

SFO OPERATIONAL HANDBOOK

The SFO Operational Handbook is for internal guidance only and is published on the SFO's website solely in the interests of transparency. It is not published for the purpose of providing legal advice and should not therefore be relied on as the basis for any legal advice or decision. Some of the content of this document may have been redacted.

Information Gateways and MoUs

This chapter is divided into three parts.

Part A sets out the circumstances in which information obtained by a person in his or her capacity as a member of the SFO may be disclosed to an individual or body outside the SFO.

Part B briefly addresses memoranda of understanding ("MoUs").

Part C summarises some of the legislation which allows other public bodies to disclose information to the SFO, should SFO staff wish to request such information.

PART A – SFO Disclosures

This part applies to the intended disclosure of information that is protected by a duty of confidence ("protected information") which, for the avoidance of doubt, includes disclosures to other law enforcement bodies for "intelligence purposes" or on a "police-to-police" basis. A duty of confidence may arise under contract or from the relationship between the communicator and recipient or on account of the circumstances of the particular communication. Information protected by a duty of confidence includes:

- information obtained by the SFO in response to a section 2 notice or seized by the SFO as a result of the execution of a search warrant
- information voluntarily provided to the SFO in circumstances where the SFO knew, or ought to have known, that it was to be treated confidentially
- information provided to the SFO in an interview (whether by a potential witness or a suspect interviewed under caution)
- information provided by another public body which is already protected by a duty of confidence (such as where a police force provides the SFO with information obtained under PACE).

So long as the duty of confidence applies, the SFO is subject to legal restrictions in respect of the disclosure of the information to a third party. But the nature of the restrictions varies depending on the identity of the proposed recipient and/or the reason for the intended disclosure. Further, the duty of confidence does not apply to prevent a disclosure if the information has entered the public domain (e.g., because the document was read in open court) or the person entitled to consent has consented to the disclosure.

If the duty of confidence applies, the SFO can disclose the information only if:

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1. there is a specific statutory provision ("information gateway") which permits the information to be provided to the particular recipient for the contemplated / known purpose; or
2. the common law limitation on the scope of the duty of confidence applies *to the extent that this limitation is available* (on which, see below) – this limitation, where available, would allow a disclosure on the basis that the public interest in disclosing the information outweighs the public interest justifying non-disclosure; or
3. there is an obligation to disclose the information to a third party for a particular purpose (for example, an obligation imposed by a court order).

With regard to (1), above, the SFO's principal basis for disclosing protected information to a third party is section 3(5) of the Criminal Justice Act 1987 ("CJA87"), which permits (but does not require) disclosures to be made by members of the SFO "designated" by the Director for this purpose. In addition, information obtained by the SFO in connection with the exercise of any of the Director's functions under, or in relation to, Part 5 or Part 8 of the Proceeds of Crime Act 2002 ("POCA") may be disclosed under section 438 of POCA if the disclosure is for a purpose specified in subsection (1).

If the SFO is under a legal **obligation** to provide protected information to a third party, for example pursuant to a court order, section 3(5) does not need to be considered.

With regard to (2), above, Parliament has provided the SFO with a clear and comprehensive statutory framework for disclosure of protected information, certainly for information obtained under section 2 CJA87 (and, by analogy, any other statutory power of compulsion). The SFO should therefore always rely on a specific, statutory information gateway (principally section 3(5) of the CJA87, but also section 438 of POCA) and **not** purport to rely on the common law limitation for any information obtained under section 2 or some other power of compulsion. In other words, Parliament itself has determined where the balance lies as between the public interest in non-disclosure and the public interest in disclosure for information obtained under a statutory power of compulsion. Further, it is SFO policy that SFO staff should use the same process for disclosing protected information which the original source provided voluntarily. In short, the SFO should rely on a specific, statutory information gateway if the intention is to make voluntary disclosure of protected information to a third party. That gateway will usually be section 3(5) of the CJA87 (or section 438 of POCA).

Section 3 of the CJA87

Section 3(5) of the CJA87, the SFO's principal information gateway, permits SFO disclosures of protected information to third parties, so long as (a) the disclosures are made by a "member" of the SFO who is "designated" by the

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Director for this purpose and (b) there is no separate statutory provision prohibiting disclosure.

SFO policy draws a distinction between operational disclosures and non-operational disclosures.

- An operational disclosure is one made for the SFO's own purposes (e.g. showing documents to a witness in interview).
- A non-operational disclosure is one made for another organisation/individual's purposes (e.g. sending documents to Financial Reporting Council for their own regulatory enquiry).

Non-operational disclosures can only be made by a member of SCS.

Operational disclosures can be made through the gateways created by 2.3(5) (c) CJA 1987 and s.438 (1) (a-c) POCA 2002 and by members of the SFO who have s3(5) designation. See the "**Designations**" chapter for more information about who can be designated under s3(5).

Factors to take into account when considering a section 3(5) disclosure

Although section 3(5) does not expressly set out the factors to be taken into account when considering a disclosure of SFO information, the following points must be applied:

- the designated member of the SFO must understand the nature of what, potentially, is to be disclosed and the purpose of the potential recipient in receiving the information;
- the disclosure must fall within the scope of section 3(5);
- there must be no statutory prohibition on disclosure;
- the decision to disclose must be reasonable and taken in good faith;
- the decision to disclose may in some cases require the SFO to give notice to the owner of the documents, so that the owner can provide observations or make objections (see below).

Designated staff considering the disclosure of information under section 3(5) must familiarise themselves with the relevant guidance in the applicable general designation.

Designated members of the SFO should check to see whether there is any statutory bar to the onward disclosure of information provided to the SFO by another government department/agency or a regulatory body. A statutory bar is more likely to arise in relation to non-operational disclosures by SCS but the position should always be checked in advance of any onward disclosure of such information. The principal statutory prohibitions are listed in "ID31 Statutory Prohibitions".

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