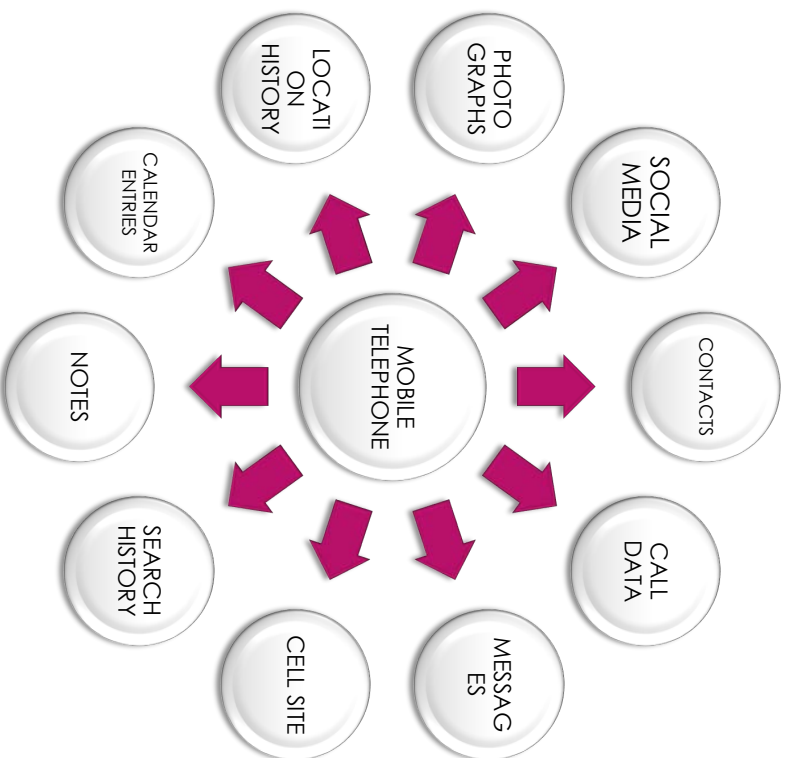


Service and Disclosure of Telephone Evidence in Criminal Proceedings

Presented by Jerry Hayes & Marie de Redman

Friday 19th June 2020

What evidence might be found on a Mobile telephone?



- ▶ Increasingly rich source of personal data;
- ▶ Some data the owner of the mobile telephone won't even realise is being stored;
- ▶ Received data as well as sent; personal information relating not only to the owner but also to others who have been in contact with them.
- ▶ Tension between progression of "reasonable lines of enquiry" and Right to Privacy
- ▶ Suspects and Complainants / Witnesses

DISCLOSURE: The elephant in the room

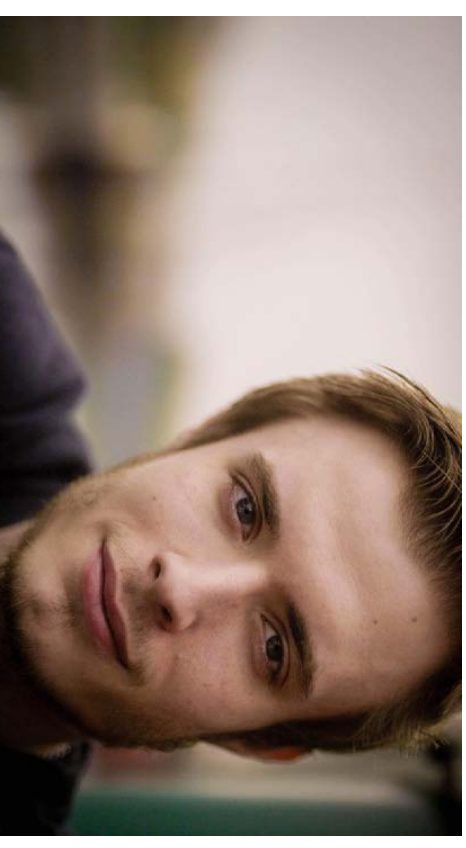


"...for an investigation to proceed and be fair for both complainant and suspect, all reasonable lines of enquiry must be pursued. This is not new and the policy has not changed - mobile devices will not be needed in every case - but when they are, there is explicit guidance that only material relevant to a particular offence may be pursued, to minimise unnecessary intrusion. This applies to all offences and is not restricted to allegations of sexual offending."

CPS, "Handing over mobile phone data in rape prosecutions" – 29 April 2019

<https://www.cps.gov.uk/cps/news/handling-over-mobile-phone-data-rape-prosecutions>

R v. LIAM ALLAN [2017]



POLICE & CPS APPROACH TO DISCLOSURE

- ▶ “THE THREE R’S”: Retrieve, Retain, Report
- ▶ CPIA 1996
- ▶ ATTORNEY GENERAL’S GUIDANCE : A thinking exercise, not a box ticking exercise.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf
- ▶ CPS GUIDANCE : <https://www.cps.gov.uk/legal-guidance/disclosure-guidelines-communications-evidence>
- ▶ CONSENT FORM FOR COMPLAINANTS: <https://www.npcc.police.uk/documents/NPCC%20FINAL%20CONSENT%20V1.2.pdf>
 - ▶ If Complainant’s refusal to give their consent, this refusal must be disclosed to the defence; and **may** result in the case being brought to an end by the Crown.
- ▶ NATIONAL DISCLOSURE IMPROVEMENT PLAN: <https://www.cps.gov.uk/sites/default/files/documents/publications/National-Disclosure-Improvement-Plan-May-2018.pdf>

DISCLOSURE:
What are we entitled to ask for?



R v E [2018] EWCA 2426 (Crim)

Relevant procedure

DISCLOSURE

- ▶ Early engagement with Police and/or CPS in writing. Can be as early as charge.
- ▶ Stage 1 - Primary disclosure. If telephone evidence is not disclosed, it should at least appear on the MG6C Schedule of unused material.
- ▶ Stage 3 - Secondary disclosure: defence statement will need to have outlined what is sought.
- ▶ Stage 4 - Section 8 application.
- ▶ Disclosure management documents.
- ▶ If all else fails, abuse of process / application to exclude under s.78 PACE 1984

SERVICE

- ▶ Early engagement with Police and/or CPS in writing. Can be as early as charge.
- ▶ Stage 1 - Service of Prosecution case.
- ▶ NAE
- ▶ Application for direction from Court under CPR 3.5 for service of the evidence.
- ▶ NOTE: These arguments are often conflated with disclosure arguments. They are a separate issue; be sure to make that clear.
- ▶ If all else fails, abuse of process / application to exclude under s.78 PACE 1984

SERVICE OF TELEPHONE EVIDENCE

COMMON ISSUES

- ▶ POLICE OFFICER SCHEDULES
- ▶ EXTRACTS
- ▶ EXPERT REPORTS

WHY THIS IS IMPORTANT

- ▶ NOT JUST ABOUT LGFS.
- ▶ DUTY TO CLIENT
- ▶ OVERRIDING OBJECTIVE /
CASE MANAGEMENT
- ▶ ARTICLE 6 RIGHT TO A FAIR
TRIAL

SERVICE OF EVIDENCE: KEY CASES

- ▶ R V BOARDMAN [2015] 1 CR. APP. R. 33
- ▶ LORD CHANCELLOR V EDWARD HAYES LLP [2017] 1 Costs L.R. 147
- ▶ LORD CHANCELLOR V S.V.S. SOLICITORS [2017] EWHC 1045 (QB)

R v. BOARDMAN

[2015] 1 CR. APP. R. 33

- ▶ Judge in the Crown Court excluded telephone evidence under s.78 PACE 1984 rather than adjourning trial for 8 months because the Crown had failed to serve telephone evidence until shortly before the day of trial which then necessitated a defence application to adjourn for the instruction of their own expert.
- ▶ COA upheld the decision.
- ▶ But also found it necessary to “sound notes of warning”: it would be perfectly open to the court to reject a complaint of prejudice to the defendant if the defence fail to bring faults of this nature to the attention of the court in a timely manner when there is still sufficient time for the court to do something about it.
- ▶ Criminal Practice Directions 2015 Amendment v9 [2019] EWCA Crim 1603:
 - ▶ 24C.21 & 24C.22: Failure to serve evidence in time.
 - ▶ However: 24C.13: “Where a party has been at fault, did the other party, if aware of it, draw attention to that fault promptly and explicitly? CrimPR 1.2(1)(c) imposes a collective responsibility on participants promptly to draw attention to a significant failure to take a required procedural step.”

L.C. V. EDWARD HAYES LLP

[2017] 1 Costs L.R. 147

- ▶ An appeal by the LC to the High Court (QBD) against the decision of Costs Judge Rowley. High Court upheld the decision.
- ▶ Concerned whether if the Crown has served extracts from a mobile telephone download, the remainder of the download is evidence for the purpose of PPE.
- ▶ Para 12, 20 & 24.
- ▶ In short: the download enables defence to see the extracted data in context; as well as check the veracity of the extracted data relied upon by the Crown.

L.C. V. S.V.S. SOLICITORS

[2017] EWHC 1045 (QB)

- ▶ The “Filing Cabinet” case.
- ▶ Para 44: The role of the defence lawyer is not simply to compare the schedule with the raw data and confirm it is accurate; also need to check that data has not been omitted to ensure a fair presentation of the evidence.
- ▶ Para 46: ...if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet. Sub-division of this kind may be proper in relation to the data recovered from, or relevant to, a mobile phone: if for example one particular platform was used by a suspect solely to communicate with his young children, on matters of no conceivable relevance to the criminal case, it may be proper to exclude that part of the data from the served exhibit and to treat it as unused material. **But it seems to me that such situations will not arise very often, because even in the example I have given, fairness may demand that the whole of the data be served, for example in order to enable the defence to see what other use the defendant was making of his phone around the times of calls which are important to the prosecution case.** The key point, as it seems to me, is that if the prosecution do wish to rely on a sub-set of the data obtained from a particular source, it will often be necessary for all of the data from that source to be exhibited so that the parts on which the prosecution rely can fairly be seen in their proper context.

WHAT CHANGES MIGHT WE SEE IN THE FUTURE?

- ▶ Attorney General's Review: <https://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system>
 - ▶ Introduction of a "rebuttable presumption" in favour of disclosure of certain documents frequently disclosed.
 - ▶ Greater use of DMD's
 - ▶ Use of predictive coding & artificial intelligence
- ▶ ICO Report: https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf
 - ▶ Statutory code of practice governing when, why and how police and other law enforcement agencies use mobile phone data;
 - ▶ Greater awareness at police level of Data Protection rules etc.
 - ▶ More emphasis on different types of "download"; blanket requests for full downloads may be inconsistent with DPA 2018.

Data protection

- ▶ The following cases may be of assistance if faced with an argument touching on the Crown's obligations under the Data Protection Act 2018:
 - ▶ Bank Mellat v HM Treasury (No. 2) [2013] UKSC 39;
 - ▶ R (Bridges) v Chief Constable of South Wales [2019] EWHC 2341 (Admin)

Contact Details

- ▶ Any Questions?
- ▶ THANK YOU

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