

PD57AD

Disclosure Considerations

October 2022



PD57AD - General Information

Relevant Documents are documents that may be relevant to any of the issues in the proceedings [PD57AD, 3.1(1)]

Disclosure involves identifying and making available documents that are relevant to the issues in the proceedings [PD57AD, 2.1]

PD57AD applies to electronically stored information (ESI) and hard-copy documents

Adverse documents contain information that contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of the opposing side on an issue in dispute, whether or not that issue is one of the agreed issues for disclosure [PD57AD, 2.7]. Where there is a known adverse documents but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any order the court may make [PD57AD, 3.4]

What is reasonable and proportionate?

Extended Disclosure is granted where it is reasonable and proportionate to do so [PD57AD, 6.4].

In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors:

(1) The nature and complexity of the issues in the proceedings

(2) The importance of the case, including any non-monetary relief sought

(3) The likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence

(4) The number of documents involved

(5) The financial position of each party

(6) The ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates)

(7) The need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

Disclosure Duties

Parties and their legal representatives are under an obligation to the court to adhere to certain disclosure duties – per PD57AD, 3.3, these disclosure duties continue until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.

Party's/Parties' Disclosure Duties—PD57AD, 3.1

A person who knows that it is or may become a party to proceedings that have been commenced or who knows that it may become a party to proceedings that may be commenced is under the following duties (the "**Disclosure Duties**") to the court:

(1) To take reasonable steps to **preserve documents** in its control that may be relevant to any issue in the proceedings

(2) No later than the time(s) set out in paragraphs 9.1 to 9.3 [of PD57AD], to disclose known **adverse documents**, unless they are **privileged**. This duty exists regardless of whether or not any order for disclosure is made

(3) To **comply with any order for disclosure** made by the court

(4) To undertake any **search for documents** in a responsible and conscientious manner to fulfil the stated purpose of the search

(5) To **act honestly** in relation to the process of **giving disclosure and reviewing documents** disclosed by the other party

(6) To use reasonable efforts to avoid providing documents to another party that have no **relevance** to the *Issues for Disclosure* in the proceedings.

Legal Representatives' Disclosure Duties—PD57AD, 3.2

Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court:

(1) To take reasonable steps to within preserve documents their control that may be relevant to any issues in the proceedings

(2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties

(3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including thorough the use of technology

(4) To act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and privilege from disclosing a document

(5) To undertake a review to satisfy themselves that any claim by the party to is properly made and the reason for the claim to privilege is sufficiently explained

Preservation Duties

Applies to hard copy documents + ESI.

Specific preservation obligations, PD57AD 3.1 and 3.2

PD57AD, 4.1: Making copies in suitable case of sources of documents that might otherwise be deleted or destroyed, and sorting them.

PD57AD, 4.2: Parties + Legal Representatives to suspend relevant document deletion or destruction processes for the duration of the proceedings.

PD57AD, 4.3: Written notifications to relevant employees + former employees + third parties where there are reasonable ground for believing that the employee/former employee/third party may be in possession of disclosable documents which are not in the client's possession.

Parties must

- (1) Identify the documents or classes of documents to be preserved; and
- (2) Notify the recipient that they should not delete or destroy those documents and should take reasonable steps to preserve them

Legal Representatives must

- (1) Notify their client of the need to preserve documents and of the client's disclosure obligations; and
- (2) Obtain written confirmation from their client or an appropriate representative of their client that their client has taken the steps outlined per **PD57AD 4.1–4.3**

Disclosure Considerations - Timeline

Claim Commences	
Parties agree in writing to dispense with or proceed with Basic Disclosure. The Court will determine whether to order Extended Disclosure.	
Statement of Case is served	
Initial Disclosure provided.	
Within 28 days from the final date of service of the Statement of Case	
Each party should state, in writing, whether or not it is likely to request search-based Extended-Disclosure to include one or more of Models C, D and/or E on one or more Issues for Disclosure in the case. At this point it should not particularise the Model(s) or the issue(s) in the case.	
Within 42 days of the final statement of case	
Where search-based Extended Disclosure will be requested (i.e., Models C, D and/or E), the claimant must prepare and serve on the other parties a draft List of Issues for Disclosure, as set out in Section 1A of the DRD.	
As soon as practicable and no later than 21 days from service of the draft List of Issues for Disclosure and proposals on Extended Disclosure Models	
Using Section 1A DRD (and, if applicable, 1B) a party served shall indicate whether it agrees with the proposals. If the party served with the proposals does not agree, or wishes to propose alternative or additional Issues for Disclosure, other Models and/or of the Model C proposals, it should set out its alternative or additional proposals in Sections 1A and 1B of the DRD.	
In advance of the first CMC	
Parties must discuss and seek to agree the draft List of Issues for Disclosure, the Models identified for each Issue for Disclosure, and the wording of any Model C proposals. Parties should consider whether any draft Issue for Disclosure can be removed.	
As soon as reasonably practicable, no later than 14 days before first CMC	
Parties to agree the List of Issues for Disclosure, proposals on Model(s) for Extended Disclosure and the wording of any Model C requests.	Parties to prepare and exchange drafts of Section 2 of the DRD (including costs estimates of different proposals and where possible estimates of likely amount of documents involved). NOTE: Section 2 of the DRD should be completed only if any party is seeking an order for search-based Extended Disclosure (i.e., Models C, D, and/or E).
Filing no later than 5 days before CMC	
Claimant to file a single joint DRD	Related correspondence and earlier drafts should not ordinarily be filed
As soon as reasonably practicable after filing of finalised DRD but not less than 2 days before the CMC	
Parties must each file and serve a signed Certificate of Compliance substantially in the form set out in Appendix 3 of PD57AD, no less than two days before the CMC.	A Certificate of Compliance is not required for cases where a DRD has been dispensed with under paragraph 10.5 PD57AD (for Models A and B), i.e. a Certificate of Compliance is only required if a party is seeking an order for search-based Extended Disclosure under Models C, D and/or E.
CMC	
The Court will make an order for disclosure, noting that the Court may order different disclosure models for different issues and the use of technology. The court may also provide disclosure guidance in accordance with paragraph 11 PD57AD.	<p>PD57AD, 6.8: The court will determine whether to order Extended Disclosure at the first case management conference or, if directed by the court, at another hearing convened for that purpose or without a hearing.</p> <p>PD57AD, 6.9: The court may determine any point at issue between the parties about disclosure including the application or effect of any provision in this Practice Direction [PD57AD] or an order made by the court and about the scope of searches, the manner in which searches are to be carried out and the use of technology. The parties may, at any time, apply to the court to seek the determination of an issue concerning disclosure by issuing an application notice.</p>

Initial Disclosure

- The **key documents on which a party has relied** (expressly or otherwise) in support of the claims or defences advanced in its + **documents referred to in the Statement of Case**; and
- Key documents necessary to enable the other parties **understand the claim or defence they have to meet**.

Providing Initial Disclosure

- Provided electronically.
- Initial Disclosure List of Documents is filed – Documents not filed.
- Parties are under no obligation to search for documents beyond any search already undertaken for the purposes of the proceedings, including in advance of the commencement of the proceedings.
- There are circumstances where Initial Disclosure does not need to be provided. This includes where the documents:
 - are known to be or have been in the other party's possession
 - have already been provided to the other party:
 - could be by disclosure before proceedings start
 - through pre-action correspondence
 - or otherwise in the period following intimation of the proceedings (and including when giving Initial Disclosure with a statement of case that is being amended)
- Need not disclose adverse documents by way of Initial Disclosure.
- No requirement to translate the documents .

Extended Disclosure:

- [PD57AD, 8.2] There is no presumption that a party is entitled to search-based Extended Disclosure (Extended Disclosure Models C, D and/or E).

- No Extended Disclosure Model will apply without the approval of the court.
- [PD57AD, 6.6]. The objective of Disclosure Models is to **limit the searches required** and **the volume of documents to be disclosed**. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that **increases cost through undue complexity**.
- The court may order that Extended Disclosure be given using different Disclosure Models for different Issues for Disclosure.
- Models C, D, E (search-based Extended Disclosure) require a document to be populated. The document is called the List of Issues for Disclosure (LOIFD).
- **Claimant** prepares and serves a *draft* LOIFD using section 1A of the DRD within 42 days of the final Statement of Case. LOIFD should include a fair and balanced summary of key areas of dispute identified in the Statement of Case.

LOIFD – Fair and balanced summary of key issues in dispute

- Should be as short and concise as possible.
- Does not bind the parties at trial.
- Does not need to include all the issues in the case (it may be developed/refined as the case precedes) .
- May be revised /supplemented any time prior to or following the CMC.
- Does not extend to every issue disputed in the Statement of Case.
- Parties should consider what issues are common ground and only include the key issues in dispute.
- At the same time as serving a draft LOIFD the claimant is to identify for each issue for Disclosure which Model of Extended Disclosure it proposes for each party.
- Determine whether Extended Disclosure is required and the Models.
- Identify documents and categories of documents that are likely to exist and should be disclosed.

- Practical and proportionate.
- Guide and define searches for search-based Disclosure.
- Assist with process of reviewing documents produced by searches.
- Avoid the productions of documents that are not relevant to the proceedings.

DRD (Disclosure Review Document)

- The purpose of Section 1 of the DRD is to provide the court with a concise summary of the parties' positions in relation to Extended Disclosure by identifying the Issues for Disclosure and the Model or Models (as set out in PD57AD at section 8) which are proposed in respect of such issues. It is a single document that should be jointly completed by all parties.
- The DRD is intended to: (A) facilitate the exchange of information and provide a framework for discussions around the initial scoping of a disclosure exercise; (B) help the parties to agree a sensible and cost effective approach to disclosure; and (C) provide the court with the information it needs to make appropriate case management decisions.
- The DRD only needs to be completed if one or both parties are seeking an order for Extended Disclosure.
- Not every section of the DRD will need to be filled out if the case is likely to require only limited disclosure and/or if the identification and retrieval of documents is likely to be straightforward. Section 1B only needs to be completed if a party is seeking request-based Extended Disclosure.
- In the DRD, the parties identify and agree the scope of disclosure. Can be modified – shortened or lengthened. Can remove/add questions in Section 2 DRD.
- The Disclosure Models are: (A) No order for Disclosure, i.e. key documents only; (B) Limited Disclosure (C) Request-led Search-based Disclosure (D) Search-based Disclosure excluding Narrative Documents (E) Search-based Disclosure including Narrative Documents.

Extended Disclosure

Five models of disclosure that can be ordered by the court in addition to, or as an alternative to, Initial Disclosure, namely:

Extended Disclosure	Disclosure Requirements	In Further Detail
Models A– E		
Model A	Disclosure confined to known adverse documents only	
Model B	Limited Disclosure + known adverse documents	Key documents on which the parties seek to rely.
Search-Based Extended Disclosure		
Model C	Disclosure of particular documents or narrow classes of documents + known adverse documents.	If the parties cannot agree that Model C disclosure should be given, the requesting party must raise it at the CMC. The request must be reasonable and proportionate.
Model D	Narrow search-based disclosure, with or without Narrative Documents + adverse documents	Documents that are likely to support/adversely affect a claim/defence in relation to one or more of the Issues for Disclosure. Reasonable and proportionate searches are required. The court will limit scope based on the information provided in the DRD. The court may order whether Narrative Documents should be included/excluded, otherwise, parties take a reasonable and proportionate view to including/excluding Narrative Documents based on the volume and cost of any subsequent review by the receiving party.
Model E	Wide search-based disclosure + adverse documents + documents that lead to a train of inquiry which identifies other documents.	Ordered in exceptional cases. Includes Narrative Documents. Documents which are likely to support/adversely affect a claim/defence in relation to one of more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure. Reasonable and proportionate searches to be undertaken in relation to the Issues for Disclosure; the scope of the search will be determined by the court using the information in the DRD. Model E is likely to be broader than Model D.



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