

# A Guide to the Disclosure Pilot Scheme PD51U

Now that litigation is in prospect, you owe duties to the Court and are required to take a number of important, mandatory steps to ensure that potentially relevant documents are preserved.

Failure to comply with the requirements can result in sanctions, including costs penalties, so these matters need to be taken very seriously.

In this guide, we will provide a detailed summary of the express duties owed, plus details of the procedural steps that need to be taken now, so as to ensure that potentially relevant documents are preserved. This guide also sets out some important general “dos and don’ts” regarding your documents.

As the case develops, we will need to discuss specific points relating to the disclosure exercise (including identifying issues on which disclosure is reasonably required and considering what models of disclosure might be appropriate) in detail. While the focus of this guide is on duties owed to the Court, and specific document preservation steps required to be actioned now, below is a schedule summarising some of the key procedural stages that will follow and explaining some of the relevant terminology.

This Guide addresses the following points, in turn:

- The disclosure obligation in civil litigation.
- Co-ordination of the disclosure process on your behalf
- Important principles governing the Disclosure Pilot Scheme (DPS), which is expected to apply in this case.
- Your express duties under the DPS and possible sanctions for failure to comply.
- Specific document preservation steps required to be taken by you now.
- Summary of action points and document “dos and don’ts”.

## A. THE DISCLOSURE OBLIGATION IN CIVIL LITIGATION

1. The duty of disclosure is strict, and the Court takes it very seriously. As your legal representative, we are under an express duty to inform you of the duties that you are required to comply with, and to ensure that you understand them. If anything in this Guide is unclear, please let us know, and we will be happy to provide further information.
2. Disclosure involves identifying and making available documents that are relevant to the issues in the proceedings.
3. The precise disclosure obligation, in particular proceedings, derives from the relevant Civil Procedure Rules (CPR) and the disclosure order made by the Court in the proceedings.
4. As these proceedings are being or have been or are expected to be commenced in the Business and Property Court (B&PC), we anticipate that they will be subject to the Disclosure Pilot Scheme (DPS) which is currently operating in the B&PC under Practice Direction (PD) 51U.
5. If the claim has a value of less than £500,000 or the volume of disclosure is limited or there are other factors as mentioned in PD 51U, it may be possible for us to agree with the other party or obtain a Court order providing that a simplified approach known as the ‘Less Complex Claims’ regime should apply. However, the key duties will be the same whether the “mainstream” DPS or the Less Complex Claims regime applies.
6. The DPS is mandatory (save for limited exceptions). It places significant emphasis on the need for proportionality and for co-operation between the parties and sets out a number of prescribed steps that must be taken to ensure that relevant documents are preserved. As detailed below, it is important to note that “document” is defined very widely.

7. Failure to comply with the express duties set out in the Rules can result in sanctions, including an order for you to pay costs, so it is essential to ensure that all of the necessary steps are taken.

## **B. CO-ORDINATION OF THE DISCLOSURE PROCESS ON YOUR BEHALF**

8. From the outset, it would be helpful to identify someone who will be responsible for coordinating the disclosure exercise.
9. It should be someone who will be willing to sign a Disclosure Certificate to be given to the Court confirming that disclosure has been properly completed, and who will be able to attend the first Case Management Conference (CMC) (the procedural Court hearing at which the Judge will make the Court order for disclosure). Continuity is important, so it will be helpful to identify someone who can stay involved through the entire process, and case, if possible. Under the Rules, it will be necessary to explain why the person signing the Disclosure Certificate is appropriate.

## **C. IMPORTANT PRINCIPLES GOVERNING THE DISCLOSURE PILOT SCHEME (DPS)**

10. Co-operation and proportionality are fundamental to the disclosure process.
11. The DPS expressly identifies the following principles, which underpin the entire disclosure process:
  - The Court expects the parties (and their representatives) to co-operate with each other, and to assist the Court, so that the scope of disclosure, if any, that is required can be agreed, or determined by the Court in the most efficient way possible.
  - The Court will be concerned to ensure that disclosure is directed to the issues in the proceedings, and that the scope of disclosure is not wider than is reasonable and proportionate in order to fairly resolve those issues.

## **D. YOUR EXPRESS DUTIES UNDER THE DPS, AND POTENTIAL SANCTIONS FOR FAILURE TO COMPLY**

12. Under the provisions of the DPS, you must comply with the following express duties that are owed to the Court:
  - To take reasonable steps to preserve documents in your control that may be relevant to any issue in the proceedings. This includes (i) documents that are (or were) in your physical possession, (ii) documents in respect of which you have (or had) a right to possession or (iii) documents in respect of which you have a right to inspect or take copies (for example, documents held by any third-party professional agents, such as other firms of solicitors or your accountants on your behalf).
  - To disclose “known adverse documents”, in accordance with the timings specified in the Rules. This means documents that either contradict or materially damage your contention or version of events on an issue in dispute or support the contention or version of events of an opposing party on an issue in dispute. We will discuss this requirement with you in more detail once we have formulated the details of your claim. When we consider the requirement to disclose known adverse documents, it will be necessary to consider documents that any person who has accountability for the events or circumstances which are the subject of the case, or the conduct of these proceedings, is aware of. There is no requirement to undertake any searches for this purpose. It will also be necessary to take reasonable steps to check the position with any person who previously had such accountability or responsibility.
  - To comply with any order for disclosure made by the Court (which will usually be at the first CMC, after each party has provided details of what disclosure it considers to be reasonably required).
  - To undertake any search for documents, that is ordered by the Court, in a responsible and conscientious manner to fulfil the stated purpose of the search.
  - To act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party.
  - To use reasonable efforts to avoid providing documents to another party that have no relevance to the issues in the proceedings on which disclosure of documents is required.
13. These are continuing duties that will last until the conclusion of the proceedings (including any Appeal) or until it is clear that there will be no proceedings.

14. As your legal representatives, Mayo Wynne Baxter also owe express duties to the Court in conjunction with the disclosure process, namely:
- To take reasonable steps to preserve documents within our control that might be relevant to any issue in the proceedings.
  - To take reasonable steps to advise and assist you to comply with its disclosure duties.
  - To liaise and co-operate with the legal representatives of the other parties to the proceedings (or the other parties if they do not have legal representation) so as to promote the reliable, efficient, and cost-effective conduct of disclosure, including through the use of technology.
  - To act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party.
  - To undertake a review to satisfy ourselves that any claim to privilege from disclosing a document is properly made and that the reason for the claim to privilege is sufficiently explained. Confidential communications passing between a party and its legal advisers, in which the party is seeking or obtaining legal advice, will be subject to legal advice privilege. Certain confidential communications made when litigation is likely, or has begun, passing between a party and its legal advisers, a party and third parties (for example, potential witnesses) and, in certain circumstances, the legal advisers and third parties, where the main purpose of the communication is to seek or obtain evidence for use in the litigation, or to provide advice on the litigation will be subject to litigation privilege. This is something we will need to consider carefully, in the context of the disclosure process.

15. This Guide is just the starting point, and we will provide ongoing guidance and information on the disclosure process, as the case progresses.

## **E. SPECIFIC DOCUMENT RETENTION STEPS REQUIRED TO BE TAKEN BY YOU NOW**

16. The Court Rules specify a number of steps that must be taken so as to ensure that potentially relevant documents are preserved. It is essential that these are complied with. Failure to comply could result in adverse inferences being drawn and may also give rise to costs sanctions.
17. Under the DPS, “document” has a wide meaning. A document may take any form including, but not limited to, paper or electronic; and may be held on a computer or portable devices, such as memory sticks or mobile phones or within databases. It includes emails and other electronic communications such as text messages, webmail, social media, and voicemail, audio, or visual recordings. It extends to information that is stored on servers and back-up systems and electronic information that has been “deleted”. It also extends to metadata, and
- other embedded data that is not typically visible on a screen or a print-out: for example, details of the time and creation, or modification, of a document, or the author, date, and time of sending an email. Metadata may be created automatically by a computer system or manually by a user.
18. It is important to note that documents to be preserved include documents which might otherwise be deleted or destroyed in accordance with a document retention policy or in the ordinary course of business.
19. The Court Rules expressly require you to take the following steps to ensure that potentially relevant documents are preserved:
- Suspend any relevant document deletion or destruction processes for the duration of the proceedings.
  - Send a written notification (in any form) to relevant employees and former employees where there are reasonable grounds for believing that the employee or former employee may be in possession of disclosable documents which are not also in the party’s possession, identifying the classes of documents required to be preserved, and notifying them that they should not delete or destroy those documents, and should take reasonable steps to preserve them. We can help you with drafts of such notification letters and please let us know if this is the case.
  - Take reasonable steps so that agents or third parties who may hold documents on your behalf do not delete or destroy documents that may be relevant to an issue in the proceedings.
  - Provide us with written confirmation that you have taken these steps.
20. These steps should be taken as soon as possible.
21. Please let us know if anything is unclear and if you need further guidance on any points.
22. The Rules expressly require us to obtain written confirmation from you that these steps have been taken so we would be grateful if you could confirm when all of the necessary steps have been actioned.

23. Throughout the disclosure process, it will be important to record all of the steps that you have taken to comply with the obligations under the DPS, as the Court might ask to see evidence. This should include details of all the employees, former employees, agents and third parties who have been contacted, and the date when they confirmed that they would comply with the requirements. Reminders should be sent from time to time, if necessary, and the dates when these are sent should also be documented. On this point, note that:

- It will be necessary for you to confirm in writing, if you are serving the Particulars of Claim (the Court document setting out the basis for the claim against any other parties), that the necessary steps have been taken to preserve relevant documents. We can do this on your behalf once you have confirmed that the steps have been taken.
- At a later stage in the process, it will be necessary for you/an appropriate person to sign a document known as a Disclosure Certificate, which is supported by a Statement of Truth. Among other things, this will confirm that you have taken reasonable steps to preserve potentially relevant documents. Proceedings for contempt of Court may be brought against a person who signs, or causes to be signed by another person, a false Disclosure Certificate, without an honest belief in its truth.

24. Failure to comply with document retention requirements could lead to the Court drawing adverse inferences: for example, if any potentially relevant documents are destroyed. Please contact us straight away if you have any queries, or if there are likely to be practical difficulties in implementing the required document preservation steps.

- Take reasonable steps so that agents or third parties who may hold documents on your behalf do not delete or destroy documents that may be relevant to an issue in the proceedings.
- Provide us with written confirmation that you have taken these steps.

## **F. SUMMARY OF ACTION POINTS AND GENERAL DOCUMENT “DOS AND DON’TS”**

25. We are conscious that this is a lot of information to digest, so a summary of the key steps to be taken is set out below:

### **Document Preservation Steps Required By The Court**

- Immediately suspend any relevant document deletion or destruction processes. They must remain suspended until the conclusion of the proceedings (including any Appeal) or until it is clear that there will be no

proceedings. A suggestion that potentially important documents may have been lost or destroyed after the proceedings began could be very damaging to your case.

- Identify, and then send a written notification to, all relevant current employees who may have documents connected with the claim in their possession or control, identifying the classes of documents required to be preserved, and notifying them that they should not delete or destroy those documents, and should take reasonable steps to preserve them. They should be asked to confirm, in writing, that they will comply.
- Identify, and then send a written notification to, relevant former employees where there are reasonable grounds for believing that they may be in possession of disclosable documents which are not also in the party’s possession, identifying the classes of documents required to be preserved, and notifying them that they should not delete or destroy those documents, and should take reasonable steps to preserve them.
- Identify, and then send a written notification to your agents or third parties, who may have documents connected with the claim in their possession or control, identifying the classes of documents required to be preserved, and notifying them that they should not delete or destroy those documents, and should take reasonable steps to preserve them.
- Provide us with written confirmation that you have taken these steps.

### **Some General “Dos And Don’ts” Regarding Your Documents**

- Do not search for documents until we have had a chance to discuss the claim in more detail. There is no search obligation for the purposes of providing Initial Disclosure. We need to discuss the appropriate approach.
- Do not create new documents (or annotate or amend existing documents) relating to the dispute with any other parties without discussing with us. It is very important that you do not create any new documents that it might have to disclose to any other parties that could damage your case.

- Some documents that are created may be protected by litigation privilege. If applicable, you will need to monitor carefully any communications about the dispute by personnel within the/your company or organisation, whether internal or external. This includes communications between, or involving, those who are not witnesses or potential witnesses, or who are not involved in making decisions about the way in which the litigation should be conducted. It may be appropriate to inform your employees not to communicate about the dispute at all, unless they are instructed to do so. In any event, you should inform them to take particular care when using email.
- You should also inform employees not to amend, or in any way annotate, existing documents. Documents containing any relevant annotations will be treated as separate documents and may need to be disclosed even if the original document was not disclosable. Informal annotations, in particular, can be prejudicial to the case of the party that might be obliged to disclose them.
- Discuss with use, first, any documents that you propose to circulate internally.
- Do not ask any third agent to send documents to you without talking to us

It is extremely important that neither you nor any agent or employees ask any third parties to send you (or us) documents that may relate to the dispute, until I have had the opportunity to assess the documents they propose to send.

It is likely that most documents held by professional third parties on your behalf are, on a proper analysis, within its control. If so, those documents will possibly be disclosable.

- Ensure that nothing is done that might damage metadata associated with electronic documents. It would be helpful if your IT manager could join us when we meet to discuss the disclosure process in more detail. We should also consider whether IT consultants should be engaged to assist with retention of electronic documents, to ensure that no material is inadvertently destroyed or altered. Please let us know if you would like us to obtain quotes from potential e-disclosure providers.
- Ensure that you comply with relevant data protection requirements. Data protection issues are something we can discuss further when we meet.

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