

[Review of the Criminal Courts of England and Wales - Chapter 10: "Preparing for trial: Disclosure"]**Public interest immunity**

191 The doctrine of public interest immunity enables the prosecution to withhold disclosure of material where, in the court's view, the public's interest in non-disclosure outweighs the defendant's interest in having full access to all relevant material.

192 The 1996 Act, reproducing the common law, makes the court, not the prosecutor, the arbiter of what may be withheld from disclosure on the ground of the public interest or, as the 1996 Act Code of Practice describes and lists it, "sensitive material". Where the prosecutor is not prepared, or is uncertain whether, to make voluntary disclosure because of the sensitivity of the material, the statutory procedure takes one of three possible forms.

First, and whenever possible, he should notify the defence of his intention to apply to the court for a ruling, and indicate at least the category of material in question. The court then holds a hearing at which both parties may make representations. Second, where the prosecutor considers that disclosure of the category of material would reveal what it would be contrary to the public interest to reveal, he should notify the defence of his intention to make an application, but not of the category of material the subject of it. The court then holds a hearing in the absence of the defence to determine whether they should be present and, if not, rules on the application. Third, in a highly exceptional case in which the prosecutor considers that even notification of an intention to make an application would reveal too much to the defence, the prosecutor should apply to the court in the absence of, and without notice to, the defence. The court then considers whether either of the first two procedures should have been adopted and, if not, considers whether to order non-disclosure.

Whichever of the three procedures is adopted, the court, if it orders non-disclosure, must keep its decision under review as the case progresses. In the magistrates' courts, the conflation of roles of magistrates as triers of fact and law has necessitated a variation of the scheme. An application by the prosecution to withhold material, if granted, may lead to the bench being disqualified and a new bench hearing the trial.

193 The scheme that I have described is an improvement on what went before and has been generally welcomed on that account. But there is widespread concern in the legal professions about lack of representation of the defendant's interest in the second and third of the three forms of application, and anecdotal and reported instances of resultant unfairness to the defence. This concern has been fuelled by the clear unease of the European Court of Justice as to whether, in the absence of the defence, hearings for such purpose are Article 6 compliant. A suggestion, argued on behalf of applicants in Strasbourg and widely supported in the Review, is that the exclusion of the defendant from the procedure should be counterbalanced by the introduction of a "special independent counsel".