

# A Guide to the Disclosure Process

This guide outlines and explains the disclosure process in contentious proceedings and your duties under the disclosure process.

## A. Duty of disclosure

1. The disclosure obligation in each case will depend on a number of factors, including the procedural “track” to which the case is allocated (for example, Fast Track or Multi Track) and whether electronic documents will have to be disclosed.
2. For Fast Track claims and Multi Track claims that include a claim for personal injuries, the usual order will be for what is known as standard disclosure. This requires each party to disclose to the opposing party the documents on which it relies, that adversely affect its case or another party’s case, or that support another party’s case. The Court Rules set out a procedure to be followed when giving standard disclosure. Under that procedure, the documents are usually disclosed by serving a List of Documents on the opposing party. The underlying principle is that the Court can only deal with the case justly if all of the relevant material is out in the open.
3. For Multi Track claims (other than those including a claim for personal injuries), standard disclosure is not the default, but is still one option. The Court will decide what is appropriate for the case from a menu of options. There is considerable flexibility. The Court will make its order having in mind what is known as the “overriding objective” (which means dealing with cases justly and at proportionate cost) and the need to limit disclosure to what is necessary to deal justly with the case. There is no set procedure in the Rules for giving anything other than standard disclosure. Instead, the Judge will give directions on how disclosure is to be given. It is likely, in such cases, that aspects of the standard disclosure procedure, such as the requirement for lists of documents, will be adopted.
4. Parties are compelled to disclose to each other any damaging documents, as well as helpful ones. The disclosure process, therefore, forces parties to be realistic about their chances of success in the litigation and, for that reason, many disputes settle either shortly before or shortly after disclosure.
5. The duty of disclosure is strict, and the Court take it very seriously. Having been instructed by you, we are under a duty to inform you of these obligations and ensure that you understand them. This guide contains a significant amount of important information. Therefore, we set out below at Section M a summary of “Disclosure Dos And Don’ts” to provide a checklist of the main points.

## B. Disclosure In Multi Track Cases

6. In substantive disputes, the Court may make an order for something other than standard disclosure if the case is allocated to the Multi Track.
7. Possible orders that the Court may make in these cases are:
  - An order for a party to disclose the documents on which it relies and, at the same time, to request any specific disclosure it requires from any other party.
  - An order that directs, where practicable, the disclosure to be given by each party on an issue-by-issue basis.
  - An order for each party to disclose documents which, it is reasonable to suppose, may contain information that will enable that party to advance its own case or damage the case of any other party, or leads to an enquiry that has either of those consequences.
  - Standard disclosure.
  - An order dispensing with disclosure (although this is unlikely).
  - Any other order that the Court considers appropriate.
8. There is no set procedure in the Rules where an order is made for something other than standard disclosure. Instead, the Judge will give directions on how disclosure is to be given. It is likely, in such cases, that aspects of the standard disclosure procedure, such as the requirement for lists of documents, will be adopted.
9. In Multi Track cases, there are more onerous requirements on the parties in their preparation for disclosure. Each party must file and serve a disclosure report, not less than 14 days before the first Case Management Conference (CMC). This report must:
  - Briefly describe matters such as the documents that exist that are (or may be) relevant to the matters in issue and where, and with whom, the documents are (or may be) located.
  - Describe how any electronic documents are stored.
  - Estimate the broad range of costs that could be involved in giving standard disclosure (and of giving the disclosure proposed, if that is something other than standard disclosure), including the costs of searching for and disclosing electronic documents).
  - State which type of disclosure order will be sought.
10. We will need to carefully consider what might be the most appropriate approach to disclosure in this case, to ensure that what is proposed is proportionate. This is something we should discuss in detail once we have done some preliminary scoping to get a feel for issues such as the likely volume of documentation, and how many electronic documents will have to be disclosed.

11. Not less than seven days before the first CMC, the parties must discuss, and seek to agree, a proposal for the disclosure exercise. In most cases, the Court will make the disclosure order at that CMC.
12. It is important to be aware that the time periods specified in the Rules are deadlines. It is likely that work preparing the disclosure report, and discussions with the opposing party (or parties), will have to start significantly earlier.
13. We set out below further information about the disclosure process in general. It assumes that an order for standard disclosure is made but most of the duties and requirements will apply whatever disclosure order is made in this case.
14. We will discuss with you the disclosure options in more detail, and which type of disclosure order we consider should be sought if proceedings are commenced, in due course. If a different type of disclosure order is made in this case, we will explain to you if there are any different procedural requirements.

## C. Duty To Disclose Documents, Including Electronic Data

15. You have a duty to disclose documents. The term “Document” has a very wide meaning under the Court Rules. It includes all media in which information of any description is recorded: for example, computer records and emails, as well as paper.
16. The definition of a document also extends to electronic material that is not easily accessible, such as electronic documents stored on servers and back-up systems, and electronic documents that have been deleted. It also includes information stored and associated with electronic documents, known as metadata.

## D. Duty To Disclose Documents That Are, Or Have Been, In The Party’s Control

17. You will be obliged to disclose helpful or damaging documents that are, or have been, in your control. “Control” also has a specific meaning under the Court Rules. It is not limited to documents that you have (or previously had) in your possession. It also includes documents that you have (or had) the legal right to possess, inspect or copy (for example, documents held by any third-party professional agents, such as other firms of solicitors, or accountants).

## E. The Reasonable Search

18. A party's obligation is to conduct a reasonable search for documents that are, or have been, in its control. This means that you are not obliged to carry out an exhaustive search for documents, sparing no expense and leaving no stone unturned.
19. What constitutes a reasonable search will depend on the facts of each case, but there are certain factors that the Court will apply when assessing the reasonableness of a search.

These include:

- Number of documents.
  - Nature and complexity of the proceedings.
  - Ease and expense of retrieval of any particular document.
  - Significance of any document likely to be located during the search.
  - When considering the ease and expense of retrieval of electronic documents, specific points to consider include:
    - Accessibility of electronic documents (including email communications) on computer systems, servers, back-up systems and other electronic devices or media.
    - Location of relevant documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
    - Likelihood of locating relevant data.
    - Cost of recovering, disclosing and providing inspection of any relevant electronic documents.
    - Likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.
20. Another factor to consider in the context of electronic documents is the availability of documents, or contents of documents, from other sources.
  21. Depending on the circumstances, it may be reasonable to search for electronic documents by means of agreed keyword searches.
  22. When determining the extent of the search for documents that is required in each case, the underlying principle is proportionality. Disclosure can be the most costly aspect of any piece of litigation. The Court will be looking to manage the disclosure exercise so as to facilitate a just outcome, but with an eye to balancing the sums in issue with the cost of litigating. We will discuss how these principles apply to the present case, and the extent of the search required, when we meet.

## F. Dealing With Electronic Documents

23. Specific procedures apply for the disclosure of electronic documents (often referred to as e-disclosure).
24. The procedural Rules include an optional Electronic Documents Questionnaire that highlights the information and issues we will need to consider.
25. It is possible that we will need IT consultants to assist with the search for electronic documents, to ensure that no material is inadvertently destroyed or altered during the search process.
26. It is difficult at present to assess precisely how important electronic documents might be in this particular case. In the meantime, please advise everyone with access to any electronic documents (including emails and Word files or documents) that might be connected with this case, not to access, alter or destroy them until we have had the opportunity to agree how the material should best be preserved for review.
27. The procedural Rules expressly require us to notify you, as soon as litigation is contemplated, of the need to preserve disclosable documents, including electronic documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. It is essential for you to consider whether any standard document retention policies need to be suspended. Failure to comply with this could lead to the Court drawing adverse inferences: for example, if any disclosable documents are destroyed. Please contact me straight away if you have any queries about this, or if there are likely to be practical difficulties in implementing these instructions.

## G. The Practicalities Of The Disclosure Exercise And Preparing A List Of Documents

28. The first stage is to determine the extent of the search for documents that will be required. If there is a large volume of electronic documents, we may need to consider whether external IT consultants should be appointed to assist with the e-disclosure process.
29. The next step is to conduct the search. Once the documents have been located, my team will review the materials and decide which documents must be disclosed.
30. If lists are to be exchanged, we will then draft a list of the documents that are required to be disclosed.

31. The documents are usually listed in a prescribed Court form. There are alternative options available for listing electronic documents. We will consider those options in more detail, once we have established whether there is likely to be a significant volume of electronic documents to disclose.

32. The disclosed documents will be described in the List of Documents in one of the three sections:

- Relevant documents that you currently have, and which your opponent/any other parties may view or “inspect”. These documents will be listed either individually or by category.
- Relevant documents that you currently have, but which your opponent/any other parties may not inspect, for example, privileged documents (see below). By convention, these documents are described generally rather than being individually listed but recent case law suggests that the nature of the documents should be stated and the factual basis of the grounds giving rise to the claim for privilege should be set out.
- Relevant documents that you have had in your possession, but you no longer have them. By convention, originals of documents that have been sent to third parties are described generally, but if there are documents likely to be relevant to the matter, that you should have but do not have, these will need to be identified specifically.

## **H. Documents That Your Opponent / Any Other Parties Will Not Be Allowed To Inspect (Although Their Existence Must Be Disclosed)**

33. The main categories of documents that are privileged are:

- Confidential communications passing between a party and its legal advisers, in which the party is seeking or obtaining legal advice. It applies to transactional advice as well as advice regarding contentious matters. These documents are 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. These documents are subject to litigation privilege.
- Correspondence and other communications generated as part of a genuine attempt to settle an existing dispute. These documents are subject to “without prejudice” privilege.

- Where documents are privileged, it is extremely important that you do not take any steps that might result in privilege being lost (or “waived”). This may occur if confidentiality in the material is lost. Therefore, please take care not to circulate any existing documents that might be relevant to the dispute until we have discussed the position further.

## **I. Confidential documents**

34. Unless you have a right or duty to withhold inspection, you will not be able to prevent your opponent/any other parties from seeing any documents that are required to be disclosed just because they are confidential. However, the Court Rules prevent a party that has acquired documents on disclosure from using those documents outside the litigation in which they are disclosed, except in certain circumstances: for example, if the Court’s permission is obtained.

35. If there are any commercially sensitive relevant documents that you do not wish your opponent/any other parties to see, we will need to consider whether and, if so, to what extent, we can ask the Court to put in place some specific protective measures. Sometimes, for example, it is possible to obtain an order that an opponent’s legal advisers (but not the opponent) may inspect those documents.

## **J. The Disclosure Statement**

36. The List of Documents must contain a disclosure statement that is signed by you, or a senior representative of a company should that be the client. This will usually be the person within the company who has co-ordinated or taken overall responsibility for the search for documents. Please start to give some thought as to who the appropriate person will be in this case.

37. The disclosure statement must set out the extent of the search that has been made to locate documents that are required to be disclosed and provide specific information regarding the search for electronic documents and the specific media searched.

38. The person signing the disclosure statement must certify that they understand the duty of disclosure and, to the best of their knowledge, have carried out the duty. They must expressly state that they believe that the extent of the search was reasonable in all the circumstances. This is a serious matter. Signing a disclosure statement without an honest belief that it is true carries the risk of proceedings for contempt of Court, and the penalty of imprisonment.

## K. Important Points To Consider Now

39. There are a number of important points to bear in mind.
40. Please ensure that, as far as possible, anyone who might be affected by these points is informed of the position as soon as possible.

The points are as follows:

### Do Not Destroy Documents

41. It is important, now that litigation is being contemplated (or being progressed), that you take steps to ensure that you suspend any routine document destruction policies that it has in place.
42. The List of Documents will need to state what has happened to any documents that have been lost or destroyed. A suggestion that potentially important documents may have been lost or destroyed after the proceedings began could be very damaging to your case. As I stated above, the Court Rules expressly require me to notify you, as soon as litigation is contemplated, of the need to preserve disclosable documents, including electronic documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. Failure to comply with this could lead to the Court drawing adverse inferences.

### Do Not Create Documents (Or Annotate Or Amend Existing Documents)

43. It is very important that you do not create any new documents that you might have to disclose to your opponent/any other parties that could damage your case.
44. Some documents that are created may be protected by litigation privilege. However, you will need to monitor carefully any communications about the dispute by any of your employees or personnel. 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 personnel not to communicate about the dispute at all, unless they are instructed to do so. In any event, you should inform your personnel to take particular care when using email.
45. You should also inform your personnel 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 is obliged to disclose them.

## Do Not Ask Any Third Party To Send You Documents

46. There are certain documents that you may not have in your possession, and may not have the legal right to possess, inspect or copy (for example, the working papers of your third-party professional agents, such as other firms of solicitors, or accountants). Those third-party documents will not be disclosable, unless they come into your possession.
47. It is therefore extremely important that neither you nor any personnel you may have ask any third parties to send you (or me) documents that may relate to the dispute, until I have had the opportunity to assess the documents they propose to send.
48. It is likely, however, that most documents held by professional third parties your behalf are, on a proper analysis, within its control. If so, those documents will be disclosable if they assist or damage any party's case.

## Ensure That You Comply With Relevant Data Protection Legislation

49. It will be important to ensure that you keep in mind the relevant data protection requirements. Data protection issues are something we can discuss further when we meet.

## L. Costs

50. For the purposes of the disclosure report, it will be necessary to prepare an estimate of the broad range of costs that could be involved in giving standard disclosure (and whatever form of disclosure we propose for the case). As I have mentioned, if there is a significant volume of electronic documentation, we should consider the potential benefits of appointing external IT consultants to assist with the exercise. If we decide that is appropriate in this case, we will obtain separate quotes for their work. We will provide you with estimates once these are available.
51. In some cases, it will also be necessary to provide a detailed budget for the costs of the case as a whole (including the costs of the disclosure exercise). This will be prepared based on the order for disclosure that we decide to propose.
52. However, if the Court ultimately makes a different type of disclosure order, the costs estimates are likely to vary. If that happens, we will provide you with revised estimates.

## M. Disclosure 'Dos And Don'ts'

Do not destroy any documents that might be relevant to the dispute. The procedural Rules expressly require me to notify you, as soon as litigation is contemplated, of the need to preserve disclosable documents, including electronic documents that would otherwise be deleted in accordance with a document retention policy or in the ordinary course of business. Consider whether the instruction should be given to suspend any standard document retention policies.

Do not access, amend, delete or destroy any electronic documents that might be relevant to the dispute.

Do not create any new documents that might have to be disclosed in the litigation.

Do not mark or annotate any existing documents that might be relevant to the dispute.

Discuss with lawyers first any documents that you propose to circulate internally.

Do not ask any third parties to send you documents. Ensure that you comply with any data protection requirements.

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