

## Summary note on disclosure of documents in civil proceedings

This note is a summary of our note "Disclosure of documents in civil proceedings in England and Wales". Neither note is intended as a substitute for obtaining advice in individual cases.

### Disclosure orders

Disclosure involves parties to litigation disclosing to each other the existence of relevant documents in their control, in accordance with a court order.

Whilst the extent of disclosure will ultimately be determined by the court, the parties are encouraged to try and agree the most proportionate means of carrying out the exercise.

Whilst the court can impose a different form of disclosure, the most common order is for standard disclosure. This means you will have to disclose documents which are in your control:

- upon which you rely;
- which adversely affect your or another party's case; or
- which support another party's case.

Documents are in your control if they are in your or your agent's physical possession, whether or not you actually own the documents, and if you have a right to documents or to inspect or copy them, even if they are not currently in your possession.

### Documents to be disclosed

Standard disclosure requires you to make a reasonable search for documents. What is reasonable depends on the number of documents involved, the nature and complexity of the proceedings, the ease and expense of retrieval and significance of documents likely to be found. The relative financial positions of the parties will also be taken into account.

"Documents" includes electronic documents and data. Electronic documents include documents stored on all forms of electronic media, including desktop and laptop computers, personal mobile devices (such as smart phones and tablets) and external storage devices (such as USB memory sticks and external hard drives). Also included in the definition of "documents" are documents stored on servers and back-up systems and metadata (data about documents, such as the date and time of creation of a file).

### Requirement to search for and retain disclosable documents

As soon as litigation or other adversarial proceedings are reasonably in prospect, you must stop the routine destruction of documents that might be relevant. Documents damaging to your case must not be destroyed under any circumstances.

It is important to ensure that electronic documents' metadata is preserved and not altered in any way.

You should ensure that all those within the organisation who may have disclosable documents are warned about their disclosure obligations as soon as possible.

Relevant documents should be sought out at the earliest opportunity. The search should extend to consideration of:

- the likelihood of documents being found in all your locations;
- documents in storage;
- copies of significant documents which may have manuscript notes on them;
- notes made by all those who attended significant meetings;
- types of electronic document, including e-mails, word-processed, spreadsheet, graphic and presentation files, image files, mail files (including Calendar, Journal and To-Do lists or their equivalent), voicemail recordings, instant messages, photographs, plans, drawings, video and sound recordings;
- where electronic documents may be stored, including those readily accessible on computer servers, desktop and laptop hard drives, mobile devices (such as smart phones and tablets), external storage devices (such as USB memory sticks and external hard drives), and, web-based applications;
- back-up data or metadata (in some cases);
- paper diaries, if likely to be important to any of the issues.

Lawyers should be involved in the search for documents from an early stage.

Original paper files should not be disturbed or rearranged.

## List of documents

All disclosable documents have to be described in a formal List of Documents to be supplied to the other party. In this you must also include relevant documents which used to be, but no longer are, in your control.

The list must include a disclosure statement signed by the party giving disclosure or an appropriate person within the organisation. This statement must identify the extent of the search for documents and certify that the maker of the statement understands the duty of disclosure and, to the best of his or her knowledge, has carried out that duty.

## Inspection and privilege

The other side will in due course be entitled to inspect (generally by being provided with an electronic copy) all of your listed documents except privileged documents.

Privileged documents are essentially documents which record confidential communications between:

- lawyers and their clients for the purpose of giving or obtaining legal advice ("**legal advice privilege**");
- lawyers and their clients, or between either of them and third parties, for the dominant purpose of conducting, or aiding in the conduct of, actual or likely litigation or other adversarial proceedings ("**litigation privilege**").

Not all of the employees of a client organisation will be classified as "the client" for the purpose of claiming legal advice privilege. The identity of those employees who constitute "the client" must be considered for each specific matter.

The following are unlikely to be privileged:

- internal memoranda prepared by non-lawyers, even if confidential;
- board minutes that go beyond merely recording legal advice;
- notes to accounts;

- correspondence with other professional advisers (such as accountants and, often, insurers) or the police or other authorities;
- documents obtained from third parties to provide evidence for your case;
- instructions to and correspondence and discussions with expert witnesses.

Care should therefore be taken to ensure that if such documents are created or obtained after litigation or other adversarial proceedings are contemplated or commenced, they are purely factual and contain nothing that will prejudice your case.

In order that privilege is maintained, as far as possible, requests for documents or other assistance from third persons should only be made after consultation with and, ideally, by your lawyer.

Privilege can be lost if you show your documents to third parties.

"Without prejudice" correspondence is correspondence arising in connection with settlement negotiations: such correspondence cannot be produced to the court before judgment but is not usually privileged for the purposes of disclosure (save in exceptional circumstances).

## Use of disclosed documents

Documents and information derived from documents obtained on disclosure or as a result of any other court order must not be used for any purpose other than the litigation in question except where read or referred to in open court, unless the court orders otherwise. All members of staff to whom such material may be communicated must be warned against misuse. Misuse could amount to contempt of court.

## Consequences of failing to give proper disclosure

Failure to give proper disclosure can also amount to contempt of court and may have serious consequences, including dismissal of your claim or entry of judgment against you.

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