.1 The Security Service is not an investigating agency within the meaning of the Criminal Justice and Licensing (Scotland) Act 2010 and the duties under that Act, and any Code of Practice issued under that Act, do not therefore apply to the

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Security Service. The Security Service's policies on the recording and retention of information that comes into its possession are governed by the SSA (and other legislation where relevant including the Regulation of Investigatory Powers Act 2000, the Intelligence Services Act 1994 and the Data Protection Act 1998). Accordingly, material will be obtained, recorded and retained for as long as it is necessary for the protection of national security or otherwise for the purposes of the Service's statutory functions. However, where the Security Service receives notification from the COPFS that it is in possession of material that may be relevant to the investigation, it will retain such material as is specified within that notice.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4.6 The COPFS reviewing lawyer will keep the Security Service Legal Adviser's Branch updated of any key developments during the course of the prosecution and supply an indictment and defence case statement (DCS) when these are available. A meeting may be required on receipt of the DCS or any other legal argument relevant to Security Service evidence or material. In appropriate cases, the COPFS reviewing lawyer should also provide copies of any Admissions and the Opening Note in order to ensure consistency with Service assessments.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4.9 The COPFS reviewing lawyer, alone or with the assistance of prosecution counsel, will review the material in the possession of the Security Service. It will be the COPFS lawyer's responsibility to discharge the prosecutor's obligations under the Criminal Justice and Licensing (Scotland) Act 2010 to determine whether such material either undermines the prosecution case or might reasonably be expected to assist the case for the defence.

[REDACTED]

[REDACTED]

[REDACTED]

4.13 If the COPFS reviewing lawyer determines that material in the possession of the Security Service either undermines the prosecution case or might reasonably be expected to assist the case for the defence, he/she shall notify the Security Service in writing of his/her conclusions, describing the material and the reasons why it is considered to meet the disclosure test. Such advice should be provided in good time to enable a Ministerial certificate to be obtained if necessary.

4.14 Where the material identified as relevant by the COPFS lawyer would, if disclosed, cause a real risk of serious prejudice to an important public interest, the Security Service will obtain a Ministerial certificate setting out the damage that would be caused by disclosure of the material. This certificate may be used by the prosecutor or the Advocate General's office as the basis for an application for appropriate orders under the Criminal Justice and Licensing (Scotland) Act 2010, including a section 145 order, section 146 order, a restricted notification and a non-attendance order.

4.15 Where material identified as relevant originates from another agency or department of the Crown, the COPFS lawyer will liaise directly with that agency or department in relation to the use or disclosure of that material. However, where disclosure of such material would cause damage to the work of the Security Service the COPFS lawyer will, in addition, continue to liaise with the Security Service.

4.16 The COPFS reviewing lawyer has a continuing duty of disclosure under the Criminal Justice and Licensing (Scotland) Act 2010. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4.18 Further guidance on liaison between the Crown Office and Procurator Fiscal Service and Security Service in relation to disclosure can be found at Chapters 25, 35 and 45 of the COPFS Disclosure Manual. This Memorandum of Understanding is designed to complement and not replace that guidance.

4.19 Section 17 of the Regulation of Investigatory Powers Act 2000 provides an exception to the disclosure regime under the Criminal Justice and Licensing (Scotland) Act 2010. In dealing with this material prosecutors should refer to [REDACTED] the Attorney General's Section 18 RIPA guidelines.

5. Release of Service material for evidential use

5.1 Where the reviewing lawyer is of the view that it is necessary to use Security Service material as part of the prosecution case, he or she will provide the Security Service with written request to use it, specifying the material in question, stating that its use in evidence is necessary to secure a successful prosecution and explaining why. [REDACTED]

"The relevant MIS lawyer will follow internal procedures and where appropriate seek the relevant authority to release the material for evidential use where the overall benefit to national security interests is sufficient to justify the cost (in terms of risks to sensitive information or the resources required) "

[REDACTED]

6. Post trial debriefs

6.1 [REDACTED]

[REDACTED]

[REDACTED]

6.2 [REDACTED]

7. Training

7.1 [REDACTED]

7.2 [REDACTED]

Dated: 16 January 2012

Signed:

[REDACTED]

Counter Terrorism Co-ordinator
For the Crown Office and Procurator Fiscal Service

[REDACTED]

Security Service
Legal Adviser's Department