
STATUTORY INSTRUMENTS

2008 No. 648

DEFENCE

**The Criminal Procedure and Investigations Act
1996 (Code of Practice) (Armed Forces) Order 2008**

Made - - - - *7th March 2008*

Laid before Parliament *11th March 2008*

Coming into force - - *1st April 2008*

The Secretary of State makes the following Order in exercise of the powers conferred by section 78(2)(b) of the Criminal Procedure and Investigations Act 1996^(a):

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2008 and shall come into force on 1st April 2008.

(2) In this Order—

- (a) “the Code” means the code of practice set out in the Schedule;
- (b) “material” means material of all kinds, including information and objects;
- (c) “service court” means a court-martial under any of the Service Discipline Acts or a Standing Civilian Court;
- (d) “Service Discipline Acts” means the Army Act 1955^(b), the Air Force Act 1955^(c) and the Naval Discipline Act 1957^(d);
- (e) “service investigation” means an investigation conducted by a service policeman with a view to it being ascertained—
 - (i) whether a person should be charged with a service offence, or
 - (ii) whether a person charged with a service offence is guilty of it;
- (f) “service offence” means an offence under a provision of any of the Service Discipline Acts; and
- (g) “service police force” means the Royal Navy Police, the Royal Military Police or the Royal Air Force Police.

(3) In this Order—

- (a) subject to sub-paragraphs (b) and (c), “service policeman” means a member of a service police force;
- (b) a Provost Marshal is to be taken to be a member of the appropriate service police force (if he is not a member of that force);
- (c) an officer in the Royal Air Force or the Royal Auxiliary Air Force who is appointed to exercise functions conferred by or under the Air Force Act 1955 on service policemen is to be taken to be a member of the Royal Air Force Police.

Code of practice

2. The Code shall have effect in relation to service investigations which begin on or after 1st April 2008.

Effect of the Code

3. A failure by a service policeman to comply with any provision of the Code shall not in itself render him liable to proceedings for a service offence.

4. In all proceedings before a service court the Code shall be admissible in evidence.

5. If it appears to a service court conducting proceedings that—

- (a) any provision of the Code, or
- (b) any failure by a service policeman,

is relevant to any question arising in the proceedings, the provision or failure shall be taken into account in deciding the question.

Common law rules as to service investigations

6.—(1) Where the Code applies in relation to a suspected or alleged service offence, the rules of common law which—

- (a) were effective immediately before 1st April 2008, and
- (b) relate to the matter mentioned in paragraph (2),

shall not apply in relation to the suspected or alleged service offence,

(2) The matter is the revealing of material by a service policeman charged with the duty of conducting a service investigation to a person involved in the prosecution service offences.

Signatory text

7th March 2008

Derek Twigg
Parliamentary Under Secretary of State
Ministry of Defence

CODE OF PRACTICE

Preamble

This code of practice (“the Code”) is made under article 2 of the Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces) Order 2008. It sets out the manner in which service policemen are to record, retain and reveal to the prosecutor material obtained in service investigations which may be relevant to the investigation, and related matters.

Introduction

1.—(1) The Code applies in respect of service investigations conducted by service policemen which begin on or after 1st April 2008.

(2) Nothing in the Code applies to material intercepted in obedience to a warrant issued under section 5 of the Regulation of Investigatory Powers Act 2000(e), or to any copy, as defined in section 15 of that Act, of that material.

Interpretation

2.—(1) In the Code—

- (a) “disclosure of material” to an accused includes disclosure of material to his legal representative;
- (b) “disclosure officer” means the service policeman responsible for—
 - (i) examining material retained by a service police force during the service investigation,
 - (ii) revealing material to the prosecutor during the service investigation and any proceedings in a service court resulting from it, and
 - (iii) certifying that he has done this;
- (c) “investigator” means any service policeman involved in the conduct of a service investigation. All investigators have a responsibility for carrying out the duties imposed on them under the Code, including in particular recording information and retaining records of information and other material.
- (d) “judicial officer” means—
 - (i) where the accused is to be tried by a court-martial under the Army Act 1955, a judicial officer appointed under section 75L of that Act;
 - (ii) where the accused is to be tried by a court-martial under the Air Force Act 1955, a judicial officer appointed under section 75L of that Act;
 - (iii) where the accused is to be tried by a court-martial under the Naval Discipline Act 1957, a judicial officer appointed under section 47M of that Act;
 - (iv) where the accused is to be tried by a Standing Civilian Court, a person appointed to sit as a magistrate under section 6(4) of the Armed Forces Act 1976(f),
 - (v) during the trial of an accused before a court-martial, the judge advocate appointed under section 84B(1) of the Army Act 1955, section 84B(1) of the Air Force Act 1955, or section 53B(1) of the Naval Discipline Act 1957 (as the case may be); and

(e) 2000 c.23

- (vi) during the trial of an accused before a Standing Civilian Court the person referred to in sub-paragraph (iv) before whom the trial is proceeding;
- (e) “legal representative” means in relation to an accused a person appointed by him as his legal representative, who—
 - (i) has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990(g);
 - (ii) is an advocate or solicitor in Scotland;
 - (iii) is a member of the bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland; or
 - (iv) has in any of the Channel Islands, the Isle of Man, a Commonwealth country or a British overseas territory, rights and duties similar to those of a barrister or solicitor in England and Wales and is subject to punishment or disability for breaching professional rules;
- (f) “material” means material of any kind, including information and objects; this includes not only material coming into the possession of the investigator, such as documents seized in the course of a search of premises, but also material generated by him such as records of interview;
- (g) “officer in charge of an investigation” is the service policeman responsible for directing a service investigation. He is also responsible for ensuring that proper procedures are in place for recording information and retaining records of information and other material in the investigation;
- (h) “prosecutor” means—
 - (i) subject to (ii) to (iv), a prosecuting authority under any of the Service Discipline Acts;
 - (ii) where the accused is charged with an offence under the Army Act 1955, the prosecuting authority under section 83A of that Act;
 - (iii) where the accused is charged with an offence under the Air Force Act 1955, the prosecuting authority under section 83A of that Act;
 - (iv) where the accused is charged with an offence under the Naval Discipline Act 1957, the prosecuting authority under section 52H of that Act;
- (i) “prosecution disclosure” refers to the duty of the prosecutor under articles 4 and 12 of the Application Order to disclose material which is in his possession or which he has inspected in pursuance of the Code and which might reasonably be considered capable of undermining the case against the accused or of assisting the case for the accused;
- (j) “service court” means a court-martial under any of the Service Discipline Acts or a Standing Civilian Court;
- (k) “service investigation” means an investigation conducted by a service policeman with a view to it being ascertained—
 - (i) whether a person should be charged with a service offence, or
 - (ii) whether a person charged with a service offence is guilty of it;
- (l) “service offence” means an offence under a provision of any of the Service Discipline Acts;
- (m) “service police force” means the Royal Navy Police, the Royal Military Police or the Royal Air Force Police; and
- (n) “the Application Order” means the Criminal Procedure and Investigation Act 1996 (Application to the Armed Forces) Order 2008(h).

(2) In the Code—

- (a) subject to paragraphs (b) and (c), “service policeman” means a member of a service police force;
- (b) a Provost Marshal is to be taken to be a member of the appropriate service police force (if he is not a member of that force);
- (c) an officer in the Royal Air Force or the Royal Auxiliary Air Force who is appointed to exercise functions conferred by or under the Air Force Act 1955 on service policemen is to be taken to be a member of the Royal Air Force Police.

(3) References in the Code to material which “may be relevant to a service investigation” are references to where, in relation to any material, it appears to an investigator or the officer in charge of the investigation or to the disclosure officer that it has some bearing on any service offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.

(4) In the Code material is “sensitive” if the disclosure officer believes that its disclosure would give rise to a real risk of serious prejudice to an important public interest.

General responsibilities

3.—(1) The functions of the investigator, the officer in charge of a service investigation and the disclosure officer are separate. Whether they are undertaken by one, two or more persons will depend on the complexity of the case and the administrative arrangements within each service police force. Where they are undertaken by more than one person, close consultation between them is essential to the effective performance of the duties imposed by the Code.

(2) In any service investigation, one or more deputy disclosure officers may be appointed to assist the disclosure officer, and a deputy disclosure officer may perform any function of a disclosure officer.

(3) The Provost Marshal of each of the service police forces is responsible for putting in place arrangements to ensure that in every service investigation the identity of the officer in charge of the investigation and the disclosure officer is recorded. The Provost Marshals shall ensure that disclosure officers and deputy disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively. An individual must not be appointed as disclosure officer, or continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged offence which is the subject of the service investigation. The advice of a more senior officer must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as disclosure officer. If thereafter the doubt remains, the advice of a prosecutor should be sought.

(4) The officer in charge of a service investigation may delegate tasks to another investigator, to other persons employed in support of the service police or to other persons participating in the investigation under arrangements for joint investigations, but he remains responsible for ensuring that these have been carried out and for accounting for any general policies followed in the investigation. In particular, it is an essential part of his duties to ensure that all material which may be relevant to a service investigation is retained, and either made available to the disclosure officer or (in exceptional circumstances) revealed directly to the prosecutor.

(5) In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide how many of the files on the computer it is reasonable to inquire into, and in what manner.

(6) If the officer in charge of a service investigation believes that other persons may be in possession of material that may be relevant to the investigation, and if this has not been obtained, he

should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain the material in case they receive a request for its disclosure. The disclosure officer should inform the prosecutor that they may have such material. However, the officer in charge of a service investigation is not required to make speculative enquiries of other persons; there must be some reason to believe that they may have relevant material. That reason may come from information provided to the police by the accused or from other inquiries made or from some other source.

(7) If, during a service investigation, the officer in charge of the investigation or disclosure officer for any reason no longer has responsibility for the functions falling to him, either his officer commanding or the officer in charge of service investigations for the service police force concerned must assign someone else to assume that responsibility. That person's identity must be recorded, as with those initially responsible for these functions in each investigation.

Recording of information

4.—(1) If material which may be relevant to the service investigation consists of information which is not recorded in any form, the officer in charge of the investigation must ensure that it is recorded in a durable or retrievable form (whether in writing, on video or audio tape, or on computer disk).

(2) Where it is not practicable to retain the initial record of information because it forms part of a larger record which is to be destroyed, its contents should be transferred as a true record to a durable and more easily-stored form before that happens.

(3) Negative information is often relevant to an investigation. If it may be relevant it must be recorded. An example might be a number of people present in a particular place at a particular time who state that they saw nothing unusual.

(4) Where information which may be relevant is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time. The requirement to record information promptly does not require an investigator to take a statement from a potential witness where it would not otherwise be taken.

Retention of material

5.—(1) The investigator must retain material obtained in a service investigation which may be relevant to the investigation. Material may at any time be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original, if—

- (a) the original is perishable,
- (b) the original was supplied to the investigator rather than generated by him and is to be returned to its owner, or
- (c) the retention of a copy rather than the original is reasonable in all the circumstances.

(2) Where material has been seized by a service policeman in exercise of any power of seizure conferred by or under Part 2 of the Armed Forces Act 2001(i), the duty to retain it under the Code is subject to the provisions on the retention of seized material in article 17 of the Armed Forces (Entry, Search and Seizure) Order 2003(j).

(3) If the officer in charge of a service investigation becomes aware as a result of developments in the case that material previously examined but not retained (because it was not thought to be relevant) may now be relevant to the investigation, he should, wherever practicable, take steps to obtain it or ensure that it is retained for further inspection or for production in court if required.

(i) 2001 c.19. Powers of seizure under the Armed Forces Act 2001 are conferred by the Armed Forces (Entry, Search and Seizure) Order 2003 (SI 2003/2273), amended by the Armed Forces (Entry, Search and Seizure) (Amendment) Order 2006 (SI 2006/3244).

(j) SI 2003/2273, amended by SI 2006/3244.

(4) The duty to retain material includes in particular the duty to retain material falling into the following categories, where it may be relevant to the investigation:

- (a) crime reports (including crime report forms, relevant parts of incident report books, including Daily Occurrence Books, or service policemen's notebooks);
- (b) arrest and custody records (including all written records relating to custody and produced by service policemen or other service personnel);
- (c) records which are derived from tapes of telephone messages containing descriptions of an alleged offence or offender;
- (d) final versions of witness statements (and draft versions where their content differs from the final version), including any exhibits mentioned (unless these have been returned to their owner on the understanding that they will be produced in court if required);
- (e) interview records (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);
- (f) communications between the police and experts such as forensic scientists, reports of work carried out by experts, and schedules of scientific material prepared by the expert for the investigator, for the purposes of proceedings before a service court;
- (g) records of the first description of a suspect by each potential witness who purports to identify or describe the suspect, whether or not the description differs from subsequent descriptions by that witness or other witnesses.

(5) The duty to retain material which may be relevant to the investigation also includes in particular the duty to retain material which may satisfy the test for prosecution disclosure in the Application Order, such as:

- (a) information provided by an accused person which indicates an explanation for the offence with which he has been charged;
- (b) any material casting doubt on the reliability of a confession;
- (c) any material casting doubt on the reliability of a witness.

(6) The duty to retain material falling into these categories does not extend to items which are purely ancillary to such material and possess no independent significance (for example, duplicate copies of records or reports).

(7) All material which may be relevant to the service investigation must be retained until a decision is taken whether to institute proceedings against a person for a service offence.

(8) If a service investigation results in proceedings being instituted, all material which may be relevant must be retained at least until the accused is acquitted or convicted or the prosecutor decides not to proceed with the case.

(9) Where the accused is convicted, all material which may be relevant must be retained at least until:

- (a) the convicted person is released from custody, or discharged from hospital, in cases where the court imposes a custodial sentence or a hospital order;
- (b) six months from the date of conviction, in all other cases.

If the service court imposes a custodial sentence or hospital order and the convicted person is released from custody or discharged from hospital earlier than six months from the date of conviction, all material which may be relevant must be retained at least until six months from the date of conviction.

(10) If an appeal against conviction is in progress when the release or discharge occurs, or at the end of the period of six months specified in paragraph 5(9), all material which may be relevant must be retained until the appeal is determined.

Preparation of material for prosecutor

6.—(1) The officer in charge of the investigation, the disclosure officer or an investigator may seek advice about whether any particular item of material may be relevant to the investigation from the prosecutor appropriate to the service police force of which the officer in charge of the investigation is a member.

(2) Material which may be relevant to an investigation, which has been retained in accordance with the Code, and which the disclosure officer believes will not form part of the prosecution case, must be listed in a schedule.

(3) Material which the disclosure officer does not believe is sensitive must be listed in a schedule of non-sensitive material. The schedule must include a statement that the disclosure officer does not believe the material is sensitive.

(4) Any material which is believed to be sensitive must be either listed in a schedule of sensitive material or, in exceptional circumstances, revealed to the prosecutor separately. If there is no sensitive material, the disclosure officer must record this fact in a schedule of sensitive material.

(5) Paragraphs 6(6) to 6(10) below apply to both sensitive and non-sensitive material. Paragraphs 6(11) to 6(13) apply to sensitive material only.

(6) The disclosure officer must ensure that a schedule is prepared if—

(a) a charge is preferred against a person—

(i) under section 83B of the Army Act 1955,

(ii) under section 83B of the Air Force Act 1955, or

(iii) under section 52I of the Naval Discipline Act 1957, and

(b) the charge is to be tried by a court-martial under the Service Discipline Acts or by a Standing Civilian Court.

(7) As soon as reasonably practicable after it becomes clear to the disclosure officer that a charge is to be tried by a court-martial following an election under any of the Service Discipline Acts for court-martial trial, he must ensure that a schedule is prepared.

(8) The disclosure officer should ensure that each item of material is listed separately in the schedule, and is numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed.

(9) In some enquiries it may not be practicable to list each item of material separately. For example, there may be many items of a similar or repetitive nature. These may be listed in a block and described by quantity and generic title.

(10) Even if some material is listed in a block, the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure under the Application Order are listed and described individually.

(11) Subject to sub-paragraph (12) below, the disclosure officer must list in the schedule of sensitive material any material the disclosure of which he believes would give rise to a real risk of serious prejudice to an important public interest, and the reason for that belief. The schedule must include a statement that the disclosure officer believes the material is sensitive. Depending on the circumstances, examples of such material may include the following:

(a) material relating to national security;

(b) material received from the intelligence and security agencies;

(c) material relating to intelligence from foreign sources which reveals sensitive intelligence gathering methods;

(d) material given in confidence;

- (e) material relating to the identity or activities of informants, undercover service police officers, undercover police officers or other persons supplying information to the service police who may be in danger if their identities are revealed;
- (f) material revealing the location of any premises or other place used for service police or police surveillance, or the identity of any person allowing a service policeman or a police officer to use them for surveillance;
- (g) material revealing, either directly or indirectly, techniques and methods relied upon by a service policeman or a police officer in the course of an investigation, for example covert surveillance techniques or other methods of detecting offences;
- (h) material whose disclosure might facilitate the commission of other offences or hinder the prevention and detection of offences ;
- (i) material upon the strength of which search warrants were obtained;
- (j) material containing details of persons taking part in identification parades;
- (k) material supplied to an investigator during a service investigation which has been generated by an official of a body concerned with the regulation or supervision of bodies corporate or of persons engaged in financial activities, or which has been generated by a person retained by such a body;
- (l) material supplied to an investigator during a service investigation which relates to a child or young person and which has been generated by a local authority social services department, an Area Child Protection Committee or another person or body contacted by an investigator during the investigation;
- (m) material relating to the private life of a witness.

(12) In exceptional circumstances, where an investigator considers that material is so sensitive that its revelation to the prosecutor by means of an entry in the schedule of sensitive material is inappropriate, the existence of the material must be revealed to the prosecutor separately. This will apply only where compromising the material would be likely to lead directly to the loss of life, or directly threaten national security.

(13) In such circumstances, the responsibility for informing the prosecutor lies with the investigator who knows the detail of the sensitive material. The investigator should act as soon as is reasonably practicable after the service police report on the case is sent to the prosecutor. The investigator must also ensure that the prosecutor is able to inspect the material so that he can assess whether it is disclosable and, if so, whether it needs to be brought before a judicial officer for a ruling on disclosure.

Revelation of material to prosecutor

7.—(1) The disclosure officer must give the schedules prepared in accordance with paragraph 6 to the prosecutor. Wherever practicable , and subject to paragraph 6(7), this should be at the same time as he gives him the service police report on the case.

(2) The disclosure officer should draw the attention of the prosecutor to any material an investigator has retained (including material not listed in a schedule and to which paragraph 6(12) applies) which may satisfy the test for prosecution disclosure in the Application Order, and should explain why he has come to that view.

(3) At the same time as complying with the duties in paragraphs 7(1) and 7(2), the disclosure officer must give the prosecutor a copy of any material which falls into any of the following categories (unless such material has already been given to the prosecutor as part of the service police report on the case:

- (a) information provided by an accused which indicates an explanation for the service offence with which he has been charged;

- (b) any material casting doubt on the reliability of a confession;
- (c) any material casting doubt on the reliability of a prosecution witness;
- (d) any other material which the investigator believes may satisfy the test for prosecution disclosure in the Application Order.

(4) If the prosecutor asks to inspect material which has not already been copied to him, the disclosure officer must allow him to inspect it. If the prosecutor asks for a copy of material which has not already been copied to him, the disclosure officer must give him a copy. However, this does not apply where the disclosure officer believes, having consulted the officer in charge of the investigation, that the material is too sensitive to be copied and can only be inspected.

(5) If material consists of information which is recorded other than in writing, whether it should be given to the prosecutor in its original form as a whole, or by way of relevant extracts recorded in the same form, or in the form of a transcript, is a matter for agreement between the disclosure officer and the prosecutor.

Subsequent action by disclosure officer

8.—(1) At the time a schedule of non-sensitive material is prepared, the disclosure officer may not know exactly what material will form the case against the accused, and the prosecutor may not have given advice about the likely relevance of particular items of material. Once these matters have been determined, the disclosure officer must give the prosecutor, where necessary, an amended schedule listing any additional material—

- (a) which may be relevant to the investigation,
- (b) which does not form part of the case against the accused,
- (c) which is not already listed on the schedule, and
- (d) which he believes is not sensitive,

unless he is informed in writing by the prosecutor that the prosecutor intends to disclose the material to the defence.

(2) Article 12 of the Application Order imposes a continuing duty on the prosecutor, for the duration of proceedings against the accused for a service offence, to disclose material which meets the tests for disclosure (subject to public interest considerations). To enable him to do this, any new material coming to light should be treated in the same way as the earlier material.

(3) In particular, after a defence statement has been given, the disclosure officer must look again at the material which has been retained and must draw the attention of the prosecutor to any material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused; and he must reveal it to him in accordance with paragraphs 7(4) and 7(5).

Certification by disclosure officer

9. The disclosure officer must certify to the prosecutor that to the best of his knowledge and belief, all material which has been retained and made available to him has been revealed to the prosecutor in accordance with the code. He must sign and date the certificate. It will be necessary to certify when any schedule prepared in accordance with paragraph 6 and accompanying material is submitted to the prosecutor, when material which has been retained in accordance with paragraph 8(3) is reconsidered after the accused has given a defence statement, but also whenever in accordance with paragraph 8(2) a schedule is otherwise given or material is otherwise revealed to the prosecutor.

Disclosure of material to accused

10.—(1) If material has not already been copied to the prosecutor, and he requests its disclosure to the accused on the ground that it satisfies the test for prosecution disclosure under the Application Order, the disclosure officer must disclose it to the accused.

(2) If material has been copied to the prosecutor and it is to be disclosed, whether it is disclosed by the prosecutor or the disclosure officer is a matter for agreement between the two of them.

(3) The disclosure officer must disclose material to the accused either by giving him a copy or by allowing him to inspect it. If the accused asks for a copy of any material which he has been allowed to inspect, the disclosure officer must give it to him, unless in the opinion of the disclosure officer that is either not practicable (for example because the material consists of an object which cannot be copied, or because the volume of material is so great), or not desirable (for example because the material is a statement by a child witness in relation to a sexual offence).

(4) If material which the accused has been allowed to inspect consists of information which is recorded other than in writing, whether it should be given to the accused in its original form or in the form of a transcript is a matter for the discretion of the disclosure officer. If the material is transcribed, the disclosure officer must ensure that the transcript is certified to the accused as a true record of the material which has been transcribed.

(5) If a judicial officer concludes that an item of sensitive material satisfies the test for prosecution disclosure under the Application Order and that the interests of the defence outweigh the public interest in withholding disclosure, it will be necessary to disclose the material if the case is to proceed. This does not mean that sensitive documents must always be disclosed in their original form: for example, the judicial officer may agree that sensitive details still requiring protection should be blocked out, or that documents may be summarised, or that the prosecutor may make an admission about the substance of the material under section 10 of the Criminal Justice Act 1967(k).

EXPLANATORY NOTE

(This note is not part of the Order)

Part 2 of Criminal Procedure and Investigations Act 1996 (“the 1996 Act”) makes provision relating to the preparation by the Secretary of State of a code of practice for specified purposes relating to the conduct of criminal investigations by civilian police officers.

This Order make provision equivalent, subject to modifications, to provisions of Part 2 of the 1996 Act and the code made under it. The main modifications are to adjust the provisions in and under Part 2 of the 1996 Act to take account of the structure and operation of service courts and of the service police.