

**DISCLOSURE IN FAMILY
PROCEEDINGS**

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1. One of the major causes of delay in both public and private law Children Act proceedings arises from the difficulty of obtaining experts reports within a time scale that meets the need of the children. The wider difficulties presented by a shortage of experts nationally and the reluctance of some experts to become involved in Child Protection cases is well known. It is however possible to minimise the delay in awaiting reports by ensuring that the necessary core material is available to the selected experts at the earliest possible opportunity.
2. Below I have set out, by way of reminder, the various mechanisms available to access information as speedily and as effectively as possible. In common with all other aspects of case management this requires the parties to focus at an early stage on the issues that are likely to arise and to consider the spectrum of evidence (both lay and professional) which might assist the Court in its task. Where a case is identified as suitable for “split hearing” regard should also be had to the evidence likely to be required at stage 2 and the core materials (e.g. medical records) needed for any assessment, requests for which should be made immediately.
3. It is not possible in a paper such as this to cover all aspects of disclosure in family cases. I have tried to identify those areas which arise most commonly in practice, both in relation to acquiring and releasing documentation.
4. **Information obtained in Police investigations**
The Northern Circuit Police/Family Protocol (currently being piloted) aims to provide the Family Court with **EARLY INFORMATION** to enable it to properly determine any necessary directions in relation to documents records or other evidential material held by the Police, In summary:

(i)	Requests should be made in writing stating precisely what information and evidence is sought and why in accordance with the standard request form. Response should normally be within 5 working days. Requests should be made to the nominated Police Disclosure Officer
(ii)	<p>If the Police are unable or unwilling to disclose the requested material without Court Order:</p> <p>(a) The parties opposing disclosure should complete the standard request form (this may merely be renewing the request at (i) above and serve it 10 working days before the requested Direction Hearing.</p> <p>(b) The Police response should be received 5 working days before the relevant hearing (see paragraph 3 above)</p> <p>(c) At the hearing the Court shall consider the necessity and relevance as to the issues of information sought: the wording of any proposed directions by reference to the standard variable directions, timing of any direction: expedition of the preparation of the Court Order: service. The Solicitor securing the directions shall ensure that the relevant officer or Police representative is aware of the terms of the direction within 24 hours.</p>

5. Comment

Ascertaining the identity of the Exhibits Officer and a list of the exhibits is crucial, photographs of crime scenes, housing plans etc all too frequently do not find their way into the Family Courts. Police investigations of infant deaths or serious injury cases have become more sophisticated. (In a recent case it was discovered that an expert had conducted a chronological diagrammatic spreadsheet with all the injuries noted to a child over 6 months cross referenced to the police statements. This was discovered only by reference to the exhibits list). Family practitioners also need to be alert to obtaining unused material and the distinction between primary and secondary disclosure to the defence. Secondary disclosure is triggered by the Crown's receipt of the defence statement.

6. Obtaining medical records

The quality and speed of responses to requests for disclosure in this area varies enormously. A protocol between Health Authorities and the Family Courts would be extremely helpful. Difficulties arise in the following areas:-

- (i) Obtaining the records may require separate requests to different hospitals, and different Health Authorities. It may be difficult to identify which hospital has been involved in treatment.
- (ii) A huge increase in medical negligence cases has led to administrative overload at some hospitals.
- (iii) The administrative cost is borne almost entirely by the PCT.
- (iv) In cases where General Practitioner records are computerised, backlogs often arise and letters from Consultants (which will often be very important) may not have been scanned onto the system. Below is an attempt to distil best practice:-

(1) Consideration should be given in every case, at the earliest possible stage, as to whether medical records are likely to be required. In most cases it will be obvious from the outset. **A request for medical records should usually include GP records.** GP records at least theoretically follow the patient, hospital records frequently do not. Accordingly they should provide a chronology of medical treatment at any hospital which will inform the search for hospital records too.

(2) Written consent should be obtained from the adult party at the earliest possible stage to obtain disclosure of their medical records and (where relevant) written consent to disclosure of the records for any child for whom they have parental responsibility. The fact that a child is subject to an Interim Care Order should not be regarded as obviating the need for parental consent to disclosure of the child's health records. In the event that a parent refuses to consent to disclosure of his/her records the matter should be returned to Court urgently. If a parent refuses consent to disclose the records of a child for whom he has PR the Local Authority's consent should suffice and there should be no need to return the matter to Court.

(3) Applications for hospital records should be made to the Medical Records Officer. Letters of request should emphasise (prominently) that the request is made in relation to proceedings **CONCERNING THE WELFARE OF A CHILD** and that any delay **IN OBTAINING THE INFORMATION SOUGHT** will be inimical to that child's welfare. The letter should also specify

- (i) Any records disclosed will only be used for the purposes of and preparation for the current proceedings unless permission of the Court is obtained.

- (ii) The records will be kept confidential and copying will be kept to the minimum to avoid proliferation of confidential material.
 - (iii) Records will only be disclosed to professionals in the proceedings (and those who fall within the Family Proceedings Rule), unless the permission of the Court is obtained. The Solicitor charged with responsibility for obtaining the material should follow up the written request promptly if there is no response within 14 days. Full compliance should be within no more than 40 days (Access to Health Records Act 1990).
- (4) GP Records. Letters of request should be sent to an identified GP (in the timescales identified above) emphasising that the request is made in the context of proceedings relating to the welfare of a child and where delay is likely to be inimical to the child's welfare. Requests should particularly include both handwritten and computerised records and the results of any hospital investigations.

Letters of request for medical records would do well to follow the essentials of the Protocol in Civil actions (see White Book C3-020) which is set out in amended form below:

To: Medical Records Officer

Hospital

1 (a)	Full name of patient (including previous surnames)	
(b)	Address now and any other known addresses .	
(c)	Date of birth (and death, if applicable)	
(d)	Hospital reference number if available	
(e)	National Insurance number if available	
(f)	Reasons for application	
(g)	Undertakings in relation to confidentiality	See Box 3 para 5 above
(h)	Any departments where it is known treatment was received	
(i)	The name(s) of any Consultant(s) in charge of treatment	

Access to Health Records Act 1990

Right of access to health records.

3.—(1) An application for access to a health record, or to any part of a health record, may be made to the holder of the record by any of the following, namely—

- (a) the patient;
- (b) a person authorised in writing to make the application on the patient's behalf;
- (c) where the record is held in England and Wales and the patient is a child, a person having parental responsibility for the patient;
- (d) where the record is held in Scotland and the patient is a pupil, a parent or guardian of the patient;
- (e) where the patient is incapable of managing his own affairs, any person appointed by a court to manage those affairs; and
- (f) where the patient has died, the patient's personal representative and any person who may have a claim arising out of the patient's death.

(2) Subject to section 4 below, where an application is made under subsection (1) above the holder shall, within the requisite period, give access to the record, or the part of a record, to which the application relates—

- (a) in the case of a record, by allowing the applicant to inspect the record or, where section 5 below applies, an extract setting out so much of the record as is not

excluded by that section;

(b) in the case of a part of a record, by allowing the applicant to inspect an extract setting out that part or, where that section applies, so much of that part as is not so excluded; or

(c) in either case, if the applicant so requires, by supplying him with a copy of the record or extract.

(3) Where any information contained in a record or extract which is so allowed to be inspected, or a copy of which is so supplied, is expressed in terms which are not intelligible without explanation, an explanation of those terms shall be provided with the record or extract, or supplied with the copy.

(4) No fee shall be required for giving access under subsection (2) above other than the following, namely—

(a) where access is given to a record, or part of a record, none of which was made after the beginning of the period of 40 days immediately preceding the date of the application, a fee not exceeding the maximum prescribed under section 21 of the [1984 c., 35.] Data Protection Act 1984; and

(b) where a copy of a record or extract is supplied to the applicant, a fee not exceeding the cost of making the copy and (where applicable) the cost of posting it to him.

(5) For the purposes of subsection (2) above the requisite period is—

(a) where the application relates to a record, or part of a record, none of which was made before the beginning of the period of 40 days immediately preceding the date of the application, the period of 21 days beginning with that date;

(b) in any other case, the period of 40 days beginning with that date.

(6) Where—

(a) an application under subsection (1) above does not contain sufficient information to enable the holder of the record to identify the patient or, in the case of an application made otherwise than by the patient, to satisfy himself that the applicant is entitled to make the application; and

(b) within the period of 14 days beginning with the date of the application, the holder of the record requests the applicant to furnish him with such further information as he may reasonably require for that purpose,

subsection (5) above shall have effect as if for any reference to that date there were substituted a reference to the date on which that further information is so furnished

7. Requests or Orders made against the Home Office

- (i) Such requests usually necessitate an Order from the Court. The Court shall draw up the relevant request or Order in a separate document and immediately provide a copy to the Family Division Lawyer, Presidents Chambers, Royal Courts of Justice, Strand, London WC2A2LL. The Court Service form EX660 should be completed. It will be used by the Court in the production of the Order and should also be sent to the Family Division lawyer.

<p>(ii) The request or Order should either state of be accompanied by a letter to the Family Division lawyer stating the following details in respect of all parties:</p> <ul style="list-style-type: none"> (1) Full name including all middle names (2) Nationality (3) Full date of birth and (4) Any known Home Office reference number <p>Where the query relates to the proposed adoption of a foreign national minor, the Family Division lawyer can advise as to the additional information which will be required</p>
<p>(iii) The request or Order should state the time by which the information is required, allowing a reasonable period for the Home Office to investigate and prepare a statement to the Court. In the absence of urgent circumstances, a reasonable period should be 4 weeks.</p>
<p>(iv) The request or Order should identify the questions it wishes to be answered by the Home Office.</p>
<p>The request or Order should be forwarded to the Family Division lawyer together with such information as is sufficient to enable the Presidents Office and the Home Office to understand the nature of the case, to identify whether the case involves an adoption and to identify whether the immigration issues raised might relate to an asylum or non-asylum application.</p>
<p>(v) The Family Division lawyer will then send to an appropriate Enquiries Officer in the Home Office the enquiry, together with a copy of any request or Order made. The Home Office Official will be personally responsible for either:</p> <ul style="list-style-type: none"> (a) Answering the query personally, by retrieving the file and preparing a statement for the Court or (b) If the request is made for more than mere information (for example requiring speculation as to the possible effects of an Order or the likelihood of a party being granted special leave to remain), by either obtaining information from or passing the Courts Order to the relevant Official with the carriage of that particular file.
<p>(vi) The Family Division lawyer will follow up as required an Order to ensure that the information is received by the Court in time and will receive the statement before forwarding it on as instructed by the Judge or Court making the request.</p>

8. Requests or Orders made against the UK Passport Service

Again the Judge should ask the Court to draw up and immediately to provide a copy of the relevant request or Order in a separate document to the Family Division lawyer Form EX660 should be completed.

(i)	<p>The request or Order should either state or be accompanied by a letter to the Family Division lawyer stating the following details in respect of all parties about whom they are seeking information:</p> <ul style="list-style-type: none">(1) Full name including all middle names(2) Full date of birth and(3) Any known passport numbers <p>Form EX660 should be completed and used by the Court in the production of the Order.</p>
(ii)	<p>The request or Order should state the time by which the information is required allowing a reasonable period for investigation and preparation of statements. In the absence of urgent circumstances a reasonable period should be 4 weeks.</p>
(iii)	<p>The request or Order should identify the information required from the Passport Services.</p>
(iv)	<p>The Family Division lawyer will then send to the Disclosure of Information Officer the enquiry, together with a copy of any request or Order made. The Disclosure of Information Officer will be responsible for retrieving the information and forwarding this to the Family Division lawyer.</p>

9. **Education Records**

(i) Consideration of the needs of a child subject to proceedings will often include an analysis of a child’s educational provision, whether in private law under s.(1)(3)(b) of the Children Act 1989 or as part of the scrutiny of the Care Plan in public law. Education Law is a specialist area but is often hampered by lack of public funding for representation at Tribunals. Children Act proceedings sometimes provide a useful forum to examine whether the educational provision provided by a Local Authority is appropriate. Family Lawyers can have a significant input in this area, but have been slow to take up the challenge. It is all too easy for the educational needs of a child to be eclipsed by the more fundamental issues of safety and placement needs which drive care proceedings. Particularly with older children, where the options in the care system may be limited, securing the correct educational provision can, of itself, transform the quality of a child’s life and be a very significant contribution to a successful outcome. Gaining access to the appropriate information, knowing what is available and where to obtain it is crucial. The table below should provide at least a useful starting point.

(ii) Again, early identification of issues is crucial, followed by prompt requests for documentation. The parents’ cooperation is essential (and often remarkably forthcoming, even amongst the most disadvantaged). It provides an opportunity for Social Workers and parents to work together, away from the focus on parental failings. In cases deemed suitable for split hearings, the opportunity for social work input is often squandered until the comprehensive assessment begins, based on the Judge’s findings. If parents have cooperated on these more “neutral” issues up to that point, foundations are laid which may foster greater levels of openness by parents at the assessment stage.

General Education Documents		
	Where to Obtain	Details/How to Obtain
School Attendance Records	Obtained from Child’s current	Parent or carer with PR or Child can obtain the information under the
Curricular Records		

Subject/Yearly Reports	or former school	Education (School Records) Regulations 1989 by addressing correspondence with signed authority to the Secretary of the Governing Body. A fee not exceeding the cost of supply may be charged. A response is required within 15 school days
School Prospectus/Fee Schedules		No need for any form of authority or for request in a particular format
Children with Special Educational Needs Generally		
Reports from LEA Educational Psychologist; Occupational Therapist; Speech and Language Therapist; Special Educational Needs Co-ordinator (SENCO)	Obtained from LEA	Documents are open to the public and do not require any form of authority
Child's Individual Education Plan (IEP)	Obtained from Child's current or former school	Parent or carer with PR or Child can obtain the information under the Education (School Records) Regulations 1989 by addressing correspondence with signed authority to the Secretary of the Governing Body. A fee not exceeding the cost of supply may be charged. A response is required within 15 school days
Children with a Statement of Special Educational Needs		
Statement of Special Educational Needs with full appendices	Obtained from the Independent Appeal Panel	The Panel hears all appeals against permanent exclusions and since implementation of the Disability and Discrimination Act 1995 Part 4 any claims of disability discrimination in exclusions from maintained schools and City Academies. Documents can be obtained by the Appellants from the Clerk to the Independent Appeal Panel
Minutes of the Child's Annual Review	Obtained from Child's current or former school	Parent or carer with PR or Child can obtain the information under the Education (School Records) Regulations 1989 by addressing
Reports prepared for Annual Review		

Decision/Outcome Record from Annual Review		correspondence with signed authority to the Secretary of the Governing Body. A fee not exceeding the cost of supply may be charged. A response is required within 15 school days
Decision of any Special Educational Needs and Disability Tribunal (SENDIST)	Obtained from SENDIST	Hears appeals regarding obtaining, maintaining and reviewing the Statement of Special Educational Needs and disability discrimination appeals for all fixed term exclusions and permanent exclusions from schools other than those covered by the Independent Appeal Panel. Information can be obtained by the Appellant
Children with Behavioural Problems/Discipline History		
Discipline Records	Obtained from Child's current or former school	Parent or carer with PR or Child can obtain the information under the Education (School Records) Regulations 1989 by addressing correspondence with signed authority to the Secretary of the Governing Body. A fee not exceeding the cost of supply may be charged. A response is required within 15 school days. LEA must be notified of a Pastoral Support Programme and is required to offer support
School Exclusion Policy		
Copies of any Exclusion Letters giving grounds for Exclusion		
Minutes of Governing Body Discipline Committee decision		
Pastoral Support Programme		
LEA Behavioural Support Plan	Obtained from LEA	Documents are open to the public and do not require any form of authority
Decision from Independent Appeal Panel	Obtained from the Independent Appeal Panel	Documents can be obtained by the Appellants from the Clerk to the Independent Appeal Panel
Decision from SENDIST Appeal	Obtained from SENDIST	Information can be obtained by the Appellant

10. Disclosure out of Family Proceedings

- (i) Disclosure is a two way street. Cooperation from some of the agencies we have looked at above must surely be encouraged by ensuring that information obtained during the course of proceedings which is helpful to them, may be provided by the Family Courts, where to do so is not considered to be contrary to the interests of the child.

- (ii) The amendments to the Family Proceedings Rules (Amendment No. 4 Rules 2005) inserts a new paragraph 10.20A, the salient provisions of which are set out below. Some of the amendments are obviously sensible and overdue (e.g. disclosure to spouses or close family members, Counselling Services, GMC etc). Other changes are perhaps more controversial. Disclosure of a Judgment to the police by any party to the proceedings no longer requires the leave of the Court. The inter-relation of s.98 of the Children Act 1989 (Self-incrimination) with these amendments, will be interesting to follow. It may also be worth re-visiting Wall J's assumptions in: *A Chief Constable v (1) A County Council (2) AB(a child) (3) DH and RW [2003]1FLR 579* in respect of the protection afforded to Defendants by the combination of s.98 and s.78 of the Police and Criminal Evidence Act as regards damaging statements or admissions made in care proceedings, in the light of the new landscape of the Criminal Justice Act.
- (iii) Remember also s.98 does not apply to private law proceedings (see *Re D and M (Disclosure: Private Law) 2003 1 FLR 647*). Reports and statements filed in proceedings remain confidential and may not be disclosed without leave of the Judge (see *Re L (Police Investigation: Privilege) 1996 1 FLR HL*). See: *A Local Authority v (1) W (2) A Police Authority 2003 2FLR 1023* for guidance as to the balancing exercise.

Family Proceedings Rules

A person specified in the first column of the following table may communicate to a person listed in the second column such information as is specified in the third column for the purpose or purposes specified in the fourth column.

Communication of information without permission of the court

<i>Communicated by</i>	<i>To</i>	<i>Information</i>	<i>Purpose</i>
A party	A lay adviser or a McKenzie Friend	Any information relating to the proceedings	To enable the party to obtain advice or assistance in relation to the proceedings.

A party	The party's spouse, cohabitant or close family member	as above	For the purpose of confidential discussions enabling the party to receive support from his spouse, cohabitant or close family member.
A party	A health care professional or a person or body providing counselling services for children or families	as above	To enable the party or any child of the party to obtain health care or counselling.
A party or any person lawfully in receipt of information	The Children's Commissioner or the Children's Commissioner for Wales	as above	To refer an issue affecting the interests of children to the Children's Commissioner or the Children's Commissioner for Wales.
A party or a legal representative	A mediator	as above	For the purpose of mediation in relation to the proceedings.
A party, any person lawfully in receipt of information or a proper officer	A person or body conducting an approved research project	as above	For the purpose of an approved research project.

A party, a legal representative or a professional legal adviser	A person or body responsible for investigating or determining complaints in relation to legal representatives or professional legal advisers	as above	For the purposes of making a complaint or the investigation or determination of a complaint in relation to a legal representative or a professional legal adviser.
A legal representative or a professional legal adviser	A person or body assessing quality assurance systems	as above	To enable the legal representative or professional legal adviser to obtain a quality assurance assessment.
A legal representative or a professional legal adviser	An accreditation body	Any information relating to the proceedings providing that it does not, or is not likely to, identify any person involved in the proceedings	To enable the legal representative or professional legal adviser to obtain accreditation.
A party	An elected representative or peer	The text or summary of the whole or part of a judgment given in the proceedings	To enable the elected representative or peer to give advice, investigate any complaint or raise any question of policy or procedure.
A party	The General Medical Council	As above	For the purpose of making a complaint to the General Medical Council.
A party	A police officer	as above	For the purpose of a criminal investigation.
A party or any person lawfully in receipt of information	A member of the Crown Prosecution Service		To enable the Crown Prosecution Service to discharge its functions under any enactment.

11. **Disclosure of Information to the Media**

Re B (A Child) (Disclosure) 2004 2 FLR 142 per Munby J

“The workings of the Family Justice System and, very importantly, the views about the system of those caught up in it, are matters of public interest which can and should be discussed publicly” ... “We cannot afford to proceed on the blinkered assumption that there had been no miscarriages of justice in the Family Justice System. This is something that has to be addressed with honesty and candour if the Family Justice System is not to suffer further loss of public confidence. Open and public debate in the media is essential”

X-v-Dempster 1999 1 FLR 894 per Wilson J

As a matter of general principle there is nothing in the absence of an Order to the contrary to prevent the identification of a witness who has given evidence in a case, including a witness in proceedings considering the welfare of children. s.12 of the Administration of Justice Act 1960 does not prevent the identification of witnesses.

Re S (FC)(A Child) 2005 1 FLR 591 HL

Lord Steyn, relying on the opinion of the House of Lords in ***Campbell-v-MGM Limited, 2004 AC 457***, stated

“That in considering whether to disclose material, (1) neither Article 8 nor Article 10 has precedence over the other; (2) where values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary; (3) the justifications for interfering with or restraining each right must be taken into account; (4) the proportionality test must be applied to each.”

Re S (Identification: Restrictions on Publication) 2005 1 FLR 591

Since the coming into force of the Human Rights Act 1998, the preceding case law about the existence and scope of the inherent jurisdiction of the High Court to restrain publicity need not be considered (though the case law on the inherent jurisdiction might remain of some interest with regard to the ultimate balancing exercise to be carried out under the European Convention). The interest in open justice is important to both the parallel analysis and the ultimate balancing test but is not determinative of the outcome.

Re Peck-v-United Kingdom 2003 36 ECHR 41 at para 47

“Private life is a broad term not susceptible of exhaustive definition. ... the article also protects a right to identity and personal development and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”.

BBC-v-Rochdale MBC 2005 EWHC 286 2(Fam)

The balancing exercise does not exist in perpetuity and can be re-visited. Re-visiting the balance does not lead to “procedural unfairness”, increasing recognition of the need to permit greater openness in family cases.

12. Data Protection Act 1998

- (A) Access to Social Services’ Records. (see Section 5) The Guidance covers personal data held electronically, or “in relevant filing systems” or in “accessible public records”. It deals with information held about a particular individual by a Local Social Services Authority for the purposes of the Authority’s Social Services’ functions, irrespective of where the information was recorded.

- (B) Of note, s.5.4 subject to a limited number of exemptions made under Part 4 of the DPA, any living person who is the subject of personal information held and processed by Social Services Authority, has a right of access to those data. **The information comprising this data**

includes factual information, any expressions of opinion, and the intentions of the Authority in relation to the individual. Where access is refused, the data subject may appeal to the Courts or the Data Protection Commissioner.

(C) s.5.5. **NOTE** a person does not have the right to know what is recorded about someone else. So, for example, where an Authority has maintained files on an entire family and a request is recorded for access to one of these “family” files, one member is not entitled to see information about another member without that persons consent. However, there may be circumstances in which the Local Authority considers it reasonable to disclose such information (see s.5.7 and s.5.2.3.).

(D) s.5.8 **the right of access extends to children and young people under 18 who understand what it means to exercise that right.** Where a child or young person under 18 makes a request for access to their records, an Authority will need to decide whether or not he or she has sufficient understanding to do so.

(E) s.5.10 where an Authority considers that granting access to a parent is likely to result in serious harm to anyone ... the Authority will need to decide whether to refuse access. If an Authority refuses to disclose data to a parent, either on the grounds that the request is not in the child’s interest or on the grounds that it consider that to do so would result in serious harm. That parenting acting on the child’s behalf, may make application to the Court or to the Data Protection Commissioner.

(F) s.5.20 **NOTE** also that the information to be disclosed is all the data held about the data subject by the data controller. **It should not be altered in order to make it acceptable to the data subject.**

(G) s.5.25 an Authority should set itself a sensible timescale, within the 40 days allowed, in which to seek any third party consent. **The 40 day period does not commence until the Authority has received the written request and the appropriate fee and, if necessary, the further information required to satisfy itself as to the identity of the person making the request and to locate the information**

sought. At Rule 5.41 the Court has the power to order disclosure or to order correction, erasure or to confirm non-disclosure.

(H)s.6 deals with the confidentiality of the person on Social Services' Records and Appendix 1 sets out the Data Protection Principles.