HMCPSI
HM Crown Prosecution Service Inspectorate

Serious Fraud Office - Disclosure

An inspection of the handling and management of disclosure in the Serious Fraud Office

April 2024

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Who we are

HM Crown Prosecution Service Inspectorate inspects prosecution services, providing evidence to make the prosecution process better and more accountable.

We have a statutory duty to inspect the work of the Crown Prosecution Service and Serious Fraud Office. By special arrangement, we also share our expertise with other prosecution services in the UK and overseas.

We are independent of the organisations we inspect, and our methods of gathering evidence and reporting are open and transparent. We do not judge or enforce; we inform prosecution services' strategies and activities by presenting evidence of good practice and issues to address. Independent inspections like these help to maintain trust in the prosecution process.

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1. Summary

Headlines

1.1. The handling of disclosure is core to the fairness and effectiveness of the criminal justice system. The Serious Fraud Office (SFO) roughly estimates that managing and handling disclosure alone amounts to 25% of its operational budget and takes up 40% of its staff capacity. This inspection, which assesses if the SFO has the necessary skills and infrastructure to effectively discharge its disclosure obligations, was included in our inspection plans and was due to take place no earlier than late 2023, early 2024. However, the decision to offer no evidence in the G4S case (GRM02) after 10 years, with disclosure featuring as a core reason, we decided to bring forward the inspection.

1.2. It must be recognised that the majority of SFO cases are successful. It is not surprising that the cases that garner the most media interest and criticism relate to case failures. The aim of inspection is to be fair, objective, evidence led and transparent.

1.3. Part of our inspection included SFO case examination. This was not straightforward; cases run for many years, have many million pages of documents, and include both the investigation and prosecution stages. However, we must ensure that we develop an evidence base that is fair and objective. To be able to assess if the SFO has the necessary skills and infrastructure to discharge its disclosure obligations we decided to examine two cases, one of which was successful (Balli Group Companies – BGC01) and the other that was unsuccessful (G4S – GRM02). This approach would allow us to identify any obvious differences and themes between the cases.

1.4. Much of the evidence we have from our file examination relates to historic case activity. For cases that run for six or 10 years any case examination is going to have an extensive element of older activity and how cases were managed historically. Over the past three years there have been two reviews involving case failures, which in part were because of disclosure failings. The Calvert-Smith review[1] of the Unaoil case commissioned by the Attorney General and the Altman review[2] of SERCO commissioned by the SFO both published in 2022, made recommendations. Our own HMCPSI case progression inspection[3] published in May 2023 also examined SFO processes and practices and

[1] Independent Review into the Serious Fraud Office's handling of the Unaoil Case – R v Akle & Anor - GOV.UK (www.gov.uk)
[2] Review of R v Woods & Marshall by Brian Altman QC - Serious Fraud Office - Serious Fraud Office (sfo.gov.uk)
[3] Follow-up inspection of the Serious Fraud Office – case progression (justiceinspectorates.gov.uk)

assessed progress by the SFO to implement the recommendations made by Calvert-Smith and Altman.

1.5. There were some obvious differences between the two cases. There was staff continuity in BGC01. There was one case controller (CC) throughout for the six years of the case and consistency of disclosure counsel who assisted the disclosure officers (DOs) in the case. Conversely in GRM02 there were numerous CCs and difficulties in retaining DOs. Admittedly GRM02 ran for 10 years and some of the changes were because of circumstances outside of the control of the SFO, but the lack of continuity and resulting lack of handover record keeping had a significant effect on the management and control of the disclosure process.

1.6. BGC01 defined and set out how it would handle disclosure, engaged with the defence early and used case management documents to ensure that the approach for disclosure was clear to the defence and the court. The processes to support the disclosure of legally privileged material were clearly defined and communicated. The case exploited the advantages of block listing for the scheduling of much of the unused material in the case. In BGC01 there was a proactive approach to the management and control of the disclosure process.

1.7. GRM02 posed considerable challenges in the disclosure process. Factors that contributed to the failure, were an overall lack of disclosure planning (especially at the early stages of the prosecution), and a lack of proper disclosure record keeping. Defence engagement was also more difficult in GRM02, and while the SFO was proactive in trying to engage the defence, there was a lack of defence engagement except when required under the Criminal Procedure and Investigations Act 1996 (CPIA) requirements.

1.8. GRM02 also had issues which related to the operation of the Document Review System (DRS) then in use in SFO, Autonomy. Decisions of what material to schedule and disclose were not always fully recorded and given the lack of continuity of staff in key roles and of disclosure planning this caused delay. There were also problems caused by the way in which the case team decided to schedule material from their own case drive.

1.9. GRM02 disclosure problems were compounded by a misunderstanding of how searches within the DRS worked. This system is no longer used by SFO. Our findings can confirm that the management of the digital material seized and systems to record and monitor extensive volumes of digital and hard copy materials acquired during investigations are sound. The replacement of an outdated, unsupported e-discovery system with a modern, fully supported industry standard platform, Axcelerate, mitigates the risks that existed in GRM02.

1.10. Having said that, there remains a risk that some staff are not confident in using the Axcelerate system. There is a clear need for the SFO to ensure that staff understand what is expected and how they will be supported to develop the necessary skills to use the system properly.

1.11. Our view was that the assurance processes in place during GRM02 were not effective. Information provided for assurance mainly comes from the case team and as such was not easy to challenge. The information provided by case teams contains some degree of 'optimism-bias'. This is because of those producing the information for senior management being heavily invested in their case. This is not a surprise given they would often have worked on the case for many years. Also, we found that there was a perception that management wanted to hear positive news.

1.12. Over the past two years the SFO has changed and strengthened its internal assurance processes considerably. The introduction of systems of challenge that allow for cases to be independently scrutinised by both Associate General Counsel and Deputy Heads of Division, is a positive step. This change, which is starting to become better embedded, has the dual benefit of creating an extra layer of case assurance focused on disclosure and also provides case teams with targeted and valuable support in conducting disclosure reviews. We suggest the adoption of another layer of assurance by recommending an independent disclosure review should take place on every case post-charge, to further strengthen the revised assurance processes.

1.13. Both cases had trials scheduled for 2022, they were prioritised and as such were well resourced. Even in cases which were prioritised it is clear that securing and maintaining experienced and consistent case teams is a major challenge for the SFO. Our findings highlight that the SFO struggles to compete in the market to retain its own staff, engage external staff and counsel, and attract those with the necessary experience to maintain and progress its cases. The SFO has, over the past three years, lobbied for change and worked hard within its pay remit to address the issue. Cases have been made to Ministers and Treasury. However, it is clear that others across government and within the private sector can offer more attractive salaries and benefits – this is a risk to long running cases and a risk to the handling of disclosure. We recommend that the government urgently addresses how the SFO is funded to be able to compete in the open market.

1.14. The cases we examined between them had many millions of documents. Reviewing every piece of digital material is impractical so search terms have to be deployed. The search terms in GRM02 were subject to much criticism and in the end were one of the reasons that the case failed. The effectiveness of search terms depends on the choice and precision of the keywords and search

terms used. There is common misconception that search terms are infallible. Most users experience of searching documents is in MS Word. The way that e-discovery systems run searches is not that simple. Designing search strategies that return exactly (and only) the intended results is challenging with large and complex datasets. To undertake key word searches and expect results like those seen in MS Word document searches would take years of processing time. No e-discovery system is designed to run searches in that way.

1.15. The new Axcelerate system has developed much more functionality, which as well as being able to conduct searches using search terms, also has additional capabilities that includes versatile search methods. This change enhances the technology that the SFO can deploy. However, it must be recognised by all parties that searching millions of documents is not an exact science and that the systems used are not flawless and will never return all results. The current misconception is damaging to the current debate and places burdens on the SFO that are not reasonable.

1.16. The SFO do not operate in a vacuum. The CPIA sets out clear responsibilities for the prosecution and defence relating to disclosure. In the cases we examined there was a divergence in the way that the defence had engaged during the case.

1.17. The system is an adversarial one and responsibility for disclosure rests with the prosecution. It must identify material that may undermine the prosecution case or assist the defence. This material must be disclosed. The defence must represent their client's best interest. There is a raft of guidance and legislative frameworks in place, however apart from the legislative requirements, defence engagement cannot be mandated. Our findings confirm that the current legislative framework does not mandate the defence to engage early, and in GRM02 this contributed to delay.

1.18. In the cases we examined the SFO had engaged with the defence, and in BGC01 this was successful in ensuring the disclosure process was understood and unchallenged. SFO made attempts to engage with the defence early in GRM02, but the defence engaged only in accordance with their statutory obligations. It is our view that the SFO is clear about the benefits of engagement and makes attempts in line with the guidance and protocols to engage. The current approach to defence engagement within the legislative framework does not provide a strong basis for engagement; the requirement on the defence is based on voluntary engagement and given that the defence represent the best interests of their clients this may give rise to a conflict to engage early.

1.19. The government launched its Fraud Strategy in May 2023, this includes an independent review into the challenges of investigating and prosecuting

fraud. We have shared some of our early high-level findings with the review. It may be that the independent review considers if change is needed to the disclosure system which could reduce the burden upon the criminal justice system and produce options that increase the effectiveness of engagement.

1.20. There were a number of structural weaknesses identified during the inspection. Many of these the SFO has already identified and started to action.

1.21. The lack of attractiveness of the DO role to many is something that impacted the cases we examined. Many staff do not view the role as being one that leads to promotion. Recent reviews have also criticised DOs and this too has had an impact. SFO management have engaged with staff in the DO and deputy disclosure officer role and have started to work up plans to consider if a 'profession' for DOs could be a solution. There are also early plans to consider the development route for those taking on the roles. We recommend that the SFO should find ways to incentivise staff who take on the role of DO.

1.22. Our findings are that the processes to quarantine and deal with Legal Professional Privilege (LPP) material were sound. There was evidence that there were delays due to a lack of resource in the team dealing with the handling and management of the LPP material. As a result of the need to quarantine material away from case teams the management of LPP material is undertaken by the eDiscovery team. Where LPP is managed may have made sense in terms of organisational structures in the past, but our view is that the SFO should consider if this model is fit for purpose given some of the current resourcing constraints in the eDiscovery team and also whether this model is still fit for purpose.

1.23. As the change to the Operational Handbook, and revised assurance processes becomes embedded, and staff accept and adopt the changes we are confident that the management of disclosure in SFO casework will improve. There still remains a degree of cultural challenge, but evidence from our inspection is that staff are starting to engage and understand the need for assurance. Revised guidance has also been well received, although some staff we spoke to remained unconvinced that they needed to engage.

1.24. The new document review platform is a significant improvement. There is more functionality to support the management and handling of disclosure, and the supported platform mitigates risks that were a cause of failure in GRM02. Some staff remain to be convinced and there needs to be more communication across the SFO to clarify expectations of responsibility for using the system.

1.25. The revised handbook has improved the internal guidance. It is more prescriptive and there are templates and clear expectations outlined for case

handover. There was a lack of compliance seen in the cases we examined, but examination of more recent assurance documentation and our interviews with staff convince us that the revised internal guidance will improve the handling of disclosure.

1.26. Overall, our assessment is that the SFO has made a number of changes to how it manages and assures its casework which should provide a degree of assurance that the SFO has the skills and infrastructure to discharge its disclosure obligations. Our inspection included evidence from some of the very recent changes made and, given the recent change we have not been able to fully test whether the degree of change has been fully embedded. We also are aware that compliance and acceptance of revised practice is not wholly accepted by some. Even with these caveats our view is that the SFO is better placed to discharge its disclosure obligations and improvements have been made since the handling of the G4S case.

1.27. We make six recommendations that the SFO must implement.

Recommendations

We make the following recommendations.

Recommendations
By September 2024, the Serious Fraud Office to update the Operational Handbook with guidance in relation to the handling of a Deferred Prosecution Agreement (DPA) and its related material on prosecutions of individuals in which a DPA has been entered into with the corporate entity. [Paragraph 6.6]
By October 2024, the Serious Fraud Office to revisit the guidance provided in the Disclosure Management Document template to ensure that it guides the case teams to fully explain the disclosure process employed and safeguard their position should their disclosure handling be challenged. [Paragraph 6.40]
By September 2024, the Serious Fraud Office should introduce a disclosure review process, equivalent to a peer review, to be conducted on every case post-charge by an individual independent of the case team. [Paragraph 7.28]
By September 2024, the Serious Fraud Office should consider ways in which staff may be incentivised to take on the roles of disclosure officer and deputy disclosure officer to increase the pool of able and experienced candidates and improve staff retention in those roles. [Paragraph 7.40]
By October 2024, the government, through its economic and finance ministry must develop a long-term funding strategy to support the Serious Fraud Office to discharge its disclosure obligation to allow it to compete in the open market to secure enough experience to deal with its cases. [Paragraph 9.33]
By October 2024, the Serious Fraud Office should review the current model for the management of Legal Professional Privilege (LPP) material. Consideration should be given to whether, due to the risks associated with the delivery of the core business by the eDiscovery team, a different system for the management and control of LPP material should be implemented. The Serious Fraud Office should engage with others who have similar requirements to consider how it might manage and control LPP material. [Paragraph 9.40]

Issues to address

Issues to address
The Serious Fraud Office should consider if, where appropriate, a specific disclosure learning event should be held on concluded cases. [Paragraph 7.31]
The Serious Fraud Office should seek to engage with the judiciary at a strategic level to address some of the SFO staff perception regarding judicial management with their casework. [Paragraph 8.18]
The Serious Fraud Office to address the staff perception of the limited capabilities of Axcelerate and their ability to navigate it, considering what the best model maybe to ensure that case teams have the right balance of expertise and capability. [Paragraph 9.45]

2. Context and methodology

The Serious Fraud Office

2.1. The Serious Fraud Office (SFO) is a specialist investigating and prosecuting body tackling the top level of serious or complex fraud, bribery and corruption. When compared to other much larger criminal justice organisations, such as the Crown Prosecution Service, the SFO has a relatively small caseload, but the cases it deals with are large and complex. Cases can take years to investigate and reach a conclusion.

2.2. The SFO's caseload is usually over 100 cases with around 35 live criminal cases at any one time. Its budgeted headcount is around 600 staff. The number of cases, however, does not reflect their scale and complexity. SFO cases can involve hundreds of victims, many millions of documents, and potential criminal activity in, and evidence from, across the globe. As a result, cases take longer to investigate and prosecute than other types of criminal cases. Furthermore, the obligations as regards the retention, revelation and disclosure of unused material are very significant and often complex.

2.3. The SFO has the power to investigate and to prosecute cases, and its teams are multidisciplinary. A case team is led by a case controller (CC), who may be a senior lawyer or investigator. The CC oversees lawyers, investigators, forensic accountants, and other specialists, as well as instructing counsel from the outset. This structure is known as the Roskill model, named after a 1985 review, chaired by Lord Roskill.

2.4. The SFO has three casework divisions, each handling fraud, bribery and corruption. It also has an operational division dealing with the proceeds of crime and international assistance. Other supporting units that assist casework divisions include the Digital Forensic Unit (DFU), which processes all digital material the organisation receives from searches, seizures or voluntary surrender. Once the DFU processes the material, the eDiscovery team assist case teams with navigating it and manage Legal Professional Privilege (LPP) materials. There are also teams dealing with non-digital material and reprographics, known as the Evidence Handling Management Office.

2.5. Once a case is accepted, it enters the investigation and prosecution stage where investigators and lawyers work together from the outset, under the Roskill model. The organisation applies the Code for Crown Prosecutors: if the investigation results in enough evidence to support a realistic prospect of conviction, and if a prosecution is considered to be in the public interest, charges will normally be brought. If the decision is to prosecute, the case can take significantly longer to reach a conclusion than other criminal trials because of the complexity of the evidence.

2.6. The SFO must comply with the current disclosure regime and complete the various stages of disclosure. This is set out in law, supported by guidance, and provides for a proportionate system in which the defence has access to material which might undermine the prosecution case or strengthen its own case. The law requires that relevant unused material is described on a schedule. Invariably, due to the volume of digital material gathered during SFO investigations, this requires extensive time and resources.

2.7. The SFO has a higher national profile than other prosecuting authorities in the UK due to the nature of its cases, which involve multi-million-pound allegations of fraud and bribery and corruption. The SFO has faced, and continues to face, substantial challenges, some stemming from the complexity of its casework, and others from the frequent interest shown by Parliament, the national media and other commentators. The two reviews published in 2022, Calvert-Smith and Altman, and the recent judgement in the ENRC case, also highlight how high-profile issues in SFO cases can garner great interest and significant commentary. Disclosure is often at the heart of this commentary.

The inspection (Context)

2.8. There has been significant media coverage of the SFO in the past few years, with some of it being negative because of adverse case results and some high-profile case failures. The SFO's failure to comply with its disclosure obligations in the cases against SERCO and Unaoil resulted in two reviews. The SFO itself commissioned the SERCO review, and the Attorney General commissioned an independent review of Unaoil and committed to updating Parliament on findings and progress. The reviews were published in July 2022. Since the reviews, a further case (a linked case to SERCO) has been discontinued by the SFO on public interest grounds. Although the decision to stop the case was a result of an ongoing review against the Code (whether there was still a public interest in prosecuting the case) it was clear that there were several issues in the decision to stop the case linked to how disclosure had been handled in the case.

2.9. In the 2023/24 business plan HMCPSI set out plans to inspect disclosure in the SFO. The proposal was that in the third quarter of the 2023/24 year that we would commence the inspection. However, given the fact that a case linked to SERCO (which had been subject to the findings of the Altman review) had failed, the Attorney General requested that the planned SFO disclosure inspection be brought forward.

Other aspects of work to examine disclosure

2.10. At the same time as our inspection the SFO has commissioned and commenced an internal root cause analysis on casework practice. The internal review has been supported by a firm of consultants with expertise in business analysis and transformation. During the development and the course of the inspection we worked with SFO to ensure that any overlap was managed and appropriate.

2.11. The government launched its Fraud Strategy in May 2023. Fraud Strategy include plans to conduct an independent review into the challenges of investigating and prosecuting fraud, recognising that there has not been an independent review of fraud since 1986. This independent review will include the proposal to modernise the disclosure regime for cases with large volumes of digital evidence. The review is being undertaken by Jonathan Fisher KC.

2.12. It is suggested that the first phase of the independent review will consider how the disclosure regime can be streamlined for cases with large volumes of digital material, reducing the significant burden on law enforcement and prosecutors. This will include looking at international comparators on disclosure for any lessons that can be learnt. The first phase of the independent review has commenced. As a result of the announcement of the Fraud Strategy review the scope of the inspection did not consider the matters relating to the current disclosure regime in any detail. We have also ensured that where appropriate we engage with the independent review to ensure that we mitigate any burden and share relevant (general) findings.

Methodology and cases examined

2.13. In line with all inspections, at the outset of the process HMCPSI develops an initial scope and defines the inspection question and the inspection aim(s). We do this to ensure transparency, but also to allow us to engage with those we inspect, to provide interested parties the opportunity to comment. We publish an initial scope on our website seeking views and comments. After developing the initial scope, we finalised the inspection question as follows:

Does the SFO have the necessary skills and infrastructure to effectively discharge its disclosure obligations?

2.14. The aims of the inspection were as follows to assess:

- The effectiveness of the SFO disclosure handling of casework.
- Whether the SFO has the appropriate tools and culture to handle disclosure appropriately.

- Whether the SFO follow the law and guidance, adapting them to the unique circumstances of SFO practice, producing and maintaining effective internal guidance.
- Whether SFO disclosure assurance processes are robust.
- Whether there is effective engagement with key stakeholders (e.g. the defence and judiciary) to aid the disclosure process.
- Whether disclosure lessons are learnt from previous casework experience.
- Whether the findings from the Altman review have been adopted into current practice.

2.15. To gather evidence to support the inspection we examined key stages in two cases. The key stages were from case acceptance to conclusion of the case. This examination included amongst other things, disclosure decision making in terms of; setting a strategy; what material was obtained or not obtained; handling of case material; engagement with defence and court; and any disclosure learning taken from the case. The inspection also assessed the application of the law and guidance relating to disclosure by the SFO on their cases.

2.16. To assess the whole disclosure process in the case it was necessary to select cases that had concluded. Given the sheer size and complexity of SFO cases and the length of time needed for the inspection team to examine the case in detail it was decided to limit case examination to two cases: one which ended successfully and one which ended unsuccessfully. The most recent finalised cases were selected to give the most up to date picture of the whole disclosure process. The two cases were:

- the case involving Balli Group Companies - BGC01, which ended successfully.
- the case involving G4S - GRM02[4], which ended unsuccessfully.

2.17. While factually very different, both cases were fraud cases. We did not examine a case involving bribery and corruption which is the other main category of SFO investigations and prosecution.

2.18. Although the scope of this inspection did not extend to the consideration of Deferred Prosecution Agreements (DPAs) the cases chosen allowed

[4] Consideration of GRM02 had also been specifically requested by the Attorney General as part of the remit of the inspection.

inspectors to compare two cases one of which involved a DPA prior to the prosecution of individuals (GRM02) and one that did not (BGC01).

2.19. The inspection team was made up of seven inspectors. As well as a lead inspector, two separate sub-teams were appointed to undertake the case file analysis. Each sub-team was made up of two legal inspectors assisted by an external barrister who examined either Balli Group Companies or G4S. The sub-teams spent 10 weeks examining the cases. After examining the case, each team conducted a series of interviews with members of the SFO case team who had worked the cases (those that were still employed by the SFO). We also conducted interviews with independent counsel who had been instructed on the cases (where they were willing to engage with the inspection). A separate team of inspectors also examined SFO technology, systems, and processes for the handling of disclosure material, resources, and training.

2.20. This inspection was led by senior legal inspector, Jeetinder Sarmotta. He was assisted by senior legal inspector, Colin Darroch and three legal inspectors, Gavin Hernandez, Jonathan Ellis, and Joseph O'Connor. Two external barristers assisted legal inspectors with case examination. They were James Benson from Blackfriars Chambers and John Burke from Legis Chambers. Two business inspectors, Anthony Rogers and James Hart also joined the team with lead business support Shauna Compton.

2.21. We also assessed the handling of LPP on the cases we examined. We assessed SFO procedures for dealing with LPP material and examined the guidance produced by the SFO to assist practitioners. We also considered the current structures for the handling of LPP.

2.22. As well as case examination and case specific interviews, inspectors also carried out a programme of more general interviews. These included interviews with numerous SFO staff and managers. We also interviewed and spoke with external stakeholders. We requested and examined SFO documentation in relation to the governance and assurance of casework, and other aspects of business that were pertinent to the scope of the inspection.

2.23. The recommendations in the Altman and Calvert-Smith reviews relating specifically to matters of disclosure were also considered as part of the inspection.

2.24. Inspectors attended SFO offices to conduct the onsite phase of the inspection to speak with staff between August and October 2023.

2.25. The Intelligence Unit, DPAs, Proceeds of Crime and Appeals Division were excluded from scope of the inspection.

BACKGROUND

3. Disclosure and document heavy cases: The law and guidance

Disclosure – the law, guidance and obligations – a short background

3.1. This chapter sets out the Serious Fraud Office's (SFO) main disclosure obligations and provides an overview of the rules in which organisations dealing with document heavy cases must operate. It is not an exhaustive guide to the disclosure regime or the obligations of the SFO in handling disclosure.

3.2. Material gathered during the course of an investigation falls into two categories, evidence and unused material. If the prosecuting body chooses to rely upon the material in support of its case, it is served as evidence. Any other relevant material is unused material. Material is relevant if it appears to have some bearing on any offence under investigation, any person being investigated or on the surrounding circumstances unless it is incapable of having any impact on the case. The prosecution must consider unused material for disclosure purposes. If the material may undermine the prosecution's case or assist the defence case, then it must be disclosed to the defence. This is termed as disclosure in criminal cases.

3.3. There are several sources of authority that govern the disclosure regime applicable to complex fraud and other document heavy cases. References to this authority appear throughout the chapters of this report. The purpose of this chapter is to summarise the authority.

3.4. The applicable authority falls into two broad categories. The first is the legislation itself, which is the Criminal Procedure and Investigations Act 1996 (CPIA). The second is in various forms, on how the legislation should be approached and applied. These forms include case law, guidance from the Attorney General, and judicial protocol(s).

3.5. There is also a residual source of disclosure authority in the common law rules which apply to the stages of the criminal justice process not governed by the CPIA. This includes the time before a case is sent to the Crown Court for trial, and in relation to sentence or appeal.

The Criminal Procedure and Investigations Act 1996

3.6. The CPIA is the overriding authority on disclosure in all criminal cases, including those prosecuted by the SFO. All criminal investigations commencing on or after the 4 April 2005, are governed by the Act and the amendments to it introduced by the Criminal Justice Act 2003.

The stages of disclosure

3.7. The CPIA requires disclosure to take place in three stages.

3.8. The first stage is known as initial disclosure. Initial disclosure is generally served at the point the prosecution serve the evidence upon which it relies in support of its case. The main features of initial disclosure are defined under section 3(1) of the CPIA and require that the prosecution must (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a). Prosecution material is material which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused, or material which he has inspected in connection with the case.

3.9. The second stage is defence disclosure. This takes the form of the defence serving upon the court and prosecution a defence statement. In the Crown Court this is mandatory. Under section 6A CPIA a defence statement is a written statement:

- setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
- indicating the matters of fact on which he takes issue with the prosecution,
- setting out, in the case of each such matter, why he takes issue with the prosecution,
- setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence,
- indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

3.10. The third stage is referred to as continuing disclosure. Section 7A of the CPIA requires the prosecution to continue to disclose to the defence any further

material that meets the test under section 3(1)(a). It requires the prosecution to consider the defence statement once received for the purposes of the exercise and make any further disclosure in response to the issues raised, or to provide written confirmation that no further material exists.

3.11. Timetabling of the above stages is a function of the pre-trial preparation hearing. Time limits are expected to be observed in routine Crown Court cases, but there is power to vary. Defence disclosure is governed by the 2011 regulations to the CPIA which require a defence statement within 28 days of initial disclosure. Variation by extension is common in complex cases due to the volume of material.

Scheduling under the Code of Practice

3.12. There is a Code of Practice issued under section 23 of the CPIA. The latest version of this Code of Practice came into force from 31 December 2020. The Code of Practice sets out how investigators should record, retain and reveal material relevant to an investigation. This incorporates scheduling of material. Under paragraph 6.2 of the Code of Practice, any relevant unused material must be described on the unused material schedule (irrelevant material does not require scheduling). There are two schedules, one containing non-sensitive material and the other sensitive material. The schedule of non-sensitive material is disclosed to the defence. Disclosure of sensitive material is restricted (the sensitive material schedule is not provided to the defence).

3.13. Paragraph 6.11 provides that *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*.

3.14. Paragraph 6.12 provides for block listing where it is not practicable to list each item of material separately, such as where many items are of a similar or repetitive nature. The Code of Practice provides that *these may be listed in a block and described by quantity and generic title*. This is subject to the caveat in paragraph 6.13 that *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 are listed and described individually*.

Defence disclosure applications

3.15. Under section 8 of the CPIA the defence may apply for the disclosure of material from the prosecution. Such an application can only be made after the service of defence statements. The application is determined by a judge. In document heavy fraud or bribery and corruption cases such applications may relate to search terms. Search terms are a method of identifying relevant

documents from a large pool of material; we discuss them in more detail later in the report.

The Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners

Introduction

3.16. The Attorney General's Guidelines on Disclosure (AGG) apply in conjunction with the statutory regime and other guidance. The AGG has been updated over time. There has been changes in the guidance in 2013, 2020, and 2022[5].

3.17. The 2013 AGG contains an annex devoted to the disclosure of digitally stored material. Such material in complex fraud and bribery and corruption cases is often vast. The Guidelines recognise that it would not be practicable to review all such material and set out how the CPIA may nevertheless be complied with.

3.18. The 2013 Guidelines introduce themselves by declaring that they *do not contain the detail of the disclosure regime; they outline the high level principles which should be followed when the disclosure regime is applied.* They are *intended to operate alongside the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases.*

3.19. Nevertheless, the Guidelines contain a significant amount of practical instruction on how to achieve the aims of the CPIA. Much of this practical instruction is particularly relevant to the more challenging disclosure exercises which present in complex fraud and bribery and corruption cases. There is, for example, guidance on how a disclosure team should be structured and staffed, and guidance on record keeping, scheduling, defence engagement, and search terms.

Principles of Attorney General's Guidelines

3.20. The guidance explains what the CPIA sets out to achieve, namely to ensure that criminal investigations are conducted in a fair, objective and thorough manner, and requires prosecutors to disclose to the defence material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

3.21. Some of the most relevant principles to this inspection are as follows:

[5] The Attorney General's Guidelines on Disclosure – 2024 has been published and effective from 29 May 2024

- Properly applied, the CPIA should ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources.

- Disclosure must not be an open-ended trawl of unused material.

- A critical element to fair and proper disclosure is that the defence play their role to ensure that the prosecution are directed to material which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused.

- Disclosure should be conducted in a thinking manner and never be reduced to a box-ticking exercise; at all stages of the process, there should be consideration of why the CPIA disclosure regime requires a particular course of action and what should be done to achieve that aim.

Practical guidance

3.22. A significant part of the Guidelines takes the form of practical guidance on how to achieve the aims of the CPIA. Some of this is particularly relevant to heavy fraud and bribery and corruption cases. The steps relate largely to the conduct of the prosecution, but there are clear obligations upon the defence.

3.23. In terms of this inspection, the guidance advocates the following practices:

- Early disclosure planning. The Guidelines highlight the need for disclosure planning from the very earliest stage, and that it is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation, which must continue throughout all aspects of the case preparation.

- The use of search terms to locate disclosable material. The annex, which contains guidance on how to comply with disclosure in cases with large amounts of digital material, recognises that the review of such material must be reasonable, and specifically that *it is not the duty of the prosecution to comb through all the material in its possession.* It sanctions the use of search *by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers.* It requires that the defence are appraised of the search terms used and invited to suggest their own.

- The use of a Disclosure Management Document (DMD). The purpose of the document is to explain the approach to disclosure, track the progress of disclosure, assist the court in case management and enable the defence to

engage from an early stage with the prosecution's proposed approach to disclosure. The Guidelines recommend that the document should include an outline of the prosecution's general approach to disclosure, which may include detail relating to digital material. In such a case there should be explanation of the method and extent of examination. An explanation of the prosecution approach to other areas of disclosure, such as reasonable lines of enquiry pursued, is also required. The DMD is described as a *living document* that should be amended in light of developments in the case and updated as the case progresses.

- The early engagement of the defence. The Guidelines emphasise the importance of early defence engagement in the disclosure process. They require that *defence engagement must be early and meaningful for the CPIA regime to function as intended.* The annex on digital material requires the defence to *participate in defining the scope of the reasonable searches that may be made of digitally stored material by the investigator to identify material that might reasonably be expected to undermine the prosecution case or assist the defence.*

- Good record keeping. The Guidelines point out that prosecutors only have knowledge of matters which are revealed to them by investigators and disclosure officers, and the schedules are the written means by which that revelation takes place. Whatever the approach taken by investigators or disclosure officers to examining the material gathered or generated in the course of an investigation, it is crucial that disclosure officers record their reasons for a particular approach in writing. Record keeping is a key theme in many of the practical recommendations. These include that a full log of disclosure decisions (with reasons) must be kept on the file and made available as appropriate to the prosecution team. The emphasis on record keeping is particularly resonant in SFO cases as they can span years and involve many investigators and lawyers leaving and joining the case. The Guidelines recognise the challenges that changes in key personnel present to the disclosure exercise, providing that where the conduct of a prosecution is assigned to more than one prosecutor, steps must be taken to ensure that all involved in the case properly record their decisions. Subsequent prosecutors must be able to see and understand previous disclosure decisions before carrying out their continuous review function.

- Adequate scheduling. The Guidelines require prosecutors to scrutinise the schedules of unused material prepared by the disclosure officer(s). There is an instruction that *if no schedules have been provided, or there are apparent omissions from the schedules, or documents or other items are inadequately described or are unclear, the prosecutor must at once take action to obtain*

properly completed schedules. Likewise, schedules should be returned for amendment if irrelevant items are included. There is a reminder to comply with the CPIA Code of Practice and ensure that each item of unused material is listed separately on the unused material schedule and numbered consecutively, that the description of each item makes clear the nature of the item and contains sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed, and that if not *practicable to list each item of material separately, the rules in relation to block listing should be followed.*

- The involvement of the prosecution counsel team. This highlights the need for prosecution advocates to place themselves in a fully informed position to enable them to make decisions on disclosure….consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been fully instructed regarding disclosure matters…..keep decisions regarding disclosure under review until the conclusion of the trial and specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected.

3.24. The following more general guidance includes:

- Guidance on how the prosecution team should be structured in cases with multiple disclosure officers. This recommends a lead disclosure officer who is the focus for enquiries and whose responsibility it is to ensure that the investigator's disclosure obligations are complied with.

- Guidance on staff qualifications. This requires that investigators and disclosure officers are deployed on cases which are commensurate with their training, skills and experience.

- Guidance on disclosure coordination. This recommends that where appropriate, regular case conferences and other meetings should be held to ensure prosecutors are apprised of all relevant developments in investigations. Full records should be kept of such meetings.

The 2013 judicial protocol on the disclosure of unused material in criminal cases

3.25. This is a comparatively short document (17 pages). This protocol is intended to guide the judiciary on disclosure. The aims are set out as follows:

- The protocol aims to set out the principles to be applied to, and the importance of, disclosure; the expectations of the court and its role in

disclosure, in particular in relation to case management; and the consequences if there is a failure by the prosecution or defence to comply with their obligations.

3.26. The protocol applies to disclosure generally but certain guidance is directed specifically at long, complex cases such as the two cases examined in this inspection.

3.27. The first sub heading after the introduction is headed *The importance of disclosure in ensuring fair trials*. This section highlights the *golden rule* that full disclosure of material that is relevant and undermines the prosecution case or assists the defence case is required. At the same time, it sets out that the *overarching principle is that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure.* This is to ensure that the trial process is not *overburdened*.

3.28. Having set out the importance of disclosure, the protocol deals with how appropriate disclosure should be achieved. Practical steps such as the use of a DMD by the prosecution, and the selection of a trial judge at the earliest opportunity are recommended.

3.29. Defence engagement receives a significant amount of attention in the protocol. The opening section speaks of the need to *trigger comprehensive defence engagement.* Elsewhere, the protocol obliges the court to require the defence *to engage and assist in the early identification of the real issues in the case and, particularly in the larger and more complex cases, to contribute to the search terms to be used for, and the parameters of, the review of any electronically held material (which can be very considerable)*. The guidance is designed to support the AGG in this regard. There is specific note that the AGG is of *particular relevance and assistance in this context.*

3.30. The need for early defence engagement appears more than once. The protocol requires that any criticisms of the prosecution approach to disclosure should be timely and reasoned. It also requires that judges should be prepared to give early guidance as to the prosecution's approach to disclosure, thereby ensuring early engagement by the defence.

3.31. Much of the principle espoused in the protocol is the same as that which appears in the Attorney General's Guidelines. The emphasis on defence engagement is an example.

The 2005 protocol for the control and management of heavy fraud and other complex criminal cases

3.32. This protocol was issued by the Lord Chief Justice of England and Wales on 22 March 2005. It was last updated on 17 December 2020.

3.33. The aim of the protocol is to reduce the length of fraud and other complex criminal trials. As such, it is not principally concerned with disclosure. Disclosure is only considered in the context of how it affects length of trial, and in particular how disclosure issues have the *potential to disrupt the entire trial process.*

3.34. The guidance as a whole is short by comparison with other authority (a few pages). The section dealing with disclosure is about a page in length. In this section, the protocol emphasises the importance of the prosecution only disclosing that which is relevant and may undermine its case or assist the defence. It suggests that the court should timetable disclosure and should fix a date by which all defence applications for specific disclosure must be made. It suggests the judge should ask the defence to indicate what documents they are interested in and from what source from the outset but does not grapple with digital material and search terms in this context.

3.35. The protocol contains a section on case management. This contains guidance in relation to the setting of a trial date. Two options are provided. The first option is to set the trial date at the first opportunity (the first hearing in the Crown Court). This requires that everyone must work to that date, all orders and pre-trial steps should be timetabled to fit in with that date, and that there is an expectation that the trial will proceed on that date. The second option is that the trial date should not be fixed until the issues have been explored at a full case management hearing and after the advocates on both sides have done some serious work on the case. The choice between the two options has an indirect, but clear impact on disclosure. If the trial date is set at the first hearing, then there is likely to be less time for the prosecution to comply with its disclosure obligations.

Caselaw

3.36. Like most areas of law, the law on disclosure has been subjected to the scrutiny of the Court of Appeal on a number of occasions. Some of these appellate decisions have related to decisions as to how the law on disclosure should be applied in document heavy fraud cases.

3.37. The case of *R. v R and others (Practice Note)* [2016] 1 W.L.R. 1872, CA involved a large-scale fraud with several terabytes of digital data to consider for disclosure. To deal with the legal issues that arose on appeal, the Court of

Appeal reviewed the CPIA, its Code of Practice, the Criminal Procedure Rules, the AGG on disclosure (2013 version) and the judicial protocol on the disclosure of unused material. It then set out the following principles:

- The prosecution are in the driving seat at the stage of initial disclosure; in order to drive disclosure, it is essential that they take a grip on the case and its disclosure requirements from the outset; to fulfil their duty, the prosecution must adopt a considered and appropriately resourced approach to initial disclosure; this must include the overall disclosure strategy, selection of software tools, identifying and isolating material that is subject to legal professional privilege, and proposing search terms to be applied; they must explain what they are doing and what they will not be doing at this stage, ideally in the form of a "Disclosure Management Document" (the intention of which should be to clarify their approach (*e.g.* which search terms have been used and why) and to identify and narrow the issues in dispute (compliance with the test for initial disclosure calls for analysis of the likely issues; absent such analysis, it would not be possible to form a view, even at this stage, of which materials would, and which would not, undermine the case for the prosecution and/ or assist the case for the accused)); by explaining what they are - and are not - doing, early engagement of the defence should be prompted;

- The prosecution must then encourage dialogue with, and prompt engagement of, the defence; the duty of the defence is to engage with the prosecution and thus assist the court in fulfilling its duty of furthering the overriding objective;

- The law is prescriptive of the result, not the method; the prosecution are not required to do the impossible, nor should the duty of giving initial disclosure be rendered incapable of fulfilment through the physical impossibility of reading (and scheduling) each and every item of material seized; common sense must be applied; the prosecution are entitled to use appropriate sampling and search terms, and their record-keeping and scheduling obligations are modified accordingly; the right course at the stage of initial disclosure is to formulate a disclosure strategy, to canvass that strategy with the court and the defence, and to utilise technology to make an appropriate search or conduct an appropriate sampling exercise of the material seized; that searches and sampling may subsequently need to be repeated (to comply with the continuing duty of disclosure under section 7A of the 1996 Act or to respond to reasoned requests from the defence under section 8 is irrelevant; the need for repeat searches and sampling does not invalidate the approach to initial disclosure involving such techniques; the problem of vast quantities of electronic documents having, in a sense, been created by

technology, in turn, appropriate use must be made of technology to address and solve that problem; the prosecution's duties of record keeping and scheduling must likewise reflect the reality that not every one of perhaps many millions of e-mails is to be individually referenced; the scheduling duty imposed on the disclosure officer separately to list each item of unused material (as contained in the Code of Practice) is modified in favour of "block listing" (albeit that it remains the prosecution's duty to list and describe separately "the search terms used and any items of material which might satisfy the disclosure test": 2013 Guidelines, Annex A, para. A50;

- The process of disclosure must be subject to robust case management by the judge; the judge's case management duties in relation to disclosure are not confined to the secondary or subsequent stages of disclosure; however, when exercising case management powers at this stage, it is critical that the court should have regard to the structure of the scheme under the 1996 Act, and the judge should take care not to subvert that scheme by confusing or conflating the various stages; the judge must keep well in mind that he is concerned with initial disclosure, with the corollary that the true issues in the case may yet be unclear;

- Flexibility is critical; disclosure is not to be conducted as a "box-ticking" exercise; in a document-heavy case, there can be no objection to the judge, after discussion with the parties, devising a tailored or bespoke approach to disclosure, but, whatever the approach adopted, there is one overriding proviso: the scheme of the 1996 Act must be kept firmly in mind and must not be subverted;

3.38. The law, guidance and case law as mentioned above were used to assess the handling of disclosure in our case examination of the two cases in our file sample.

4. Disclosure and Serious Fraud Office technology

Safeguarding evidence and management of case material

4.1. The previous chapter highlights the legal requirements on The Serious Fraud Office (SFO) when handling disclosure in its cases. This chapter details the tools that the SFO use to handle and manage the material which falls subject to the disclosure rules. Material seized during investigations into fraud and bribery and corruption involve vast amounts of digital material. This material needs to be navigated to locate evidence and properly deal with unused material. In this chapter we detail our examination of the technology used by the SFO for this purpose.

Digital Forensics Unit and Evidence Handling Management Office

4.2. The effective management and analysis of electronic data is crucial in how the SFO investigate criminal cases and manages the disclosure process.

4.3. The Digital Forensic Unit (DFU) is responsible for processing digital material acquired during the course of investigations. Collaborating closely with case teams, the DFU assists with identifying and triaging electronic devices which could be relevant to the case.

4.4. Historical concerns regarding potential bottlenecks in the DFU prompted pro-active changes, encouraging closer collaboration between case teams and the DFU on planned searches. This collaborative approach means that seizures can be better planned and has resulted in a much more structured and planned approach to seizure of devices and material. This ensures that only material relevant to the investigation is seized.

4.5. Material can also be received in the DFU through various channels including from external sources, such as accountancy firms and banks via secure file transfer or dedicated email addresses. Regardless of the source, all material is processed following guidance and standards as set out in the operational handbook. As well as the specific guidance in the operational handbook there are also bespoke desk notes, to ensure a consistent approach. Management checks and other assurance methods are also employed to check the systems are working effectively and guidance being followed.

4.6. Seized devices and other evidence are subject to a systemic process, from assignment to evidence bags, transportation to the SFO office and logging on various, secure databases. There is guidance at the entrance of the Evidence Handling Management Office (EHMO) which sets out clear expectations of how both physical and digital material should be managed. There is also clear

guidance for staff set out in the operational handbook. We observed material being booked in and saw an example of a recently seized device being delivered to the EHMO and the process undertaken to log it and record it on the database.

4.7. The database is detailed and robustly maintained. Inspectors were shown records of evidence seized as part of investigations dating back many years and were able to test audit trails, evidence processes and systems. In our observation of the booking in of a material EHMO staff followed strict guidance, undertaking several checks with the case team member to ensure that all relevant guidance had been followed. Once evidence has been stored, it cannot be moved without the authorisation from someone in the case team. There are robust procedures in place to ensure that the location of material is clearly recorded and logged.

4.8. Once material has been recorded and stored by the EHMO, the case team will, when required, request that digital devices are sent to the DFU for processing. The SFO ensures that the DFU can utilise the latest technology tools to process and extract digital material from various digital platforms and devices. Automated processes are adopted to process and disregard material which will not be relevant for review purposes, for example operating system files.

4.9. Our view - having observed and tested the systems for the processing, storage and seizure of material - is that the system is clearly sound. Given that all information received or seized is retained in its entirety and that there are clear systems of management and control allows means that the risk of losing material is extremely low. Rigorous checks are consistently applied across the DFU and EHMO when managing physical and digital evidence. The SFO has continued to invest in the technology solutions which support the DFU and EHMO to record and track evidential material effectively.

4.10. Inspectors saw a robust system with sufficient checks in place. The SFO's proactive measures, including strategic collaborations between the DFU and case teams contribute to a process aimed at minimising the risk of losing material throughout the life of a case. Case team vigilance in reviewing the material obtained will ensure no evidence bags are overlooked and any suggestion that bags go missing are unfounded.

E-discovery and Document Review Systems

4.11. The SFO handles cases which are characterised by significant volumes of documents and data. They have recognised the need to make use of advanced technology to make a complicated process more streamlined and efficient.

4.12. Technical experts manage and process digital material after it has been extracted. The e-discovery team is responsible for preparing digital material for review purposes by the case teams. The process that the SFO utilises includes automations which analyse the material being processed. The automated process will extract material that obviously will not require review, such as system files; the rest of the material is marshalled and ingested in line with established procedures.

4.13. When digital material has been triaged and processed the e-discovery team ingest the material to the Document Review System (DRS). The DRS allows the SFO to process large volumes of digital material, run searches against the material to identify documents and data which could be pertinent to the investigation, review the material and mark documents as evidential or unused material.

4.14. In 2009, the SFO adopted the Automony platform for e-discovery and document review purposes. Until 2018, it remained the primary platform for the management and review of digital material. Due to some limitations as the system aged the SFO commenced a procurement exercise to replace the Autonomy platform. Following presentations from several suppliers, in 2018 the SFO invested significantly in procuring a new platform, Axcelerate by OpenText. Unlike Autonomy where the operating system had been changed and developed internally, the new Axcelerate system would be fully supported and all updates developed by OpenText.

Benefits of moving to Axcelerate

4.15. Following the purchase of Axcelerate, the SFO started a programme of case migration. Given the size and complexity of SFO cases this migration was a significant undertaking and took a number of years. All but one long running historic case is now on the Axcelerate system. Following the conclusion of this case, no further cases will be managed in Autonomy, although the Autonomy system will remain supported, in case the need arises to access material in the future.

4.16. Axcelerate brings many improvements in how digital material can be processed and searched. Crucially, Axcelerate is a fully supported platform, recognised across the e-discovery industry and used by companies globally. Axcelerate offers advanced analysis features, artificial intelligence, machine learning and the ability to automate processes.

4.17. The SFO has maintained the default setup of Axcelerate, ensuring a comprehensive audit trail of change that goes back to changes and development that OpenText make. This allows transparency regarding the timing and

rationale behind any modifications made to the system. This is a significant improvement to that which was available for the Autonomy system. The fact that Axcelerate is supported allows the SFO to quickly identify issues and liaise with OpenText to identify potential resolutions, again a much-improved position to that in place with Autonomy. In addition to internal guidance, multiple support options are available from OpenText. Inspectors were told that members of the e-discovery team can contact OpenText to provide additional context or clarity should issues be raised by case teams which cannot be resolved.

4.18. The e-discovery team is currently developing a ticketing system to allow for systematic capture of issues raised by operational users. It is hoped that this will provide an improved mechanism for monitoring issues, promoting a more proactive approach to maintain a full audit trail of issues and changes with Axcelerate.

4.19. There are two distinct phases of how material is processed in Axcelerate, Early Case Assessment (ECA) and Review and Analysis (R&A).

4.20. ECA is a starting point, allowing case teams to quickly analyse and understand the data before carrying out a full-scale review. If utilised to its full potential, this could save cost and effort, as unnecessary data can be identified and excluded early on, reducing the volume of material requiring review.

4.21. The R&A phase allows users to complete a detailed examination of the material retained following the ECA phase. This involves an analysis of documents, emails and other relevant material to determine relevance along with other legal considerations.

4.22. Axcelerate has numerous ways in which users can search, identify, and group documents. By identifying patterns, grouping information by subject matter, organising material by timelines, Axcelerate can minimise the time case teams spend on sifting through large datasets, allowing them more time to building and progressing cases in an effective way. When used to its full potential, it can improve the document review process, allowing a focus on most relevant documents.

4.23. Axcelerate also has the functionality to allow collaboration between staff in different roles across case teams. Team members can participate in the review process and ‘tag’ documents for relevancy. This is often completed by staff in the role of document reviewers. Furthermore, Axcelerate allows those reviewing material to provide detailed descriptions of the material they are reviewing. Inspectors were shown an example where a document reviewer was able to tag and provide a description of the document and they were able to highlight with the case team that a further review was required due to multiple

languages being used in the email chain. This is a major improvement on the functionality that existed with Autonomy.

4.24. In addition to collaborative efforts, those users overseeing the document review process have the ability in Axcelerate to simplify the quality assurance process. Users have the ability to automatically create batches for assurance. This function allows the relevant users to provide feedback to reviewers with a view to ensure accuracy and consistency is maintained.

4.25. Axcelerate also can provide real time management information. This is available to those users with the correct licence. This functionality provides users with the ability to monitor and oversee the document review process more effectively. The dashboards allow users to:

- Track review progress: Users of the dashboard can see how many documents have been reviewed in each batch by reviewer, bringing transparency and accountability in the document review process.
- Relevancy tagging insights: The dashboard offers insights into the number of documents tagged for relevancy.
- Quality assurance insights: The dashboard allows those overseeing the disclosure process to monitor and track the progress of quality assurance reviews.

Keyword searches (search terms) and searching digital material

4.26. The use of keyword searches, or search terms is crucial when dealing with the vast amount of digital material extracted from devices. Management of the material presents a significant challenge to the SFO and can impact on how quickly and effectively investigations are progressed.

4.27. Reviewing every piece of digital material is impractical and costly. There have been examples of SFO cases which start with up to 60 million documents. Search terms help the case teams to reduce datasets to a manageable size. Using search terms is crucial for achieving this, acting as a tool to efficiently identify material which could be relevant to the investigation, or which may assist the defence or undermine the prosecution case as set out in legal guidance.

4.28. Developing a successful search term strategy requires an understanding of the case and clear goals for the search. However, there are challenges to SFO case teams. Success with search terms depends on creating a list or search terms that return relevant results while minimising hits on incorrect data. If a search term strategy is not effectively planned and successful in reducing

the volume of documents requiring review, it can slow down the identification of relevant case material, increase costs and extend the time required for manual review.

4.29. Keyword searches take time and require significant investment because dealing with large datasets in SFO cases is complex. Different data formats, the need for precision and the evolving use of language make the process slow. Choosing the right keywords and the need for a careful validation process contribute to the challenge and cost of searching digital material. As set out above in Chapter 3 how search terms are developed and agreed with the defence can be crucial to effective handling of cases.

4.30. As with all DRSs, Automony relied heavily on using search terms to narrow the data pool case teams were searching. Due to the way Automony was set up and subsequently developed through system changes, creating these search terms became evermore complex. For example, finding emails between specific individuals required constructing elaborate and intricate search terms.

4.31. To manage this process effectively, case teams had to develop a search strategy that reduced the volume of documents to be reviewed. This meant identifying specific sets of keywords or phrases that help to sort documents and emails, isolating those which are crucial to the case.

4.32. While search terms remain useful, case teams using Axcelerate are not limited to them alone as they were with Automony. Axcelerate provides additional features that expand the ways digital evidence can be searched. Instead of relying solely on search terms, Axcelerate introduces versatile search methods. This means that search terms are now just one part of what should be a broader strategy for exploring digital evidence. The flexibility in Axcelerate's functionality should allow case teams to use a combination of features to support the disclosure process. This is a major improvement.

Keyword search terms and search limitations

4.33. There are limitations with searches against digital material. Inspectors were told about the significant challenges that e-discovery search terms present.

4.34. Searching is a valuable tool for identifying relevant information, but effectiveness depends on the choice and precision of the keywords and search terms used. They may not capture context within the documents or metadata being searched, potentially leading to incomplete results. Using search terms and systems to search data is not infallible. There is a widely held misconception that using search terms will return a 100% accurate result. This misconception is often founded on the experience of using search functions across MS Word documents and MS Outlook mailboxes. The way that e-discovery systems run

searches is not that simple. Designing search strategies that return exactly (and only) the intended results is challenging with large and complex datasets''. To undertake key word searches and expect results like those seen in MS word document searches would take months of processing time. No e-discovery system is designed to run searches in that way.

4.35. We were told about the potential challenges with the use of search terms as the primary tool for sifting digital material. The efficiency of these searches relies on how any e-discovery platform organises information through indexing. As well as digital material, there is often other material that needs to be ingested. Other types of material such as paper, PDFs and other documents into editable and searchable data must be scanned using optical recognition software (OCR). OCR software recognises text characters, enabling the extraction of information. When considering the efficacy of searching material using search terms and metadata it is crucial to note that OCR software can misinterpret characters or words leading to incorrect indexing. It is important to recognise that these limitations are inherent to all e-discovery platforms, not just those used by the SFO. The SFO has made significant investment in a platform recognised across the industry, ensuring that any change is made to the system by the provider and transparent. This enhances the reliability and effectiveness of the SFO e-discovery process, as well as the openness of how the system will work when returning search results.

Management of Legal Professional Privilege material

4.36. Legal Professional Privilege (LPP) is a principle in UK law that ensures certain confidential communications between legal professionals and their clients remain confidential[6].

4.37. Amongst the digital documents prepared for review, can often be large volumes of LPP material. This can include email chains, documents, and other digital methods of communication. The SFO will use obvious search terms such as solicitors' details to identify LPP material but invariably, search terms for LPP hits are often agreed with the defence. The case teams can direct the e-discovery team to immediately quarantine the material.

4.38. Once LPP is identified, it is the responsibility of the e-discovery team to take action to quarantine it from other case material. This is essential to prevent the material being seen by SFO case teams and maintain the confidentiality of privileged information. Inspectors were told that there are clear lines of communications between the operational divisions and e-discovery team,

[6] See para 6.46

ensuring that case teams are made aware of material identified as LPP and instructing them not to access or view it.

4.39. Once material is quarantined, the e-discovery team prepare it for review by specialist LPP counsel who are instructed by the case teams. LPP counsel are experts in reviewing material which has been identified as LPP to determine if LPP principles should be applied. If LPP counsel decide that the material is not privileged, then there is a process to release material back to the case team for review and consideration as part of the disclosure exercise.

Case Management System and transition of case drives

4.40. The SFO has recently piloted the use of a new document management system as the method for storing case related documents and plans to migrate all teams to the new system during 2024. The migration away from traditional shared drives demonstrates a significant strategic move by the SFO to invest in and improve its operational infrastructure. This transition should bring some notable advantages which will improve collaboration and overall operational efficiency.

4.41. The SFO's investment in a new document management system is positive and in line with the recommendation[7] made in the Altman review. When the project is delivered, it should bring significant improvements for how case documents are managed, allow for better collaboration across case teams and better security and assurance for sensitive documents.

[7] Review of R v Woods & Marshall by Brian Altman QC - Serious Fraud Office - Serious Fraud Office (sfo.gov.uk)

FINDINGS

5. Casework examination headlines

BGC01 and GRM02 - the file sample

5.1. We examined two cases to assess the quality and standard of the Serious Fraud Office's (SFO) disclosure handling. The files examined were GRM02 which was unsuccessful and BGC01 which was a successful case. Both cases were concluded at the time of our examination although the issues of costs remained live on GRM02.

5.2. We set out below a short summary of findings of our examination and highlight key themes identified from the cases.

GRM02 - high level case summary

5.3. On 10 March 2023 the SFO offered no evidence against Richard Morris, Mark Preston and James Jardine on seven counts of fraud, thus bringing to an end the prosecution and concluding the SFO investigation into G4S. The SFO had made the decision to halt proceedings because they considered it was no longer in the public interest to pursue the case.

5.4. The SFO had commenced their investigation into G4S on 24 October 2013 following a referral in July 2013 by the Lord Chancellor and Secretary of State for Justice. The allegations were that G4S (and another company Serco) had engaged in unacceptable billing practices in respect of their electronic monitoring contracts with the Ministry of Justice which had led to the government being overcharged for those services.

5.5. The SFO investigation subsequently concluded that there had been no dishonest overcharging by G4S. The SFO investigation covered the corporate wrongdoing of G4S and the potential criminal actions of individual employees. The SFO identified ten different suspects (including the three defendants), who had been employed by G4S, who were all interviewed under caution. Ultimately the SFO reduced the number of suspects down to the company G4S and the three defendants.

5.6. Over this period the SFO had also conducted a parallel investigation into Serco (against whom the allegations were very similar). Initially the SFO prioritised the investigation into Serco over that into G4S and entered into a Deferred Prosecution Agreement (DPA) with Serco in July 2019. The SFO subsequently prosecuted two Serco employees for offences of fraud. That prosecution collapsed on 26 April 2021, during the trial, due to disclosure failings by the SFO. That matter has been the subject of a report by Brian Altman KC[8].

[8] Review of R v Woods & Marshall by Brian Altman QC - Serious Fraud Office - Serious Fraud Office (sfo.gov.uk)

5.7. On 17 July 2020 the SFO entered into a DPA with G4S, under which G4S were required to pay a financial penalty of £38.5 million. (G4S had already paid £121.3 million to the Ministry of Justice in 2014 under a civil settlement).

5.8. On 10 July 2020 the SFO charged each of the three defendants with seven counts of fraud, relating to the provision of false information to the Ministry of Justice about the costs to G4S of supplying electronic monitoring services. The defendants each entered not guilty pleas. The trial was fixed for 10 January 2022.

5.9. The SFO complied with its obligation to provide initial disclosure of unused material to the defence on 26 January 2021 (the day it was due). Defence statements were served at the beginning of June 2021. The defence statements generated the need for significant further disclosure by the SFO.

5.10. On 2 September 2021 the SFO notified all parties that it would not be able to complete the disclosure exercise in advance of the 10 January 2022 trial date and that it would therefore be seeking to adjourn the trial. This was because of the further work required from defence statements. On 15 October 2021 the SFO's adjournment application was heard and was opposed by each of the defendants. The application was granted, and a new trial date fixed for 9 January 2023. Directions were set which required the SFO to provide disclosure in a manner that would ensure the defence teams had sufficient time to process it in advance of the trial. Disclosure had to be completed by 8 September 2022 at the very latest.

5.11. By January 2022 the SFO had concluded that they would be unable to complete the disclosure exercise in compliance with the court timetable without third party assistance. In April 2022 this led to the SFO engaging a third-party specialist company, Anexsys, to assist with the review of unused material. In addition, over the ensuing months the SFO dedicated much of the division's resources to the disclosure exercise in this case, in the course of which thousands of documents were disclosed to the defence. Despite this the SFO failed to comply with the 8 September 2022 disclosure deadline. Nonetheless until December 2022 the SFO remained of the view that they would be able to complete the disclosure exercise and be ready to start the trial on 9 January 2023.

5.12. At a pre-trial review hearing on 14 and 15 December 2022, the SFO conceded that they would not be trial ready by 9 January 2023 and applied to adjourn the trial. There was also a parallel application from the defence to stay the proceedings as an abuse of the court's process on the basis of the prosecution's disclosure failures.

5.13. The trial was taken out of the court list without the application to adjourn being granted. That application was to be heard, alongside the defence application to stay proceedings, on 20 March 2023. That hearing never took place as on 10 March 2023 the SFO took the decision to offer no evidence on the basis it was no longer in the public interest to pursue the case. The SFO had concluded that the disclosure exercise would still take many months to complete, and that significant further resources would need to be expended on it. Furthermore, they recognised that each of the defendants was of good character and that by the time of any future trial they would have been the subject of the investigation and prosecution for in excess of ten years.

5.14. It should be noted that each defendant made a costs application against the SFO on the basis that the SFO failed to conduct a proper disclosure process.

GRM02 - Findings

5.15. The delay in the SFO completing the disclosure of unused material in this case was the main reason why the case did not proceed to trial. That delay was a significant factor in the subsequent SFO decision to offer no evidence.

5.16. There was no single reason why the SFO did not complete the disclosure of unused material in advance of the second trial date on 9 January 2023. The case posed the SFO considerable challenges in the disclosure process and during the latter part of 2022 it was the cumulative impact of a number of issues that proved decisive. The scale of the disclosure task was considerable, and the case did not fail due to a lack of hard work, commitment, or dedication from the case team. Nor did it fail due to a lack of resources in its latter stages.

5.17. We have found several issues with the handling of disclosure, which contributed towards its failure. The most immediate of these related to the operation of the Document Review System (DRS) then in use, Autonomy, and problems caused by the way in which the SFO had chosen to schedule material from their own case drive. In addition, there were other factors that contributed to the failure, particularly an overall lack of disclosure planning (especially at the early stages of the prosecution), a lack of continuity of personnel in key roles, insufficiently robust case oversight and a lack of proper disclosure record keeping.

The Document Review System – Autonomy Introspect

5.18. The digital system used in this case was called Autonomy Introspect. It is often referred to as a DRS. The system ingests and stores digital material seized during an investigation, allows searches to be conducted across that material to locate relevant documents, and contains a platform upon which to review the

material. The effectiveness of the system depends on the capabilities of the system itself, and the ability of those who use the system to understand it and operate it correctly.

5.19. The process of running search terms on the Autonomy DRS was technical and sophisticated. For the purpose of initial disclosure, the SFO devised their own search terms to locate relevant material from within all the documents they had obtained as part of their investigation (which numbered several million). The system operated in such a way that the pool of documents generated by a search term could depend (appreciably) on how that search term was constructed. Those search terms used were set out in the Disclosure Management Document (DMD) served in advance of the defendants' first appearance in the Crown Court.

5.20. Importantly, certain punctuation affected search terms and impacted on the resulting documents identified. If a word in a document was immediately followed by a 'tangible' character, then only by including that tangible punctuation mark (or a wild card character) after the search term would the document be identified by the search. Tangible punctuation marks included full stops and colons. Up until the middle of 2022, none of the search terms deployed in the case had been run using a full stop or colon (or any of the other tangible characters other than expected alphanumeric characters). Consequently, there were documents that could have been relevant and disclosable that were not identified by the searches that the SFO ran.

5.21. This issue did not come to light until the second half of 2022 and when it did most of the search terms had to be run again with the additional tangible punctuation marks included or use of wildcards, and the resulting documents considered for disclosure. This was ordered by the court at a disclosure hearing on 20 September 2022 after the judge found that there were 'flaws' in the construction of the initial search terms.

5.22. The punctuation issue arose not because of the Autonomy system, but because of how the Autonomy system was set up and operated. The system functioned as it was designed to function, but it relied upon search terms being appropriately formulated to produce the desired pool of responsive documents, which included the appropriate use of tangible punctuation marks, or inclusion of wildcard characters, to enhance search terms.

5.23. The evidence in this case suggests that not all of the necessary people on the case team knew how punctuation impacted search terms, and that those who did know were not aware that it might cause the type of problem that occurred. The SFO's internal guidance did specify how search terms functioned on Autonomy and specifically how punctuation impacted upon those terms. We

consider the problem lay not in the guidance itself but of individuals not being aware of or understanding the guidance and in a lack of assurance and challenge when the search terms were developed and run in 2020.

5.24. It was this lack of awareness that led to what the judge found were 'flaws' in the construction of the original search terms. As a result, this meant that the defence were not informed of the issue until late in the court process. By that stage it was too late. Though the prosecution was able to re-run the search terms ahead of the second trial date, shortly before the hearing on 14 December, it became apparent that DPA material, together with other material arising out of the abuse of process argument could not be reviewed and, where necessary, disclosed before 20 January 2023. That meant that the SFO could no longer assert that the prosecution would be able to comply with the Criminal Procedure and Investigations Act (CPIA) obligations prior to the start of the trial on 9 January 2023. This, together with other issues, led to the prosecution being unable to discharge its statutory obligations regarding disclosure and ensure that the defendants would have a fair trial in time for the start of a trial on 9th January 2023.

5.25. A combination of factors led to the punctuation issue that arose in this case. The punctuation issue was, it seems, unique to Autonomy, the digital review system used by the SFO at that time. This has now been replaced by a system called Axcelerate, which does not operate in the same way in relation to tangible punctuation marks.

The SFO case drive

5.26. The CPIA requires the revelation of all material relevant to the investigation, this is done by means of a schedule of unused material. The practical result of this is that the SFO, as the investigating body, must in each prosecution they undertake, list on a schedule all the non-sensitive relevant material in their possession including any material held on their own internal case drive.

5.27. In this case the exercise was complicated by the fact that there was originally a single case drive for both the investigations involving Serco and G4S as they had both initially been investigated by the same case team.

5.28. Nonetheless, the SFO would always have been aware of the need to schedule and reveal to the defence a large amount of their own material. Indeed, their own Disclosure Strategy Document (DSD) from 2019 sets out the way in which the SFO intended to undertake this task, for example in relation to emails these would be separated into five categories of correspondence (witnesses, suspects, experts, third parties, emails with attachments), each of those categories would be listed on a schedule specifying the number of emails

together with an outline of contents. Any material identified as disclosable would be described as a separate entry.

5.29. The DMD also confirmed that all case generated material held on the internal case drive and all case related emails in the shared case team mailbox would be reviewed for relevance.

5.30. However, when the SFO complied with initial disclosure, it produced a case generated schedule containing just two items: the case drive, with a list of its subfolders, and the shared inbox. Both items were endorsed as not being disclosable. It is difficult to understand how the SFO felt able to make that assessment, particularly given that they would later disclose a considerable amount of material contained within it to the defence.

5.31. The decision to schedule the case generated material in this way was contrary to the DMD and the rationale for why it was done in such a way was not recorded anywhere. It appears to have been made because the case team had run out of time to properly schedule their internal material and is probably indicative that the disclosure scheduling process had started too late (we discuss the lack of disclosure planning below).

5.32. The case generated schedule was inadequate, and not in compliance with CPIA. This would later impact the case in two separate ways.

5.33. First, the exercise of properly scheduling the internal material was never completed. The case team knew that this task needed to be undertaken and on different occasions they set about doing it. However, that task was continually of less priority than other urgent disclosure issues, and so was paused and did not receive the attention it required. Furthermore, because the internal case material inevitably continued to increase over time as the case went on, so too the task itself continued to expand.

5.34. Second, the internal case material contained documentation relating to the DPA with G4S. Some of that material was capable of assisting the defence case and therefore fell to be disclosed under CPIA. However, that material was not disclosed until December 2022.

5.35. There is no record of why the SFO did not disclose the key DPA material at initial disclosure. Nor is there a record of why, when a schedule of DPA material was created in January 2022, the material which met the disclosure test was not disclosed then. Key members of the SFO case team were no longer available to clarify this point. We have noted that the Operational Handbook does not provide specific guidance on the scheduling of DPA material. By

December 2022 the SFO conceded that some of the DPA material in question was disclosable.

5.36. The lack of record keeping explaining these decisions precludes us from establishing the precise reasons around these decisions, but it is difficult to conclude other than that both decisions were errors. This was a case with significant disclosure challenges, and in which there had been a strict deadline of 8 September 2022 to complete disclosure, yet the SFO did not schedule and disclose material which had always been in their possession until December 2022, just one month before the second trial date.

Disclosure planning

5.37. The case was charged on the 10 July 2020. There was therefore 30 months (two and a half years), between charge and the second trial date, to complete the disclosure process. The inability to do this within such a time frame, notwithstanding the overall complexity of the case, requires consideration of whether disclosure was sufficiently planned.

5.38. Two distinct aspects of the case suggest that the planning process was deficient. The first is the failure of the case team to properly schedule the SFO's internal case material as set out above. This was something that clearly needed to be done and it is apparent that insufficient time had been allowed for this exercise between the date of the SFO deciding to charge the three defendants and the initial disclosure deadline. Disclosure was not in sufficiently good order before charge and there should have been a recognition that much hard work lay in store upon receipt of the defence statements. With the benefit of hindsight more time could have been taken pre-charge preparing disclosure in such a way as to ensure that the SFO could meet the inevitable court deadlines that were set once the case was charged.

5.39. Following the inadequate scheduling exercise undertaken at initial disclosure the case team did know that the internal case material still needed to be scheduled. Again, as set out above this task was continually delayed by other more pressing issues. While the extent of the disclosure exercise after the service of the defence statements in June 2021 was significant, our case examination identifies that there was a period of relative quiet between January and June 2021, which may have presented the opportunity for the case team to rectify the scheduling of the internal case material. Indeed, during that period, the core members of the case team were for a time diverted onto another investigation when, if planned properly, that time would have been better spent ensuring that initial disclosure had been properly completed.

5.40. The second element of the case, which demonstrates deficiencies in the planning of the disclosure exercise, is illustrated by how much the SFO had to

do to respond to the defence statements. The SFO was not assisted through early engagement by the defence in the disclosure process as required by the Attorney General's Guidelines. This was because although early engagement was requested initially, there was no real attempt to enforce it by the prosecution and it was not picked up by the court. It can be reasonably inferred that any attempts by the court or prosecution to enforce earlier engagement would have been resisted by the defence, who clearly felt that they could not meaningfully engage until they had fully mastered the case against them and their defence to it.

5.41. While it would always have been the case that the defence statements would generate further enquiries and necessitate the disclosure of additional material, it is notable that the number of documents listed on unused material schedules had more than doubled from 27,350 at initial disclosure to in excess of 62,000 by the time the case ended.

5.42. The evidence we have examined indicates that the case team limited the initial disclosure exercise in scope, both by the way in which search terms were constructed, and by the decision to deem certain categories of material as not relevant (such as material relating to G4S bidding for a further electronic monitoring contract). It is understandable that with such a vast pool of documents from which to identify relevant material, the SFO sought to filter it as much as possible. However, it should have been obvious that the disclosure exercise would therefore expand considerably upon service of the defence statements as indeed it did. The case team do not appear to have recognised this or to have seen the obvious risk it would create to their ability to stay on top of that exercise.

5.43. The way in which the initial disclosure exercise was conducted was perfectly legitimate, however it ceded the initiative to the defence and left the SFO with an enormous disclosure task which effectively started in June 2021. Had there been more foresight of how much the SFO were leaving themselves to do in order to respond to defence disclosure requests (many of which were fairly predictable), they may have chosen to conduct a more comprehensive disclosure exercise at the initial disclosure stage of the case.

Continuity of key personnel

5.44. The investigation took over six years before charge and the prosecution lasted over two and a half years; a case of this complexity and scope demanded continuity of personnel wherever possible. Any officer new to the case would take weeks if not months to fully assimilate all that had happened on the case.

5.45. Two of the key roles in relation to disclosure on an SFO case are the case controller (CC) and the disclosure officer (DO). This case had five CCs

over the course of its lifespan. There was a total of ten disclosure officer appointments on the case; five of those were post charge. It is perhaps unsurprising therefore that we found a lack of clarity over the roles and responsibilities of those involved in the disclosure process towards the end of the prosecution.

5.46. It must be recognised that some of the continuity issues were completely beyond the control of the SFO, in particular the serious illness of one of the CCs. However, others were not. We consider that the breadth of knowledge and insight into the case issues demonstrated by some of those who worked on the case the longest show the value of continuity. The case would have had a better chance of making trial if key roles had not changed so frequently.

Case oversight

5.47. The evidence suggests there was a failure in effective case oversight in latter stages to identify and challenge the case team on their progress with the disclosure process. This is most apparent in the latter stages of the case from 2022 onwards when senior management were receiving monthly progress reports about the case.

5.48. We consider that those progress reports were unduly optimistic, with the case team so focused on the mammoth task which they were confident would be completed that they failed to consider the consequences of what would remain outstanding by the disclosure deadline of 8 September 2022 (in particular the scheduling of internal case material and a large amount of Legal Professional Privilege (LPP) material).

5.49. Greater scrutiny of the detail within the updates could have identified some of the ongoing issues with disclosure and provided an opportunity for the case team to be challenged about those unresolved issues. Opportunities were missed to have a thorough review of the disclosure position and external counsel did not highlight the problems to senior managers. As a result, measures could have been put in place to address the disclosure issues before time became so critical that the SFO were forced to concede that they would not be ready for the trial.

Disclosure record keeping

5.50. The disclosure audit trail on this case is on occasions poor, especially for the period prior to 2022. There are several examples of how this manifested itself.

5.51. The DSD, which is intended to be a live document maintained as the investigation progresses, was never updated after 2019 despite significant disclosure events.

5.52. The record keeping of the initial quality assurance process used to ensure that disclosure was applied correctly and consistently was found to be lacking.

5.53. The Disclosure Decision Log (DDL), which is a record of key disclosure decisions made throughout the life of the case was not maintained consistently. In particular, no log was kept of disclosure decision making covering 2021, a critical year in which initial disclosure and the first responses to the defence statements were served. Therefore, there are no records covering the decisions taken around initial disclosure, including the decision to schedule the internal case material as set out above, and the decision that the DPA material was not considered to be disclosable. This presented the SFO with considerable problems in December 2022 when they were unable to explain why the DPA material had not been disclosed previously.

5.54. The evidence shows that members of the case team were aware of the lack of record keeping and that there was an intention to rectify this at some stage, however that did not happen. As has already been set out there was a tendency in the early stages of the case to postpone certain actions for a later stage, but once that stage was reached there were too many competing priorities for everything to then be completed.

BGC01 - high level case summary

5.55. The BGC01 case involved the investigation and prosecution of fraud offences by directors and employees of three companies registered in the United Kingdom. The case name is taken from the three companies involved in the fraud: Balli Group Plc, Balli Steel Plc, and Balli Trading Ltd., known collectively as the Balli Group Companies (BGC). The basis of the fraud was applying for and obtaining from financial institutions trade financing for the purchase of steel and other commodities. Approximately 26 financial institutions were defrauded by BGC before the Companies entered administration in 2013 showing a combined deficiency to creditors of approximately 600 million dollars.

5.56. Following referrals from two separate banks in 2013, the SFO accepted the case in May 2014. The prosecution focused on five victim banks. The case remained covert until September 2016 when searches were executed at several addresses. The volume of case documents amounted to 8.5 million files, most of it in digital format.

5.57. Charges were approved by the Director of the SFO in March 2020 against five defendants, Nasser Alaghband (director/company secretary), Vahid Alaghband (director/shareholder), David Spriddell (director, company secretary, finance director), Melis Erda (group treasurer and member of executive

committee) and Louise Worsell (director of Balli Middle East and member of executive committee). Nasser Alaghband entered acceptable pleas in June 2022. The case went to trial in September 2022 resulting in the convictions of Melis Erda, and Louise Worsell and the acquittal of David Spriddell. Vahid Alaghband was severed from the trial owing to health concerns and the allegation subsequently did not proceed against him.

BGC01 - Findings

5.58. The overall success of the disclosure exercise in BGC01 owed much to the pro-active approach taken by the SFO case team. Our examination highlights early and effective engagement with the defence as the case team sought to remain on the front foot and pre-empt challenge throughout the disclosure process.

5.59. Consistency of key roles such as the CC ensured that the case had consistent leadership from case acceptance to the conclusion of the case. The CC provided confidence to the team to deploy counsel to good use in the development of the disclosure strategy. The strategy included utilising the block listing principles to reduce the burden of disclosure and further expertise was brought in to ensure block listing was robustly deployed.

5.60. However, our examination highlighted that there was a high turnover in the role of DO, pressure in the team and in some instances a lack of relevant experience in those taking on the role. This led to further demands being placed on the rest of the case team and at some points an over-reliance on external counsel. The task of the case team was made more difficult due to the lack of an overarching strategy for resources.

Defence engagement

5.61. LPP was a particularly complex issue in the case. The issues were very complex, had the potential to impact on a very large volume of material and as a result brought a risk that could significantly delay the disclosure exercise and thus impact readiness for trial.

5.62. Early in the investigation the auditors of the defendants' companies had provided a very large amount of material (circa 2.5million documents) to the SFO. This was accompanied by a waiver from the auditors as regards any assertions they might make of LPP over it. This waiver did not, of course, cover assertions of LPP by other parties and there were multiple such assertions over that material, and other material in the case, on behalf of the defendants themselves and from linked entities. Furthermore, there were legal challenges to the validity of the waiver itself provided by the administrators.

5.63. Advice was sought from specialist leading counsel at an early stage and a case specific LPP protocol was set up for this case three years before charge. The overall strategy was to set out the SFO's approach at the outset and invite challenge from the defence at each stage to minimise delay in releasing non-LPP material for the disclosure review and to avoid a challenge at court at a late stage which may have the potential to undermine the entire prosecution. The protocol provided for internal quality assurance by leading counsel and invited the defence to make representations regarding the process being employed. Again, rather than providing the defence with all the determinations at the end of the process the defence were provided with schedules of the LPP team's determinations on a rolling basis inviting challenge to the process with a route set out to the High Court if agreement could not be reached. The defence teams made no significant challenge to the process.

5.64. There was also effective engagement with the defence teams over search terms. In a case like BGC01, where the volume of digital material to be reviewed for both LPP and disclosure is so vast as to make review of individual items impractical, the use of search terms to identify relevant items to then be individually reviewed is acceptable under the CPIA Code of Practice and the Attorney General's Guidelines on disclosure (see chapter 3). However, defining search terms can be difficult and it is important to involve the defence in the exercise as they may have specific knowledge of the material in cases where, as in BGC01, large amounts of digital material are seized from the defendant's addresses or from related companies over which they may have detailed knowledge.

5.65. The team in BGC01 invited engagement from the defence at an early stage for both the LPP and disclosure reviews and the defence teams did provide search terms to assist SFO for LPP material. The approach to working with the defence to define search terms was effective in identifying relevant LPP material. None of the defendants ultimately provided search terms for the disclosure review, the repeated attempts to engage made by SFO meant that the defence could not credibly raise at a later point any claims that they had been excluded from the search term process or that additional specific terms ought to/ought not to have been used.

5.66. To review, describe and schedule all the digital unused items in BGC01 would have had huge resource implications for the case team. Firstly, due to the sheer volume of items to be described. Secondly, due to the complex nature of many of the documents themselves which would have necessitated a detailed and lengthy individual description. Such schedules are not only hugely time consuming to produce but can be confusing and unhelpful to the defence.

5.67. On the advice of lead disclosure counsel, the case team took the decision to follow a block listing approach with regards to the bulk of the digital unused material to be scheduled: over 140,000 individual hits from relevancy search terms. All the relevant hits would still be reviewed but individual descriptions and individual entries on the schedule would only be generated where an item was deemed as either undermining the prosecution case or assisting the defence case. This resulted in schedules of unused material which were much shorter than if each separate item of relevant non-disclosable unused material had been separately listed. In addition, where it existed a schedule of metadata for the items was also provided in relation to the items listed in block. An explanation for the approach taken including a guide to interrogating the metadata was recorded in the DMD which explained the block listing approach being taken to the defence and the court. The DMD which was provided to the defence and the court at an early stage. There was no significant challenge to the approach taken by the defence teams.

Resources

5.68. Even at an early stage BGC01 had features which made the issues around obtaining, retaining, and disclosing unused material complex: in particular, the issues around LPP mentioned above and also the joint investigation which was undertaken with Czech prosecutors at an early stage in the investigation. Lead disclosure counsel was appointed early (15 months after the case was accepted) to assist with the disclosure issues the team were facing and was to remain instructed until the conclusion of the case – over seven years later. While advising on disclosure issues generally lead disclosure counsel set up the strategy to deal with LPP and also advised on the particular approach to scheduling the unused material.

5.69. There was also a further investment in external counsel resources towards the end of the case. In 2021, additional counsel were recruited to the case team, initially on a short-term basis but ultimately staying until the conclusion of the trial. In the run up to the trial this additional resource helped the SFO case team DO both in terms of completing necessary tasks and also providing objective strategic judgements. Those we spoke to in the case team were unified in their praise for how lead disclosure counsel and this additional resource contributed to case success.

5.70. Although BGC01 ended successfully, as the trial approached the case team was stretched, and the need to prioritise getting the remaining phases of disclosure served in time came at the cost of other important work such as parts of the quality assurance exercise and the provision of an updated DMD to the court and defence. Even with the resource focus on disclosure, four schedules of unused material were served upon the defence after the start of the trial.

While this only represented a small proportion of the total unused and disclosable material provided to the defence it still created a demand on the defence and was a potential risk for the prosecution.

5.71. Our view is that there was no strategic resourcing plan to identify all the strands of work necessary to complete the disclosure exercise and to give educated estimates of the resources required to meet those challenges. The case team members we spoke to confirmed that there was no strategic resource planning. With such a plan in place the case team could then be expected to be resourced accordingly to meet each disclosure demand in a timely fashion prior to trial. Such a plan could be regularly updated and discussed with the Head of Division, so the organisation is aware of upcoming disclosure demands, can anticipate timescales, and make available resources to meet that challenge. Decision making on resources was taken in what appeared to be ad hoc and often when demand had emerged which put further strain on the case team and posed a risk to the success of the case.

Key documents in the case file

5.72. The DSD, the DDL and the DMD are the key documents in the disclosure process and ensure proper assurance of cases both for the case team and senior managers. The DSD sets the strategy at the start of the investigation and should evolve with the investigation and provide overarching direction to all the different aspects of the disclosure process throughout the life of the case. The DDL should record all the relevant operational decisions which underpin the DSD. Both are inward facing documents. The DMD is the outward facing document which explains to the court and defence how the SFO has complied and will continue to comply with its disclosure obligations throughout the court process. Read together the three documents should provide a picture of the whole disclosure process to the case team and to those assuring their work.

5.73. Our examination of the case found that the DSD though completed at an early stage in the investigation was never updated as the case progressed, even though it clearly stated that it was a ‘living document’ which would be updated as the investigation developed.

5.74. The DDL did provide a thorough record of operational disclosure decisions at some stages but was not a complete record in certain important regards. Key operational decisions in relation to disclosure were recorded in a number of different locations across the case file and not on the DDL. This lack of complete record meant that those coming to the case as disclosure officers could not immediately understand the disclosure decisions on the case.

5.75. The DMD was completed at the time of the first phase of disclosure. This set out the SFO’s approach to the performance of its disclosure obligations, and

in particular the rationale for the use of block listing mentioned above. It also set out the various roles in the case team and included a projected timeline for the provision of further disclosure. A DMD update was provided approximately five months later which updated the position as regards changes of roles in the disclosure team, amendments to the disclosure timetable going forward and the stage reached in the quality assurance process. However, there was no further update provided before the trial some 16 months later, even though things had moved on since the previous update. It seems that the intention was to provide a further updated DMD, but the case team were too busy with other pressing disclosure tasks to provide this.

The role of disclosure officer

5.76. The role of DO is multifaceted and their responsibility extensive. The DO is responsible for reviewing unused material retained during the investigation, determining whether material is disclosable and preparing schedules for the court. The DO is also responsible for the management of the disclosure exercise within the case team including recruiting and managing the team of reviewers and formulating and managing a quality assurance process to ensure the work is done properly.

5.77. Our case examination highlighted that at key times during the case those holding the role of DO were overstretched and needed the support of additional resources. There was a high turnover with a total of five individuals holding the role during the life of the case and there was evidence that the role was causing stress and burnout to those who held it. Adding to the pressures none of the individuals coming into the role had sufficient experience to direct the disclosure process and so although they worked very hard, they needed to seek advice and support from the case controller and lead disclosure counsel.

5.78. Given the scale of the case and the extent of the disclosure exercise disclosure counsel was appointed to a new role of ‘disclosure co-ordinator' with the view that this role would take over responsibility for much of the DO’s quality assurance role and to provide support. A deputy disclosure officer was also appointed from the cadre of senior investigators on the team to support the DO and was tasked to deal with the administrative side of the role: engaging and monitoring document reviewers and disclosure counsel.

5.79. As the case was reaching a critical stage approaching trial, the DO left and a temporary DO was installed. This was intended to be for a short period until an experienced DO took over. The temporary DO, however, remained in the position for more than nine months. Lead disclosure counsel raised concerns and eventually a permanent DO was appointed.

5.80. Even with the challenges set out above in the case the proactive nature of the leadership in the case ensured that despite the numerous challenges encountered, the case remained on track and the case was not overwhelmed with issues surrounding the disclosure process. Key to the successful of handling of the disclosure process in this case was the continuity of key roles within the case team and the effective use of block listing. These factors contributed significantly to the success of the case.

6. Disclosure: The Serious Fraud Office handbook and disclosure process

The Serious Fraud Office operational handbook

6.1. The Serious Fraud Office (SFO) disclosure process is set out in their Operational Handbook (OH). The OH disclosure chapter contains seven parts which set out the approach to be taken to disclosure throughout an investigation and a prosecution. The OH is a web-based tool, allowing navigation between pages with links from chapters to documents. Pages or chapters can also be printed. This was updated in 2022 in response to recommendations in the Altman report and as part of the continual on-going review of operational practice.

6.2. The disclosure process on both cases we examined commenced well in advance of the 2022 changes to the OH. We see little value in setting out what the OH said some years ago. Nonetheless, it is worth highlighting where the case teams' actions were not in compliance with previous internal guidance and where their actions would not be in compliance with the latest OH.

6.3. Part 1 of the OH covers the law and basic principles. Part 2 covers roles and responsibilities at the SFO. Part 3 covers the setting of a disclosure strategy. Part 4 covers managing material. Part 5 covers reviewing material. Part 6 covers quality assurance. Part 7 covers scheduling, revelation and disclosure to the defence. Parts 2 through to 7 all start with a reminder to ensure the user is referring to the most up to date legislation and have links to the Criminal Procedure and Investigations Act 1996 (CPIA), Code of Practice, Attorney General's Guidelines (AGG), Criminal Procedure Rules and Criminal Justice Act 1987.

6.4. The OH does not set out a prescriptive disclosure process; it is clear about the obligations placed on individuals and case teams and sets out what must be done in respect of disclosure. However, it is permissive in that it is generally open to the case controller as to how their case team complies with those requirements. Among staff we spoke to there was generally significant positivity about the assistance provided by the handbook. There was some appetite for it to be more prescriptive, but this was far from a universal view with others stressing how each investigation is different, making a one size fits all approach undesirable.

6.5. It is clear to us is that the OH is vital reading for every case team member at the SFO, and that it sets out obligations and expectations that are not contained in any other single source. It is therefore essential that all staff members read it. Our interviews with staff indicated that not all staff had read it, including those carrying out functions of disclosure officers (DOs).

6.6. There is one significant gap we have identified in the OH. It is silent about the approach a case team should take to the disclosure of Deferred Prosecution Agreement (DPA) material to individuals who are subsequently prosecuted after a DPA has been entered into with a corporate entity in respect of the same wrongdoing. In GRM02 the late disclosure of undermining DPA material was a factor in the case being stopped. The earlier decisions not to disclose the material were not properly documented, however we conclude that the lack of guidance, either in the OH or elsewhere may have influenced those decisions. We therefore make the following recommendation:

Recommendation
By September 2024, the Serious Fraud Office to update the Operational Handbook with guidance in relation to the handling of a Deferred Prosecution Agreement (DPA) and its related material on prosecutions of individuals in which a DPA has been entered into with the corporate entity.

Part 1- law and basic principles

6.7. This part contains a correct summary of the law relating to disclosure, with reference to the CPIA, the CPIA Code and the AGG. A note of caution is sounded in the OH advising that these documents are written primarily on the basis that an investigation is carried out by police officers and that prosecutions are brought by a different agency to that which conducted the investigation. This is a very important point and one which must not be forgotten because the guidance in those documents relates to a police officer revealing material to a prosecutor and this does not apply to a body like the SFO which operates on the Roskill model.

6.8. Part 1 sets out the obligations placed upon the prosecutor under the CPIA, explaining the disclosure test and the relevance test. There is a detailed explanation of relevant material. The advice is unambiguous: "*Case teams should start with the presumption that all items of material obtained by their investigation need to be reviewed for relevance*."

6.9. This is clearly a sensible premise upon which to start and should ensure a mindset is created in which case teams recognise that the rules of disclosure will likely apply to all the material they gather in the course of their investigation. The OH then stresses that this advice does not mean all items are automatically relevant, nor that the presumption means every single document needs to be individually reviewed. Case teams are told that it is acceptable to use search terms, dip sampling or other appropriate analytical techniques to identify relevant material.

6.10. The OH then instructs that decisions about what constitutes relevant material and how such material will be identified must be recorded in the Disclosure Strategy Document (DSD) and later in the Disclosure Management Document (DMD). Furthermore, where there is any doubt about whether material is relevant it must be treated as relevant until determined otherwise.

6.11. Case teams are advised that they should consult Head of Division (HOD)/General Counsel's office when there are any queries about the application of the relevancy test.

6.12. Case teams are also advised that they should consider engaging with defence at the earliest opportunity to narrow the scope of what material is relevant.

6.13. This part also includes templates to assist staff. There are templates of three types of document which are critical to SFO cases. These are the DSD, the DMD and the Disclosure Decision Log (DDL). However, only the link to the DSD is active in the current version of the OH. The SFO may wish to rectify this and add working links to DDL and DMD.

Part 2 - roles and responsibilities

6.14. The chapter sets out how the CPIA, the Code of Practice and the AGG detail the functions and duties of individuals involved in the disclosure process and that individuals may hold more than one role. The DSD and then the DMD should specify the individuals involved in the disclosure process and the roles they are performing. All individuals must have sufficient knowledge and competence (individuals are personally responsible for attaining and maintaining that knowledge and skill, including a responsibility to attend SFO training courses).

6.15. All members of case teams are expected to take collective responsibility for compliance with disclosure obligations. There is an expectation that individuals will assist and challenge colleagues when necessary.

6.16. The handbook then sets out the individual roles which exist and the duties which attach to each of those roles.

6.17. The first role described is that of the investigator. This is where the Roskill model differentiates the SFO from the operation of the regime under CPIA. All members of an SFO case team have responsibilities associated with this role under the CPIA. The main aspects of this responsibility are to approach an investigation fairly and objectively, to pursue all reasonable lines of enquiry and to record and retain material. There is an emphasis on the personal nature of compliance with these responsibilities.

6.18. The OH then goes on to describe the duties of the case controller (CC). The CC fulfils the role of the officer in charge of the investigation, as set out in the CPIA, being the person responsible for directing a criminal investigation. The CC can be a lawyer or an investigator. It should be noted that if the CC is a lawyer they will almost certainly always be the prosecutor in the case (which again sits outside the clear distinction made between the OIC and prosecutor roles envisaged by the CPIA).

6.19. The CC has overarching responsibly for the management of the investigation and to ensure proper procedures are in place for the recording and retaining of all relevant material. This includes responsibility for the investigative and disclosure strategies and for the recording of all decision making. It is the CC's responsibility to appoint case team members, including the DO and a prosecutor.

6.20. The OH then goes on to describe the duties of disclosure officers (DOs). DOs perform a crucial function in respect of disclosure. Their main responsibilities entail the review of all relevant material, the preparation of the schedules of unused material, and the revelation of material to the prosecutor. SFO cases involve large quantities of material (especially digital material). It is therefore impossible for DOs to personally examine every item of relevant material. For this reason, the OH sets out that the DO will manage a process by which material is reviewed and the individuals involved in that review process. This includes responsibility for a quality assurance process of the review work conducted by those individuals. The SFO's position is that any member of the case team with sufficient training, skill, experience and authority can take on the role of DO.

6.21. The OH encourages DOs to join the DO's Forum. It also emphasises that DOs can always contact General Counsel's (GC's) office to discuss any significant disclosure related problems, and that it is preferable they do this as early as possible, reassuring them that this is an avenue for assistance and that they will not be expected to have a proposed solution.

6.22. The CPIA Code permits appointment of one or more deputy disclosure officers (DDOs). DDOs can perform any of the functions of the DO, and naturally as with the DO they can be any member of case team (with sufficient training, skills and so on).

6.23. The OH then describes the role of the prosecutor. This individual is defined in the CPIA Code as "*the authority responsible for the conduct, on behalf of the Crown, of criminal proceedings*". Each case team must have an individual appointed to act as the prosecutor. The role must be performed by a lawyer. The prosecutor must also be of a grade equal to or more senior than the DO. The

prosecutor's critical disclosure responsibilities are to review schedules of unused material and determine whether or not each item meets the test for disclosure and then to provide material which satisfies that test to the defence along with a schedule of non-sensitive unused material and a DMD, the prosecutor must update the latter at significant points during the course of a case, and in any event at least twice a year.

6.24. The OH then discusses the role of the HOD. The CPIA Code reserves certain disclosure responsibilities to '*the chief officer of police.'* While the overall discharge of these responsibilities remains the responsibility of the Director of the SFO, in practical terms, a number of them are performed at a divisional level by the relevant HOD. In addition, the HOD has to ensure that each case has a prosecutor and a DO.

6.25. The OH then mentions prosecution counsel and review counsel. Prosecution counsel may include a junior counsel appointed specifically to advise on disclosure issues. Review counsel is an independent counsel instructed to review material and/or to conduct quality assurance reviews as part of a disclosure review.

6.26. The OH then describes the role of document reviewers. These are individuals who are employed to undertake an initial review of documents to determine whether they are relevant, and then to describe the relevant ones in a CPIA compliant manner. It is common for such individuals to be junior members of staff recruited from an employment agency specifically to carry out this function. Each document reviewer must have sufficient knowledge and understanding of the case to enable them to identify relevant material. The DO is responsible for providing sufficient information and training to each document reviewer to enable them to perform their role.

6.27. In the cases we examined the critical roles were all filled and where necessary replacements were appointed promptly. This was in accordance with the OH however we highlight lack of experience of some of the appointees.

Part 3 – setting a disclosure strategy

6.28. This part begins with a reminder that the CPIA Code requires investigators to pursue all reasonable lines of enquiry, whether they point towards or away from a suspect. The OH does then emphasise that this does not mean that investigators are required to pursue all lines of inquiry, or that they have to embark on an endless investigation.

6.29. Investigators must record and retain material which may be relevant to the investigation. They must always seek to obtain material in as targeted and focused a way as possible.

6.30. SFO case teams must consider the specific approach that they will take to disclosure at the start of the investigation and as part of their investigative planning. This should include determining which lines of enquiry are reasonable, what material needs to be obtained and retained (including electronic devices and how these will be examined), what is relevant and how relevant material will be identified and scheduled (and what material, if any, will be block listed).

6.31. The disclosure strategy must be set out in the DSD. The disclosure strategy must be kept under review and be updated throughout the lifetime of an investigation and must be reconsidered in the light of changing information. The DSD, which is a living document, must be updated accordingly. The OH gives the example of information being provided by a suspect in interview, as an occasion when the disclosure strategy will need to be reviewed.

6.32. The purpose of a DSD is to identify how the case team will comply with the various disclosure obligations imposed by the CPIA, the CPIA Code and the AGG in light of the specific facts, issues and circumstances of the matter under investigation.

6.33. Responsibility for completing and updating the DSD lies with the CC. The DSD must identify the lines of enquiry considered appropriate to the investigation and explain which are considered reasonable and will be pursued, and which are not considered reasonable and will not be pursued. The DSD must cover the sources of the material to be obtained, the approach that will be taken to analysing digital and non-digital material, how and by whom the disclosure review will be conducted and how that review will be quality assured. It should also explain how material will be scheduled (including whether block listing will be deployed). The DSD should also specify the approach that will be taken to any sensitive material, material over which there are potential claims of Legal Professional Privilege (LPP)[9] and third party material. A DSD should be prepared as soon after the opening of an investigation as possible.

6.34. In both cases we examined the DSD was not updated in accordance with the OH. This was of the greatest consequence in GRM02. The failure to update the DSD after the DPA was entered into with G4S demonstrated a lack of understanding by the case team that this agreement had the potential to impact on the case against the individual defendants and critically affected the disclosure exercise the SFO would have to undertake. Had the case team updated the DSD this would have turned their mind to the way in which the disclosure exercise needed to be reconsidered which may have altered the ultimate outcome of the case. The measures the SFO now has in place to check key documents on the case drive as part of its internal assurance process make

[9] See para 6.46

this kind of shortcoming unlikely in the future (this includes the need for the HOD to check the DSD before each Disclosure Review Meeting).

6.35. If an investigation proceeds to a prosecution, the disclosure strategy must then be detailed in a DMD. The purpose of a DMD is to explain to the court and the defence, in a transparent way, the strategy and approach adopted in relation to disclosure and any outstanding steps that will be taken in the period between the Plea and Trial Preparation Hearing (PTPH) and trial. This both assists the court with case management and enables the defence to engage with the prosecution's approach to disclosure and make any representations or applications that they deem necessary.

6.36. Like the DSD, the DMD is a living document (except that a DMD must not be altered once completed; any changes must be set out in an addendum DMD). In all SFO cases an initial DMD must be prepared for the PTPH, and then addendum DMDs must be provided at least every six months. The initial DMD should set out the case team's approach to disclosure, the processes deployed and the intentions behind them. The addendums should reflect any changes or developments in the approach or process as well as to the issues in the case.

6.37. The initial DMD should explain what disclosure work remains outstanding. Each addendum DMD should explain the work completed since the previous DMD and detail what disclosure work remains outstanding along with the plan for completing it.

6.38. DMDs were seen by all SFO staff we interviewed as a crucial document in the types of cases that the SFO deal with as well as a means to safeguard the SFO because they are seen by judges. DMDs serve as a tool to demonstrate what has been done, as well as, crucially, what has not been looked at. A comprehensive DMD means that the defence can be invited to give their input into the approach to disclosure in advance of service of a defence statement. The DMD can set out the stages of the disclosure process, how LPP has been dealt with and can also specify any technical limitations.

6.39. The operational handbook provides guidance and a template for the DMD. The DMDs in the two cases we examined had some issues that could have been improved. For instance, in GRM02, the DMD could have explained better the search term methods deployed.

6.40. Disclosure Review Meetings (DRM) and a more focused approach to disclosure assurance should lead to better compliance with the process of completing DMDs. Our judgement is that improving the DMD template would be helpful. The DMD template should be updated to provide enhanced guidance to

those completing it to make it more robust as a tool and to provide greater clarity about the disclosure process adopted by the SFO.

Recommendation
By October 2024, the Serious Fraud Office to revisit the guidance provided in the Disclosure Management Document template to ensure that it guides the case teams to fully explain the disclosure process employed and safeguard their position should their disclosure handling be challenged.

6.41. In addition to the DSD/DMD case teams must maintain a DDL. All decisions made in relation to disclosure must either be recorded in the DSD or the DDL. The DSD should be used to record strategic decisions (e.g. the identification of an individual as a suspect) and the DDL to record operational decisions (e.g. the decision to obtain a certain item of material). The question of whether a decision is a strategic or an operational one is a matter of judgement for the case team.

6.42. It is essential that accurate and up to date DSDs, DMDs and DDLs are maintained, which explain how the disclosure process was conducted. This reduces reliance on individual knowledge and guards against case progression being hampered if key individuals leave the team.

6.43. In both the cases we examined the DDLs were not regularly updated. In BGC01 some, but not all, of the key operational decisions were recorded on the DDL. Generally, however, the decisions were recorded somewhere on the file. The picture with GRM02 was much less consistent. Many of the key disclosure decisions were not recorded on DDLs or anywhere else on the file. There were no DDL entries for the entirety of 2021, a crucial year for the prosecution of the case in which initial disclosure was served, the first responses to the defence statements were provided and a prosecution application was made to adjourn the trial. The lack of any record of such important decisions had a significant impact; this caused the SFO significant problems in the latter stages of the case as they were unable to explain to either the court or the defence why certain decisions were made.

Part 4 - managing material

6.44. This section contains guidance on how material should be processed and tracked so that it is available for disclosure review. There are strict procedures for how material obtained by the SFO must be bagged, sealed and booked into the Evidence Handling Management Office (EHMO). Digital material will then be passed to the Digital Forensic Unit (DFU) for processing.

6.45. It is clear to us from the examination of the two cases we examined, in both of which millions of items were obtained and processed by the SFO, and

from reviewing the procedures in place ourselves, that the SFO mechanisms for handling material are very good; in our view every item of material obtained during the course of an SFO investigation will be properly processed. We are satisfied that the guidance within the OH in this regard is fully embedded and followed.

Legal Professional Privilege

6.46. A serious fraud case involving the search of millions of electronic files will inevitably involve handling material which is protected by LPP, material that shall not be shared in court or with the prosecution.

6.47. LPP material has two distinct varieties, legal advice privilege and litigation privilege. Legal advice privilege protects communications between a lawyer and client that are made for the sole or dominant purpose of giving or receiving legal advice. Litigation privilege protects communications between lawyers and their clients and third parties for the purpose of obtaining advice or information in connection with existing or reasonably contemplated litigation. Both types of LPP material are protected from disclosure, and the SFO is required to handle LPP material consistent with the protections afforded under the law.

6.48. In short, this means that where there are reasonable grounds to believe that material the SFO acquires may be subject to LPP, the SFO must quarantine the material and have it reviewed by independent counsel to make a determination as to whether it does or does not contain LPP. In practice, this is more challenging since hard drives, servers, and thumb drives will ordinarily contain a mix of both LPP and non-LPP material.

6.49. Reviewing documents that may be subject to LPP is a time-consuming part of the disclosure process. It requires a review process to establish whether privilege applies. Only once that has taken place can those documents deemed not subject to privilege be released for review. An efficient disclosure operation therefore requires an efficient system for releasing documents under LPP consideration back into the pool for review.

6.50. Part 4 also contains some guidance on the approach to be taken to LPP, the main point made is that the case team should attempt to agree a process with the privilege holder. There is a separate section of the OH which covers LPP.

6.51. In both the cases we examined the case teams had a system for dealing with LPP and both worked well. In BGC01 the bespoke system adopted by the case team (as set out in the case summary) went beyond the requirements set out in the OH. This was appropriate because of the uniquely complex issues

surrounding LPP in the case and the potential they had to derail the prosecution. The time and resources dedicated to LPP in BGC01 was, in our view, an important factor in the ultimate success of the case. In GRM02 the system deployed was more standard. LPP material was properly reviewed and released back to the case team. However, it must be noted that the case team overlooked the release of over 4000 documents from LPP quarantine, only realising this issue in December 2022. This was not a fault of the LPP system but does highlight the challenges presented to case teams by the release of material to them from quarantine and underlines the need for the disclosure exercise to be organised and for someone to have proper oversight of it.

Part 5 – reviewing material

6.52. This section sets out that all relevant material needs to be inspected, viewed, listened to or searched. Search terms are a critical tool in this endeavour; the use of search terms amounts to the following of a reasonable line of enquiry, the purpose of which is to find relevant material. The selection of appropriate search terms requires the exercise of skill and judgement. If the terms are too narrow, they will not identify relevant documents. If they are too wide, they will identify so many irrelevant documents that it will be impractical to manually review the results. Therefore, search terms need to be reasonable and proportionate.

6.53. When it comes to the review of documents (whether these are the product of search terms or the entirety of a seized item of material) there are three discrete tasks which must be completed by a case team. The way the tasks are structured is a matter for each case team and must be detailed in the DSD and DMD.

6.54. The first task is the relevance review. A document will be relevant if it is capable of having a bearing on the case. If a document is determined to be relevant then it must be described in a manner which is compliant with the requirements of the CPIA Code (which means making clear what *the nature of the item is and providing sufficient detail to enable the prosecutor to decide whether they need to inspect the material before deciding whether or not it should be disclosed*).

6.55. The second task is the undermine/assist review. All relevant material must be reviewed to determine whether it satisfies the test for disclosure (i.e. whether it is reasonably capable of undermining the prosecution case or of assisting the defence case).

6.56. The third task is the quality assurance review**.** The work of the individuals undertaking both relevance reviews and undermine/assist reviews must be

checked and quality assured. This will involve a percentage of the documents each individual has reviewed being checked to ensure that material has been correctly classified and, where appropriate, described.

6.57. It falls to the DO to monitor the progress and quality of both the relevance reviewers and the quality assurance reviewers. It is suggested that the DO use statistical analysis of the decisions made by reviewers to identify outliers to whom more attention needs to be paid (the statistical analysis would focus on numbers of review determinations changed by the quality assurance process, speed of the document reviewer and the number of documents reviewed by a single reviewer).

6.58. The DO is responsible for the recruitment of, induction of and guidance provided to the document reviewers. The DO is expected to create a reading-in pack for the document reviewers and to meet with them regularly. It is the DO's responsibility to ensure that document reviewers have been trained on how to use the tagging panel in the SFO's Document Review System (DRS), Axcelerate. The DO is also responsible for the creation of a case specific guidance document which document reviewers must follow when reviewing and describing documents.

6.59. On both cases we examined the review process was conducted in stages as set out in the OH. On both cases there was specific document review guidance on the SFO system, which was regularly updated. The guidance was comprehensive and accurate. However, it seemed that in both cases it was external counsel who provided the day-to-day supervision of document reviewers and not the DO. While the supervision was effective, this was not compliant with the OH.

Part 6 – quality assurance

6.60. SFO disclosure reviews typically involve large numbers of people reviewing vast numbers of documents over long periods of time; the SFO recognises that unintentional errors and mistakes are to be expected and can never be eliminated entirely. Therefore, the quality assurance requirement exists, the key purpose of which is to identify errors which occur and to correct them as quickly as possible, as well as to provide feedback to prevent similar issues from being repeated in the future.

6.61. The percentage of documents reviewed by a document reviewer which are subject to a quality assurance review, should vary from reviewer to reviewer; vary according to the material being reviewed; be different for relevant and not relevant documents; and change over time. The DO is expected to review all feedback provided to document reviewers and to make appropriate changes to

the review guidance and to the quality assurance percentages based on that feedback.

6.62. The DO should check a percentage of the quality assurance reviews to make sure that each quality assurance reviewer is conducting reviews correctly. It is for the DO to decide the percentage to be checked and the method to be used for such a check.

6.63. In both cases we examined there was a quality assurance process which appears to have been followed. The record keeping for this on GRM02 could have been more complete, but the evidence demonstrates that quality assurance did take place.

Individual listing

6.64. Individual listing requires all items of relevant material to be listed separately on the schedule of unused material and numbered consecutively. Each item will need to be described in a way that makes clear what *the nature of the item is and provides sufficient detail to enable the prosecutor to decide whether they need to inspect the material before deciding whether or not it should be disclosed*. Items will be described in the review process described above.

6.65. Any relevant material not contained on the review platform will also need to be added into the unused schedule. This may include material in the SFO case drive.

Block listing

6.66. The CPIA Code and the AGG allow for the use of block listing but do not define it. The SFO considers that the only way to fulfil both the requirement for each description in a schedule to make clear the nature of the material and the requirement for the prosecutor to review each item listed on the schedules is to use block listing to record multiple items in a single entry where their general nature is described in sufficient detail to enable the reader (including the prosecutor, the defence and potentially the court) to identify what the items within the block are. It should be possible to tell from the description the broad nature of the contents of items listed in one entry.

6.67. There is a requirement that any case team that wants to use block listing must speak to GC's Office beforehand to check that their proposed method of block listing will meet the legal tests, and to ensure that a consistent approach is being adopted across the SFO.

6.68. The guidance states that where block listing is used, consideration should be given to providing the metadata for all the material within the block to

the defence (by listing that metadata separately on the unused schedule). The use of block listing and provision of metadata is not a substitute for the need to review material for relevance.

6.69. The OH was different at the time the scheduling exercises were completed on the two cases we examined. In particular there was no requirement to consult with GC's office before utilising block listing. Both cases used block listing to considerably different effect.

6.70. In GRM02 the entire SFO case drive was block listed in one entry. As we have set out above, this is not how block listing should be done and was not compliant with the guidance in place at the time, currently or with the CPIA. The decision to block list in this way was not recorded or explained on the file. The SFO case drive contains a vast amount of material; the SFO always need to review that material and properly list the relevant items. Furthermore, the case drive in GRM02 contained significant material which met the disclosure test in the form of documentation relating to the DPA entered into with G4S. The exercise of properly scheduling the internal material was never completed. The case team knew that this task needed to be undertaken and on different occasions they set about doing it. However, that task was continually of less priority than other urgent disclosure issues, and so was paused and did not receive the attention it required. To compound the problem the internal case material inevitably continued to increase over time, so too the task itself continued to expand.

6.71. Considering the different approaches to the use of block listing in the cases we examined, it is understandable that the SFO would implement a process in the OH which would encourage consistency. The way the case team in GRM02 utilised block listing with the case drive was clearly inappropriate and should never have been done. By way of contrast block listing in BCG01 was used to great effect.

6.72. On any view the SFO faced a huge task to schedule the unused material in BGC01. The case generated some 8.5 million documents. To review, describe and schedule all the items in BGC01 would have had huge resource implications not only due to the sheer volume of items to be described but due to the complex nature of many of the documents themselves necessitating a complex and lengthy individual description to be compliant with CPIA. This would in turn generate very lengthy schedules containing large numbers of items which, while "relevant" as defined under the CPIA, would in reality have little or no bearing on the real issues in the case. Such schedules are not only hugely time consuming to produce but can be confusing and unhelpful to the defence.

6.73. The case team took the decision to follow a block listing approach with regards to the bulk of the digital unused material to be scheduled: over 140,000 individual hits from relevancy search terms. All the relevant hits would still be reviewed but individual descriptions and individual entries on the schedule would only be generated where an item was deemed as either undermining the prosecution case or assisting the defence case. This resulted in schedules of unused material which were much shorter than if each separate item of relevant non-disclosable unused material had been separately listed. In addition, where it existed a schedule of metadata for the items was also provided in relation to the items listed in block. An explanation for the approach taken including a guide to interrogating the metadata was recorded in the DMD which was provided to the defence and the court at an early stage. There was no significant challenge to the approach taken by the defence teams.

6.74. Inspectors take the view that the approach to block listing in BCG01 was proportionate and compliant with the law and guidance when the decision was taken and allowed for a thorough disclosure exercise while saving the case team significant resources which could be deployed elsewhere in the disclosure exercise. In interviews with SFO staff it was made clear to us that the organisation views the use of block listing in BCG01 a success and seems keen to repeat it. We strongly encourage the SFO do so.

Revelation of material to the prosecutor

6.75. The OH recognises that the process of revelation is predicated upon a model for investigating and prosecuting cases in which prosecutors and DOs are physically separate and working in different organisations. As already stated, this does not apply to the SFO who operate on the Roskill model.

6.76. For this reason, the SFO has created its own process for revelation. In essence this involves the DO providing the prosecutor with the schedule of unused material (as above). The prosecutor should then review the schedule with the DO, following which the DO is to produce a final version of the schedule with the prosecutor's disclosure decisions recorded against each entry, which should be signed and dated by the DO and the prosecutor.

6.77. In BCG01 the schedules were completed in this way. In GRM02 none of the schedules were signed or dated.

Providing material to the defence

6.78. This section sets out that the disclosure duties under the CPIA do not apply at the commencement of a prosecution, but that there is a common law duty to disclose material in the interests of justice and fairness. The OH then covers the three stages of disclosure under the CPIA (initial disclosure, defence disclosure and continuing disclosure).

6.79. The SFO typically complete initial disclosure in phases. The OH states that each phase of initial disclosure should entail a letter being sent to the defence which contains a signed schedule of unused material and, either provides a copy of the material that needs to be disclosed; or a declaration that there is no such material to disclose.

6.80. The OH recognises that continuing disclosure and phased initial disclosure are ongoing processes, which potentially operate concurrently on SFO investigations. The guidance stresses the importance of complying with continuing disclosure obligations whenever new information comes to light, by re-considering material that has already been reviewed, and decisions made about that material, taking into account the fresh information to ensure that material that was not previously considered to satisfy the disclosure test, but which now does, is identified and disclosed.

6.81. In BCG01 initial disclosure was completed in phases and continuing disclosure obligations were clearly complied with.

6.82. In GRM02 initial disclosure was also completed in phases (the process was never completed due to the need to rerun search terms owing to the punctuation issue). The SFO purported to comply with continuing disclosure but we question how well the re-consideration of material was conducted, given for example the very late disclosure of the DPA material.

Altman Review

6.83. The Altman review contained two recommendations which related to the OH:

- Recommendation 6: the SFO should revise the Operational Handbook to introduce standardised methodologies for the disclosure process, as well as introduce management, oversight and monitoring regimes to ensure that the disclosure process is conducted and audited to the same standard across all case teams.

- Recommendation 7: the SFO should revise the Operational Handbook to include a standardised model for the conduct of Quality Assurance reviews, which ensures (a) that Quality Assurance reviews are compliant with the law and guidance on disclosure and (b) that Quality Assurance reviews are robust, reliable and proportionate.

6.84. We consider that the revisions to the OH are appropriate and beneficial and that the SFO has largely complied with these recommendations.

7. Assurance and learning

Casework assurance and learning

Formal review meetings

7.1. The Serious Fraud Office's (SFO) assurance process has been significantly changed over the past 18 months. There has been an organisational shift from the bulk of the formal casework assurance being conducted by General Counsel (GC) through Case Review Panels (CRPs) to Heads of Division (HODs) overseeing the formal assurance processes through Case Review Meetings (CRMs) and more recently Disclosure Review Meetings (DRMs). These are held on every case, at a minimum of six-monthly intervals.

7.2. In our last report[10] we were positive about the moving of case assurance to HODs, saying that assurance was now in the hands of the senior manager with the most knowledge of the case and overall management responsibility for the case team, meaning that the assurance process is more likely to discover any issues with the progression of the investigation while also making it far easier to set the case team appropriate actions.

7.3. In addition to this having a separate DRM, solely focused on the disclosure issues in a case, is clearly a sensible step and will allow time to be dedicated to the discussion of the disclosure exercise, without the distraction of the need to cover other aspects of the investigation.

7.4. CRPs were replaced in 2022 by CRMs. CRPs had only been held on pre-charge cases. Initially CRMs (and DRMs) were also only held on pre-charge cases. However, the SFO now holds these meetings on post-charge cases as well, a change that was introduced in 2023. This is another significant positive change. However, the SFO recognises that DRMs alone will not provide sufficient assurance of the disclosure picture on cases and there is a raft of other measures in place.

7.5. We have been provided with minutes of DRMs from all three casework divisions. We saw some inconsistency across divisions in how these meetings are recorded and in how much challenge there was to the case teams from the HODs. However, it is clear that these meetings are taking place regularly, as required, and we saw evidence that training needs of disclosure officers (DOs) were regularly considered. From interviews with staff there was a generally positive view of DRMs. Many on case teams felt challenged by HODs at these meetings and felt that the meetings helped ensure that there was a focus on key

[10] Follow-up inspection of the Serious Fraud Office – case progression (justiceinspectorates.gov.uk)

disclosure issues, as well as showing that there was support from senior management available should it be needed.

7.6. Guidance states that before deploying individuals into one of the specialised roles, HOD and the case controller (CC), assess and review their disclosure skills and further review during disclosure review meetings. This measure is designed to ensure that individuals possess the necessary capabilities for their role. In the event of an identified skill gap, the individual will be expected to undertake further training. Our interviews indicated that the required discussions were taking place, but that due to the pressure of resource that sometimes appointments were made of staff with limited experience.

Additional divisional level assurance

7.7. In addition to the assurance provided by DRMs, CCs are required to submit a quarterly disclosure report to the HOD on each of their cases, identifying issues and risks, which are then discussed by the HOD and CC, with supplementary oversight provided by further regular meetings which take place between the HOD and the CCs.

7.8. We have been provided with a range of quarterly disclosure reports from all three casework divisions, which was clear evidence that the CCs are producing these reports, which are detailed.

7.9. Each casework division now has a Deputy HOD and an Assistant General Counsel (AGC) allocated to be responsible for providing advice and undertaking assurance for each division. Deputy HODs and AGCs work with case teams and with the HOD to ensure that disclosure exercises remain on track.

7.10. One of the significant advantages to this new arrangement is that AGC and Deputy HODs review material held on the case drive, which allows for more effective assurance and challenge, and a degree of independent assessment. Previously those providing assurance had to rely entirely on what they were told by the case teams.

7.11. In this way an active check can be maintained on things like the Disclosure Strategy Document (DSD) and the Disclosure Decision Logs (DDL); both key documents which should furnish an audit trail of disclosure decision making and which were both neglected in the two cases we examined.

7.12. There has also been a move to require case teams to use more standardised templates for documents on cases which makes it easier to carry out an audit of key documents. Additionally, the Axcelerate system also means that material which needs to be processed for review can be tracked more

easily. This enables both case teams and HODs and their deputies, to be better informed about how much material remains to be processed and reviewed on a case.

7.13. In our focus group interviews with CCs, DOs and deputy disclosure officers (DDOs) the change in assurance and degree of challenge was confirmed by some. It was obvious that this recent change was beginning to become more embedded within the assurance process, but some staff we spoke to did express the view that this assurance was unnecessary, because they knew their cases best. Our view is that a degree of independent assurance is helpful, and any checks that improve the consistency of practice across the organisation to aid effective handover is positive. The SFO still has some way to go to ensure that all staff understand and accept that assurance and challenge is central to driving up standards and performance. Culturally some staff in SFO still remain of the opinion that they know best; this is unhelpful.

Assurance in GRM02 and BGC01

7.14. The two cases we examined, GRM02 and BGC01 were both charged prior to the introduction of CRMs. CRPs were held on both cases pre-charge. From the notes we have seen there appears to have been no more than cursory mention of disclosure in any of these meetings.

7.15. On BGC01 a CRP was held post-charge which was entirely focused on disclosure; this does appear to have been of benefit and certainly identified all the key disclosure issues. There was no such meeting on GRM02.

7.16. There was significant senior management oversight in GRM02 at the post-charge stage. This is perhaps unsurprising because it was one of the SFO's highest profile cases after the collapse of GRM01 and of the utmost priority to the organisation. This is reflected by the fact that from 2022 onwards senior management were receiving monthly progress reports about the case and GC was holding regular meetings with the CC, which did provide some degree of case assurance and challenge.

7.17. We saw in GRM02 weaknesses in the internal assurance processes in place at the SFO. Senior level oversight was focused on case readiness, risks and resourcing. This oversight was not specifically focused on case assurance (i.e. checking that activity was being completed, challenging daily actions or case decisions). With hindsight and through our case examination our view is that the monthly progress reports produced by the case team in 2022 were unduly optimistic, with the case team clearly failing to appreciate the potential consequences of the disclosure tasks which would inevitably remain outstanding by the ultimate disclosure deadline of 8 September 2022. This was a critical

issue and the degree of case oversight (it being high-level and the information being provided by the case team) meant that there was no effective challenge. In our view the management oversight that was focused on case readiness, risk and resourcing was not an effective system of assurance. The fact that the CC was reporting to General Counsel and not within the division added some confusion on how case assurance was being conducted and the monthly oversight reports may have added further confusion.

7.18. Because of the lack of clarity between oversight and assurance we saw no evidence that senior management either perceived the undue optimism in the monthly reports or that there would remain outstanding disclosure tasks after the final disclosure deadline had passed. Reports being provided by the CC continued to offer assurance that the disclosure exercise was on track and would be completed. This meant there was no proper challenge put to the case team and little awareness of the outstanding tasks.

7.19. The result of this was that the case proceeded to a stage in December 2022 when the SFO was forced to acknowledge that they would not be trial ready by January 2023, with the opportunity to rectify, or at least recognise, this at an earlier stage having been missed.

Optimism bias

7.20. In our interviews with SFO staff the overwhelming majority conceded there was an “optimism bias” at the organisation. This bias was described as having two facets; first, that the case teams are heavily invested in the cases they have been investigating, often for many years and will tend to be overly certain of a positive outcome, such as a conviction.

7.21. Second there was a belief expressed by some staff we spoke to that senior managers only wanted to hear “good news” and that dropping a charged case would be viewed as a failure. Our view is that it is not as binary as it may be perceived by staff. The commitment of resources to GRM02, including pausing the bulk of work on all other divisional cases and moving a large number of personnel from other cases to that disclosure exercise in 2022, could reinforce this impression to SFO staff. However, equally there is evidence that cases are often stopped after discussion and authority by senior management. There is recognition by senior leaders that some decisions may have fed the view held that senior management want convictions. However, it was clear in our discussions with senior management that there is now much more determination to challenge case teams and to ensure that prosecutions are brought to an end expeditiously, when appropriate. Some staff we interviewed believed that the organisation was now more balanced about what defined a successful case, including ending them early.

7.22. The SFO has introduced an initiative to improve the efficiency of its casework, which should see investigations which are unlikely to proceed to a positive charging decision abandoned far more quickly than in the past. This supports the assertion that the attitude at senior level has changed, but it must be noted that the initiative applies to pre-charge cases, not ones which have already been charged.

7.23. Our view is that there is still much work to do to dispel the impression that the organisation does not want to drop charged cases when it is appropriate to do so, which will continue to affect the information case teams provide to senior management during the assurance process.

7.24. It is quite clear that the SFO has revamped and strengthened its internal assurance processes considerably since the failure of GRM02. Much of what has been put in place provides considerable case oversight and challenge to case teams on how their disclosure exercises are progressing. We see the introduction of deputy HODs as a positive step which will have the dual benefit of an extra layer of case assurance and providing case teams with targeted and valuable support in conducting disclosure reviews. Furthermore, the clear determination of the organisation to end cases and the initiative to improve the efficiency of its casework is to be welcomed. Through more effective challenge, better assurance which has a degree of independent assessment by those not involved in the case, we expect that this should eventually lead to more willingness from case teams to report more robustly to senior management.

7.25. However, there must remain a caveat to this positive assessment of the new processes and measures; the fact remains that there was recent extensive senior management oversight of GRM02 and to some degree case assurance. This did not discover any of the fundamental problems that existed with disclosure in that case and this oversight and assurance was taking place throughout 2022 and into early 2023.

7.26. In interviews some senior figures conceded that the current assurance regime did not go far enough. It was accepted that while the assurance process is mainly reliant upon the information supplied by CC, that this poses a risk. The introduction of AGC and deputy HODs who can access case material gives some limited opportunity for independent assessment, and better challenge. However, it is unrealistic to expect anyone to be able to gain a comprehensive understanding of such voluminous material within a reasonable amount of time; certainly not within the kind of time available to HODs, deputy HODs or AGCs to prepare for CRMs and DRMs, or to review a quarterly disclosure report. When this is coupled to the optimism bias outlined above, it is clear that the current assurance regime, while an improvement, is unlikely to prevent the kind of problems which arose in GRM02 from happening again. This is because of the

continued reliance on the case team and the CC to effectively mark their own homework.

7.27. The SFO has a peer review process which is used on pre-charge cases. This entails an independent review of a case which leads to the production of what we described in our last inspection as "such useful and detailed reports". These reviews are undertaken by SFO Criminal Investigation Advisers (CIAs). The CIA looks at the whole case and interviews the case team, thereby conducting a forensically detailed examination of the investigation. The CIA then produces a detailed report which contains case recommendations and organisational recommendations and identifies good practice and learning points.

7.28. These reviews do touch upon disclosure, but as the review is of the investigation that is not the focus on a yet to be charged case. Had an analogous review been conducted upon the disclosure exercise in GRM02 after the failure of GRM01 (the investigation into Serco) it would likely have identified the problems and measures could then have been taken to address them in a timely manner. We consider there would be incredible value in a comparable review, conducted at the post-charge stage with a focus on disclosure, case strategy and case scope. These reviews should be conducted independently by someone not involved in the case to eliminate any optimism bias.

Recommendation
By September 2024, the Serious Fraud Office should introduce a disclosure review process, equivalent to a peer review, to be conducted on every case post-charge by an individual independent of the case team.

Case learning events

7.29. Case Learning Events (CLE's) take place following the closure of a case. They offer a valuable chance to review any lessons learned. CLE's have traditionally been chaired by CCs, but there has been a strategic shift in recent years, with Associate General Counsel now overseeing these meetings, providing a greater oversight from the senior leadership team.

7.30. We were provided with examples of minutes from CLE's which had occurred in recent months. Minutes show that CLE's are well attended by senior leaders, key members of the case team and the heads of other units such as the Digital Forensics Unit (DFU) and e-Discovery unit. The minutes provide good evidence that the SFO proactively attempts to understand what lessons can be learned from recent cases. While CLE's are well attended and contribute significantly to understanding the lessons to be learned from cases, concerns were raised during interviews regarding the effectiveness of disseminating

information from CLE's across the wider organisation. We were told that lessons learned are shared through various forums and groups. The SFO may wish to consider if this multi-forum approach is the most efficient and effective means of sharing information to the wider organisation.

7.31. CLEs examine events throughout the entirety of the case, from acceptance to closure. While disclosure is vital, it is just one part of these reviews. Inspectors attended the CLE for BGC01 and although there was some discussion about disclosure, the CLE touched upon numerous aspects of the case, such as staff training, processing evidential material, and case drive structures. The SFO should consider if, where appropriate a specific disclosure learning event should be an aspect to schedule on those cases where the disclosure process has been handled well or where there have been issues.

Issue to address
The Serious Fraud Office should consider if, where appropriate, a specific disclosure learning event should be held on concluded cases.

Disclosure working group

7.32. The Disclosure Working Group (DWG) is a practitioner level forum where operational staff discuss broader disclosure matters. The group is chaired by an experienced DO. The group serves as a forum for sharing information and actively addressing matters related to disclosure and is often attended by General Counsel and HOD.

7.33. The DWG discuss changes to disclosure training, amendments to disclosure processes, lessons learned from other prosecuting authorities and assisted with the development of changes to the operational handbook following the publication of the Altman review. The group also discuss operational issues which impact on the effectiveness of the management of disclosure.

7.34. The group is also responsible for developing new templates and guidance to support operational staff in managing the disclosure process more effectively. In recent months, the group have standardised a disclosure handover document. The document is designed to ensure that meticulous checks of key aspects, process and documents in the disclosure process are checked and in place if key personnel such as the DO is due to be changed.

7.35. The feedback provided to inspectors from staff across a variety of roles was that the DWG is viewed positively across the wider organisation. To maintain the effectiveness of the group, the SFO should ensure that insights and lessons learned continue to be communicated efficiently across the organisation as not all staff are members of the DWG.

Disclosure officer training and experience

7.36. The CC in consultation with the HOD is responsible for appointing the DO from the case team. The individual needs to have "sufficient training, skill, experience and authority commensurate with the complexity of the investigation to discharge functions effectively" (as set out in the CPIA Code, Attorney General's Guidelines and reiterated in the OH). Often, the DO will also act in another capacity in the case team such as an investigator or investigative lawyer while holding the role of DO dependant on the resources available to the case team. We heard that the SFO is currently considering whether to introduce specific DO and DDO standalone roles.

7.37. We found evidence of a lack of suitably experienced people available and willing to take on the role. We found this in both the cases and what we were told in general interviews on site. In BGC01 the DO in post at initial disclosure was a lawyer who had never previously prepared an unused schedule and the final DO in BGC01 (appointed about six months before the trial) was a lawyer who had no previous experience of disclosure in the criminal context and who was also new to the case team. This lack of experience placed an additional burden on other members of the case team, specifically the CC and on lead disclosure counsel.

7.38. This lack of suitably qualified and available people is compounded by the apparent reluctance of some individuals within SFO to act as DO. In GRM02 towards the end of the case a DO of undoubted experience and expertise was appointed but only on the specific terms that it would entail not only a temporary promotion for the duration of the role but also changes to the normal line management chain of command. From speaking to both sets of case teams and from our general interviews with staff at numerous levels the message was clear: for most the DO is currently a very unpopular role within SFO which few would undertake if they had a choice. More than one person we spoke to referred to the role of DO as "a very lonely job" and was seen by many as something of a cul-de-sac in terms of career progression within SFO.

7.39. Recent changes to DO training means that staff deployed in disclosure related roles must attend a detailed two-day course on the management of disclosure. We were told that this is designed to enhance the skills required for managing complex disclosure processes.

7.40. We re-iterate recommendation 4 from the Altman review.

Recommendation
By September 2024, the Serious Fraud Office should consider ways in which staff may be incentivised to take on the roles of Disclosure Officer and Deputy Disclosure Officer to increase the pool of able and experienced candidates and improve staff retention in those roles.

8. Serious Fraud Office stakeholders

Disclosure and stakeholders

Introduction

8.1. The Serious Fraud Office (SFO) has a number of stakeholders with whom they need to collaborate. Effective stakeholder relationships are key to successful disclosure handling both at the strategic and frontline level for the SFO. Strategically the SFO must navigate through the conflicting priorities of other government agencies, seeking to influence decisions to assist the discharge of their disclosure obligations. At the frontline, the SFO need to manage the volume of digital material and engage defence teams in the process, ensuring used and unused material is properly dealt with in line with the law and court orders.

8.2. To consider the impact of disclosure across the system we engaged with a number of practitioners.

The government

8.3. The government launched its Fraud Strategy in May 2023. It is to conduct a new independent review into the challenges of investigating and prosecuting fraud. The strategy includes the proposal to modernise the disclosure regime for cases with large volumes of digital evidence, such as those prosecuted by the SFO. The strategy accepts that due to the nature of fraud cases and the often-large volumes of complex evidence they generate, they can require significant time and resource to undertake a thorough investigation and bring a prosecution to court. The first phase of the independent review will consider how the disclosure regime can be streamlined for cases with large volumes of digital material, reducing the significant burden on law enforcement and prosecutors.

8.4. The SFO is involved in the independent review and will be able express views about the current disclosure regime and the impact it has on the SFO's ability to deliver within the allocated budget of the organisation. Our inspection, as set out in the scope, aims to aid the independent review based upon the findings from our fieldwork.

8.5. We heard from SFO senior leaders that prior to the government announcement of the Fraud Strategy 2023, the SFO had been campaigning to influence changes in legislation to ease the disclosure burden on investigating and prosecuting organisations that deal with high volumes of digital material. One area in particular the SFO has been focusing on is the guidance on block listing. The SFO, and the CPS alike, seek further clarification and guidance from

the government on the use of block listing[11] and how it may be deployed to ease the disclosure burden on their organisations.

8.6. The SFO collaborate with other organisations, including the Financial Conduct Authority (FCA), His Majesty's Revenue and Customs, the National Crime Agency (NCA), the National Economic Crime Centre (NECC) and the CPS, both on proposals to the government for reform and on matters of policy. The SFO engage with the government program headed by the Public Sector Fraud Authority (PSFA), who amongst other things is aiming to create a set of measurable industry standards for disclosure officers (DOs), with supervision being one of the main aspects being considered. It is hoped that set standards across the industry will assist with disclosure officer recruitment through making skills transferrable across government.

Other government departments

8.7. We were told by senior leaders that the SFO is actively looking at how other organisations operate their disclosure models. They have looked at the NCA model in terms of legal staff and the FCA in terms of their disclosure model. The SFO has also worked internally to engage with staff about how it may improve the resourcing and professionalisation of the disclosure role.

8.8. We spoke to the FCA as part of this inspection. The disclosure model they use is one of a central hub for disclosure handling; a separate disclosure unit that deals with disclosure and includes all FCA disclosure officers (DOs) and deputy disclosure officers (DDOs). DOs are assigned to case teams but are managed from the central unit. The FCA introduced this model of a separate disclosure unit to both remove disclosure responsibility from investigators and to reduce the need to instruct counsel. The unit also allows for the specialism of disclosure to be developed and contains staff of varying levels of seniority, with a clear path for career progression.

8.9. The FCA Disclosure Unit sits separately from investigation teams. The DOs and DDOs from the disclosure unit remains part of that unit but works with the case team and runs the disclosure exercise. The DOs carry a portfolio of allocated cases including Legal Professional Privilege (LPP) work.

8.10. Although we make no specific recommendation, it is our view that a centralised disclosure unit could potentially deal with a number of risks highlighted in this report. Such a unit could make the DO role more attractive with the creation of a career path for those dealing with disclosure. A discrete unit may also help plan and manage the allocation of DOs to case teams. There

[11] The Attorney General's Guidelines on Disclosure – 2024 provides further detail – effective from 29 May 2024

is also the prospect that disclosure of LPP material could be managed by a central unit (which is how this works in the FCA) which would take some burden away from eDiscovery.

International stakeholders

8.11. Those with experience of having worked with the SFO and the United States Department of Justice highlighted the stark difference between the disclosure regimes of the two countries as a barrier to speedier case progression at the SFO. The most significant difference in the U.S. is that all material is handed over to the defence. This has the substantial benefit of removing the risk that something exculpatory or undermining could be missed from within a large pool of unused material, which may contain millions of documents.

8.12. The UK regime requires that documents are scheduled[12], which can be very time consuming and resource intensive. It is also inevitable that when the pool of material is so large, often running to millions of documents, relevant documents could be missed. No doubt the independent review commissioned as part of the Fraud Strategy mentioned above will explore the safeguards that the current regime provides against the burden it places on the prosecution. It was out of the scope of this inspection to consider how differing international models for the handling of disclosure might impact the operation of the current system.

The role of the courts and judiciary

8.13. The responsibilities of the judiciary in relation to case management as it specifically relates to disclosure is set out in the background in chapter 3. The legal framework and protocols are clear on the responsibilities of each party in the case and also give guidance to judges on the handling of case management.

8.14. During our interviews with staff, we were told that there is a frustration and a perception within SFO case teams that some judges do not always make full use of their case management powers from the earliest stage of a case. We cannot comment on the views expressed as this was not evident on the cases we examined and to preserve the independence of the judiciary, we were not able to engage with judges presiding over SFO cases as part of this inspection. The SFO will want to engage with the judiciary at a strategic level to address some of the SFO staffs' perceptions regarding judicial management of SFO cases.

8.15. The role of the judge is central to the effective discharge of all parties' responsibilities in relation to disclosure. The role is core to the handling of the

[12] See para 6.64

case by the parties and is especially so for the management of disclosure. The Control and management of heavy fraud and other complex criminal cases - Criminal Procedure Rules Protocol[13] states: “At the outset the judge should set a timetable for dealing with disclosure issues. In particular, the judge should fix a date by which all defence applications for specific disclosure must be made”.

8.16. We heard from SFO staff that timetabling disclosure issues, setting fixed dates by which applications have to be made, and, establishing stringent timetables, is essential to enforce compliance. Training at the SFO encourages instructions to counsel at the Plea and Trial Preparation Hearing (PTPH) to ask for a timetable to deal with disclosure and to make sure that it is set sufficiently in advance of the trial date so that any consequential work can be completed in good time. Such powers are important, in lieu of the primary legislation. Specifically, we heard from SFO staff dealing with cases that they find that it is common for defendants (or the defence acting on their behalf) to fail to respond to Disclosure Management Documents (DMD); delay making section 8 applications; and, then to make wide-ranging and speculative disclosure requests at a late stage.

8.17. Some staff felt that there has been a change in culture relating to disclosure. Given recent case failures and the degree to which poor handling of disclosure featured in the two reviews; Altman and Calvert-Smith disclosure features more prominently. Case teams felt that they are asked to provide much greater detail than in previous years in terms of disclosure. There also appears to have been a cultural shift on how material is described and the defence challenge disclosure a lot more than they once did.

8.18. The SFO staff we spoke to commented that without early defence engagement, the SFO are at risk of disclosure being used to cause issues before the commencement of the trial, which many SFO staff consider to be a deliberate tactic. Judicial case management powers were seen as a possible solution. We saw in both cases we examined that effective early defence engagement requires significant thrust from the prosecution.

Issue to address
The Serious Fraud Office should seek to engage with the judiciary at a strategic level to address some of the SFO staff perception regarding judicial management with their casework.

8.19. The majority of SFO cases are heard at Southwark Crown Court. The SFO engage regularly with the court in a number of forums. The defence community are also engaged in these forums.

[13] justice.gov.uk/courts/procedure-rules/criminal/pd-protocol/pd_protocol

8.20. Block listing, as set out previously, is a tool that can be used to ease the disclosure burden on the prosecution. There is a lack of detail in the Attorney General's Guidelines (AGG) on block listing. Some SFO staff said they would welcome greater clarity being provided[14].

8.21. We heard from the FCA that it often uses block listing. It's interpretation of the 2022 AGG is that the use of it is encouraged. It regards block listing as the only sensible approach, citing that it is not possible to describe every individual document in large cases.

The defence

8.22. To make disclosure more effective, in recent years the AGG has placed increasing importance on ensuring defence engagement in the disclosure process from an early stage[15].

8.23. Early engagement with the defence is part of the AGG and is promoted by the SFO. We were told that some case teams will invite the defence to discuss search terms and to run search terms through the system together. This early engagement can be productive and allows for discussion to gauge the impact of search terms and the number of hits they produce. This approach also allows for immediate discussion if search terms do not work or need refining. However, it is not common for the defence to engage or accept the invitation for early engagement. Search term discussions are usually required in court. The view expressed by the defence was that it is impossible for them to engage without a case summary, and without knowing what the case is against their client. We were told by defence practitioners that this information is ordinarily missing when the SFO ask them about additional lines of enquiry or additional search terms; this makes defence engagement very difficult at the pre-charge stage.

8.24. There is some concern at senior level that case teams can lack sufficient robustness in negotiations over search terms and can agree to searches that cannot be adequately managed with the resources available. In addition, concerns were expressed that SFO counsel would sometimes agree to review more material than was necessary.

8.25. Defence practitioners told us that it is in their (clients) best interest to engage with the prosecution to ensure searches are run properly in order to get the right material. However, if they do not know whether their client is going to be charged, revealing their hand can carry a risk to their client. They are far

[14] The Attorney General's Guidelines on Disclosure – 2024 provides further detail – effective from 29 May 2024
[15] See para 8.48

more likely to engage to try to persuade the SFO that there is no case against their client. If their client is charged, then it will be in their interest to seek proper disclosure.

8.26. SFO staff commented that with search terms, the more you know about the case the better search terms will be applied. This takes time and constant refinement. Early defence engagement is required for this process to be more effective. We heard from some case controllers that they instruct counsel to holding off attempts to fix the trial date until the defence engage. Under BCM[16], the defence are required to engage. Whether they do is often dependent on the defence case team. Most defence are well-funded and liaise with each other so are fully aware of how to apply pressure to SFO stretched resources.

8.27. One of the main issues underpinning the SFO's calls for changes to the disclosure regime is that the defence do not sign up to the approach and process at a sufficiently early stage. Carrying out work on disclosure without any defence engagement pre-charge is often the norm in volume crime with police forces investigating, however the volume of material gathered in SFO cases, combined with the broad definition of relevance, require significant amounts of disclosure work to take place pre-charge. If defence representatives do not engage during the pre-charge stage (there is no legal requirement for defendants to do so) much work on disclosure is therefore carried out by the SFO without a full understanding of what may be relevant or what the true issues in the case may be.

8.28. The defence cannot be forced to engage. We were told that often the defence will wait to the last minute to engage with search terms so the SFO must anticipate the defence and then often have to re-run searches when eventually the defence do engage.

8.29. The view that we heard from the defence was that the SFO has a cultural issue of not wanting to disclose material and of using the CPIA[17] to deny defence disclosure requests, only for a judge to order the material to be disclosed once a section 8 application has been made. We were told that this was a particular problem with material generated by a defendant to which they no longer had access (such as emails sent and received while in the employment of a company the defendant no longer worked for). Some defence practitioners considered that the rules should be changed so that such material fell to be automatically disclosed. Defence practitioners also felt that the SFO will often not engage with them about material that they have requested, insisting on

[16] judiciary.uk/guidance-and-resources/better-case-management-revival-handbook-january-2023/
[17] See para 3.8 for disclosure test under CPIA

a defence statement first, only ultimately handing the material over upon order of the court. Defence asserted that this wastes a significant amount of time.

8.30. We heard from a defence practitioner who had previously worked with the SFO, that the framework under which the SFO operates allows the defence to use disclosure to put pressure on the prosecution. There was a view that the SFO is so worried about disclosure failures it replies to everything from the defence, despite the volume of correspondence and considering if the requests are necessary or proportionate. We did see some evidence of multiple requests from the defence in the cases we examined.

8.31. One experienced defence solicitor said in their opinion “Defence engagement is not necessarily the panacea it is made out to be”. It was their view that they operate in a system where they are not working on the same side as the prosecution. The rules are the prosecution disclose their case and then the defence serve a defence statement. Any early engagement turns that position on its head; that a person has the right to remain silent and so early engagement, especially if they do not know what the case is, does not reflect the reality of how the system is supposed to work and is not fair.

8.32. It is clear that the legislation that governs disclosure and the tenets of the right to a fair trial require there to be an adversarial approach. CPIA, AGG and the protocols that exist are attempts to make the system more efficient, transparent and effective, but ultimately in an adversarial system where the defence are representing their client's best interest the issues highlighted above will always remain. Added to the fact that recent SFO case failures have been founded in disclosure mistakes, the defence are going to focus on the perceived weaknesses. Unless there is to be legislative change the only thing that is likely to alter the situation is if the SFO can demonstrate that it has further improved the systems of managing and handling disclosure.

Stakeholder engagement in GRM02 and BGC01

GRM02

8.33. When GRM02 commenced, the 2013 AGG did not define the concept of ‘early’ defence engagement by reference to the ongoing stages of a criminal case; nor did the Guidelines consider the possibility that the defence might engage with the process before a decision to charge. Therefore, it is perhaps unsurprising that there was little pre-charge engagement with the defence in GRM02. Each defendant was sent a letter by the investigating officer, prior to interview under caution. This included the following overture: *if your client can give us information or point to further documents which would help us to understand these matters further or his role concerning them, then this is his opportunity to do so.*

8.34. It is somewhat unclear from the letter whether the 'opportunity' referred to was the opportunity to provide information at the interview itself or at some other stage. In any event, and with the qualified exception of one suspect, the offer was not taken up. There is no evidence that the invitation to provide information was followed up by the investigating officer after interview or before charge. Thus, such pre-charge engagement as there was petered out having provided no tangible benefit to disclosure.

8.35. The first DMD in GRM02 was served on all parties on the 28 September 2020. This was in advance of the PTPH on 6 October 2020. The DMD set out the search terms that the SFO had deployed across its digital document pool. It also contained the following invitation:

- The defendants are invited to consider whether any additional search terms are required to identify relevant material. If a defendant seeks to have further specified sampling or search terms applied, then this will be carried out provided:
- The search terms sought to be applied have been specified.
- The request is reasonable and proportionate.
- The request constitutes a reasonable line of enquiry.
- The timeliness of a request…will impact upon whether the request is considered proportionate.

8.36. The above approach was in keeping with the AGG requirement for *early and meaningful engagement* and defence involvement in suggesting and refining search terms. None of the defendants responded to the DMD until the service of their defence statements. The defence statements were due for service on 20 April 2021. They were served six weeks late on or around 1 June 2021. This was over eight months after engagement had been sought by the SFO in the DMD.

8.37. It was pointed out in the third DMD addendum (served relatively shortly after the defence statements were received, on 24 August 2021) that the timing of the defence response significantly condensed the amount of time that the prosecution had to respond before the trial date. At that stage, the trial was fixed for January 2022. It was also pointed out that the defence statements contained voluminous disclosure requests, many new search terms and identified many third-party sources of material (data custodians).

8.38. The position was therefore stark. The additional search strings would add nearly a year to the disclosure exercise. The judge considered as unrealistic the

defence submission that the SFO could have completed the task in time for trial had it not been for a two-month delay in starting the exercise and had the exercise been better resourced. The immediate impact of the timeliness and manner of defence engagement with the disclosure process in this case was to cause the first trial date to be adjourned.

8.39. It appears clear that the spirit of the AGG was not observed by the defence in GRM02. It is hard to equate 'early' defence engagement with engagement that only occurs at the point when defence statements are served (which were also six weeks late). Engagement at that stage is no more than engagement at the point the Criminal Procedure Rules (CPR) require.

8.40. The SFO was initially overtly critical of the defence for not engaging sooner. The third addendum DMD served in August 2021 pointed out those parts of the original DMD (served in September 2020) that required that the defence should engage early in the disclosure process, particularly in relation to the (thorny) issue of search terms.

8.41. Notwithstanding the above, any criticism of the defence for the timing of their engagement is tempered by the following consideration: Orders made at the PTPH did not require the defence to engage any earlier than the point at which defence statements were served.

8.42. The minutes of the PTPH show that the defence were ordered to serve a response to the DMD 'including any further search terms' by 20 April 2021, the same date as that set for service of defence statements. That order cut across the early engagement required by the AGG and adopted in the original DMD. It effectively absolved the defence from engaging in the disclosure process until a fairly advanced stage of the court proceedings. Why such an order was made at the PTPH is not clear. No transcript of the hearing is available to us. It seems likely, however, given the decision at the PTPH, that the prosecution did not make submissions to support the position it had taken in the DMD (requesting early engagement with search terms).

8.43. SFO staff we spoke to did not recall such a submission on behalf of the SFO, and Mr Justice Johnson later referred to the prosecution having agreed the timetable "*I do not criticise [the defence] for not having done so: they made their requests within the time that had been agreed by the SFO and endorsed by the court.*"

8.44. One defence team did engage with the prosecution in late 2020, albeit on a limited basis and not in relation to search terms or custodians. They requested disclosure of interview records, and disclosure of the defendant's G4S emails and calendar/diary. The SFO responded on 12 January 2021, stating that the

interviews were being prepared and that in relation to the emails and diary it was "*not appropriate to release such a vast amount of material regardless of whether the disclosure test is met."* The SFO response also invited the defence to "*engage with the Disclosure Management Document…If you believe the search terms already applied are not sufficient to identify the material capable of assisting the defence of your client then we invite your submissions as to what further search terms or timeframes we can adopt*." There were no requests for further disclosure before defence statements from two of the defendants (there was some engagement requesting clarification in relation to material served, and LPP material).

8.45. Although the SFO's initial approach to early defence engagement as set out in the DMD was correct, being firmly grounded in the AGG, it seems that approach was not pursued with any vigour. The defence rejected any criticism over the timing of their engagement.

8.46. The position can therefore be summarised as follows. There was no early engagement by the defence in the disclosure process as required by the AGG. This was because although early engagement was requested initially, there was no real attempt to enforce it by the prosecution and no meaningful attempt was made to bring this to the attention of the court. And it can be reasonably inferred that any attempts by the court or prosecution to enforce earlier engagement would have been resisted by the defence, who clearly felt that they could not meaningfully engage until they had fully mastered the case against them and their defence to it.

8.47. As previously noted, it appears beyond argument that the type of early engagement that the AGG (past and present) seek to foster was not achieved in this case. Not only was there no early engagement, but it had practical consequences in terms of its contribution towards the need to adjourn the first trial listing, and it may have had some (albeit limited) impact on the case failing to make the second trial. As has been seen, the reason for the lack of early engagement was a combination of the prosecution not pursuing such engagement with any vigour and the defence being disinclined to engage with it voluntarily (they would say for good reason). The experience of this case therefore inevitably raises questions about whether the Guidelines are being followed.

8.48. Notwithstanding the above observations, the case perhaps raises a wider question of what 'early' defence engagement actually amounts to. As has been observed, if early engagement means no more than engaging after service of the defence statement, it is difficult to see what the Guidelines achieve. However, without suggesting an actual time frame (which the Guidelines do not) the word 'early' in the context of a complex fraud case lacks precision. The AGG

are, of course, not the only driver of disclosure. Defence engagement is subject to the Criminal Procedure Rules, the Better Case Management Guidance, and (in cases such as this) the 2005 Protocol entitled Control and management of heavy fraud and other complex cases. However, none of this material better defines what 'early' really means.

8.49. Thus, the concept of early engagement would appear to remain open to interpretation. The defence might argue (and did argue in this case) that the earliest that it is reasonable to expect them to engage meaningfully with disclosure is the point at which they have properly understood the prosecution case, initial disclosure and their client's defence. The position taken by the prosecution in this case adds no clarity. It was inconsistent. The prosecution started off by requiring early engagement in the DMD, criticised the defence when it was not forthcoming, and then withdrew that criticism at a later stage. The court never seems to have been asked to express a view, lest still make any ruling on the point.

BGC01

8.50. In BGC01 the SFO contacted the defendants more than three years prior to charge, in December 2016, and invited the defence to make representations in respect to LPP over material seized during a search and noted that it had also reached out to solicitors representing the relevant companies as well as the administrators for the companies. The SFO provided the search terms it had already used, the search terms it proposed to use based on third party assertions made by privilege holders, as well as the search terms proposed by other Defendants.

8.51. The SFO wrote to the defence in March 2017 to say that it was drafting an LPP protocol and confirmed that no review of LPP material would commence until all parties were satisfied in their understanding of the strategy and that the SFO had considered all reasonable representations.

8.52. Early engagement with the defence concerning LPP material aided progression of the disclosure exercise because it meant that material in LPP quarantine could be reviewed early on and either returned to the privilege holder(s) or scheduled for the defence to review and challenge, before being released to the case team for evidential review and disclosure.

8.53. The Defendants responded in varying ways to the invitations, some providing LPP search terms and others confirming that they had none to provide at this stage.

8.54. Among the millions of documents seized by the SFO were documents in nine other languages: Arabic, Dutch, Farsi, French, German, Italian, Portuguese,

Russian, and Ukrainian. The SFO wrote to defence counsel in May 2017 that the majority of foreign language material was in Farsi and a minimal portion was in the other languages. The SFO invited defence counsel to comment on the SFO's plan to send the material to a translation service and then to independent LPP counsel. The SFO provided a deadline by which defence counsel should respond before the SFO would move forward with its plans. This is preferable to the alternative of proceeding without input from defence counsel not knowing whether a challenge to the SFO's decision would be raised later.

8.55. In July 2017, the SFO outlined its proposed protocol for identifying material that may attract LPP in the digital material it received from letters of request to third parties and from searches conducted the previous year. The SFO was clear that the process had been formulated with this specific case and the circumstances in mind and would not constitute a process which would necessarily be applied across the range of cases dealt with by the SFO. The SFO made clear that it was seeking defence counsel's input on the process outlined and that it would consider any reasonable proposals put forward that may assist in improving the SFO's ability to identify and isolate LPP material.

8.56. After formal charges of the five defendants, in the DMD, the SFO set out the approach to the disclosure process including the use of block listing where appropriate. As part of initial disclosure provided alongside the DMD, the SFO provided metadata for millions of documents and block listed the items on the initial disclosure schedule. At this time, the defence was invited to engage further regarding the search for relevant information which would assist the defence. These forms of ongoing engagement kept the SFO on the front foot. Inviting challenges early avoids becoming inundated later with responses to challenges.

8.57. Following formal charge, counsel for one of the defendants engaged with the SFO regarding the block listing of items. Counsel mentioned that while the AGG and the CPIA both permitted block scheduling, the SFO appeared to have simply applied a single block description to the contents of each device in its entirety which counsel claims was "clearly inadequate". The defence at this stage, however, did not seek to provide any additional search terms. Counsel said they would review the issue of block listing as further unused schedules were provided.

8.58. To make its work virtually criticism-free, the SFO engaged with counsel about every key aspect of the process it employed over a period of years. In order to prevent criticism in court over LPP determinations, for example, the SFO enlisted the services of two senior LPP counsel. The LPP protocol meant that defence counsel had two opportunities to convince LPP counsel that material was protected by LPP before appealing the determination in court.

Providing the “gold standard” of LPP review ultimately meant that no challenges were put forward in court.

8.59. Much of BGC01’s success rests with the case team’s pre-charge and ongoing engagement with the defence, which includes the robust engagement built into the LPP protocol. By inviting the defence to comment at every key stage of the case including on determinations of LPP, the SFO effectively deprived counsel of any ability to criticise credibly the disclosure process on the eve of trial when the stakes were most high and after significant resources had been invested. If the obligations under the current disclosure regime are to remain, then early defence engagement is crucial.

9. Serious Fraud Office recruitment and retention

Resourcing cases

9.1. Resource (people) was one of the main topics in our interviews with Serious Fraud Office (SFO) staff. Many of those involved in cases were keen to highlight that resource challenges at various stages added pressure. When this is coupled with the fact that because cases run for such long periods (GRM02 10 years) (BGC01 6 years) there is often a lack of consistency in some core roles, the challenge of resourcing becomes even more acute.

9.2. The Altman review of GRM01 (the investigation into Serco) included a number of recommendations relating specifically to resourcing. Recommendation 2 read: *the SFO must continue to consider the means by which it can adequately staff and resource case teams to ensure, so far as possible, that undue time and resource pressures minimise the risk of human error*.

9.3. In our examination of the two cases there were several clear themes that emerged relating to resourcing, recruitment and retention. Some of the themes echo the findings of the Altman report, which is unsurprising given that GRM02 was the sister case of GRM01(Serco). However, unlike GRM01 there was little evidence that either case we examined was not sufficiently resourced, certainly once the prosecution began. We heard in interviews with staff working on other cases that case prioritisation could have a negative impact on resource availability, but staff on both GRM02 and BGC01 indicated that resources were generally available at mostly the right time and that when pressures increased more resources were made available; this was likely because both cases were high priority.

9.4. There is clear evidence that the findings of the Altman review resulted in a number of strategic actions, one of which was to review all cases that were due for trial in the following 18 months. As part of this review, which was directed and managed by the Chief Operating Officer in conjunction with General Counsel case resources featured heavily. Decisions were taken as a result of the post Altman case review, which clearly set GRM02 and BGC01 as part of the SFO case priority list (it should be noted that trials were listed for both cases by this stage). Once GRM02 and BGC01 had been made priority cases we were told by staff that almost any request for resourcing was met positively. Even so, in some instances there were still challenges in securing resource with the right degree of experience.

9.5. In GRM02 after the first trial was adjourned it became apparent that the further disclosure exercise would need extensive additional resources. Our examination of the case material, and interviews with staff confirm that the SFO was willing to commit as much resource as necessary to try to meet the

deadlines set by the judge to complete that disclosure exercise. Work on other cases within division was paused and most of the division's resources were dedicated to GRM02. This commitment was further demonstrated, when the SFO engaged a third-party specialist company, Anexsys, in early 2022 to assist with the review of unused material.

9.6. In BGC01 there is clear evidence that the case team resources expanded as the scope of the case increased in demand. At regular stages there were requests for further resources submitted to the Head of Division (HOD). They were granted. As with GRM02, BGC01 was also allocated priority status, and as such we have seen evidence from discussions at case review meetings between the team and General Counsel that this resulted in staff being moved from other 'non-priority' cases in the division to work on BGC01.

9.7. While there is evidence that both GRM02 and BGC01 were allocated resources to deal with the pressures and additional 'pinch-points' that developed as the case proceeded, it is not entirely clear whether case resourcing is understood or developed in such a way to allow the SFO to manage resource demand effectively. Neither case had a clear resourcing strategy, which meant that most of the decisions taken in relation to resources were ad-hoc and often as a reaction to critical case events.

9.8. We heard, both in this inspection and in our case progression follow-up inspection[18] (published in May 2023) of recently developed approaches to calculate and provide case resources. The aim is to provide a more structured and bespoke resourcing model for the early stages of a case.

9.9. The SFO recognises that there needs to be a minimum staffing model which should include a disclosure officer (DO) and deputy disclosure officer (DDO) for all cases. As set out elsewhere in this report, the expectation is that all new cases should include a clear investigation plan from the outset and that this should be accompanied by a resource plan for the development stages of the case. As the case develops this investigation plan and other core documents, including the Disclosure Strategy Document (DSD) should affect a continual review of the resource need in the case. We heard in interviews with case controllers (CCs) and other team members that they now have a better understanding of why cases need to have some clarity of scale and scope and how this is linked to resourcing need and requests. It is also clear that in both GRM02 and BGC01 that in the latter stages of the case (once the case had been charged and in the trial stage) that there was more of an element of resource management. Whether this amounted to a resource strategy for the

[18] Follow-up inspection of the Serious Fraud Office – case progression (justiceinspectorates.gov.uk)

case is debateable, and whether this sometimes-reactive approach mitigated the risk identified in Altman recommendation 2 is not entirely clear.

Staff turnover (case staff retention)

9.10. We have commented in previous inspections about the long-running nature of SFO cases. In our 2023 case progression report follow-up inspection we said:

- It is common and expected for case team members to change throughout the life of a long-running SFO case. By the nature of long-running cases, teams experience staff turnover. In our previous inspection (2019), staff reported that team changes during an investigation had an adverse impact on case progression.

- Our judgement in the case progression inspection was that:

  Making sure cases are sufficiently and consistently resourced with experienced staff remains a challenge for the organisation.

9.11. What is clear in the two cases we examined in this inspection is that the turnover of staff likely had an impact on the outcome of the case. The turnover in GRM02 was significant, in BGC01 there was a degree of consistency in personnel (both internal SFO staff and external counsel). Our view is that turnover is an aspect that may influence case success.

9.12. In GRM02 the turnover of disclosure officers was significant. As a ten-year long case, a degree of staff turnover, was inevitable. But the fact that there were six different DOs within a three-year period following on from a six-year investigation added risk. This rate of change is excessive. It contributed to the disclosure problems which arose. Certainly, we know that record keeping in relation to disclosure was a problem and we would suggest that turnover was partly responsible for that. While some of the DOs went on to fill other roles on the case retaining their knowledge, it is less clear why others stepped down from the role. It is also clear that the degree of handover as some DOs moved on was not effective.

9.13. BGC01 ran for six years and was successful after trial. This also had a degree of staff turnover, as would be expected for matters that run over that length of time. However, our case examination highlights that there was more consistency in a number of core roles. The CC remained in place from case acceptance to conclusion. Disclosure counsel was with the case for its entirety. There were five DOs on the case – one of whom started with the case and moved back into the role as the case came to trial.

9.14. Staff turnover is going to be a challenge in SFO if cases take the length of time that these two cases did from initial investigation to trial. As set out earlier in the report there have been a number of recent changes to the operational handbook and internal processes that clearly outline mandatory expectations to support more effective handover and control of cases. The creation of case specific documents, including forms developed specifically by the Disclosure Working Group for DOs and DDOs, should improve handover.

9.15. However, it was apparent in the two cases we examined that some staff changes were as a result of poor planning. Given that we would suggest that stability of personnel in BGC01 was one of the keys to the success of the case, more effective resource control is likely critical to SFO operation. Senior managers recognise that better resource management and control is needed. In 2021 the SFO established the 'Prioritisation Gold Group'. The creation of this group allows for a much more strategic and holistic view of resourcing. While Gold Group discusses strategic resource needs, most case team decisions continue to be made in divisions and between HODs and CCs. This local approach makes some sense given that HODs are more likely to be aware of local staffing challenges and case needs, but in BGC01 and GRM02 some of the decisions were limited by availability of staff and there was a large degree of managing and balancing resource pressures for key roles. The Gold Group now forms part of the Operations committee.

9.16. Staff retention and having fully resourced teams within divisions is a major challenge for the SFO. Market forces for pay across both the public and private sector are problematic for the SFO. We heard from many staff that pay in other government departments and arm's length public bodies are substantially better than that of the SFO. The private sector is also an attractive option for many staff who have developed expertise in niche aspects of the business and as such have transferable skills. As part of this inspection, we interviewed a number of former SFO staff who had recently moved to other public sector roles; when asked why they had left the SFO, the majority we spoke to indicated that salary was the reason. Across the three casework divisions, A, B and C – there was at the time of the inspection a vacancy rate of 24.4%.

9.17. The SFO recognise that there are remuneration challenges and these are more acute in certain specific roles. The SFO has worked hard within their pay remit and where possible has looked at options to address the problem. For several years the SFO has undertaken extensive lobbying. As well as making the case to Ministers the SFO has as part of a wider proposal, drafted options related to pay and rewards to present to Treasury and Cabinet Office. These options include reform of the current pay structure. In line with other departments and current wider civil service pay changes, the options and

proposals explore capability-based pay which would bring opportunities for progression through the pay scales and the use of targeted allowances for certain roles in the SFO. Any increases in pay need to be funded from within the SFO so savings will need to be made elsewhere.

9.18. The fact that others across government and within the private sector can offer more attractive salaries (and overall benefits packages) brings with it challenges and risks to the management of long running cases which need to be mitigated.

9.19. Our view is that while there will always be a degree of staff turnover in long running cases, the risk has become acute given the disparity of salaries we have been told about and have seen. It is not unusual for lawyers, investigators, and those with technical skills to be able to achieve much greater pay in the private sector for what appears to be a similar role with similar responsibilities. The SFO has tried hard to make this point and we have seen the efforts that they have made in attempts to lobby for exceptional business cases.

9.20. We recognise that the SFO is bound by the civil service pay remit, but the fact that case success is being hampered because of pay disparities across the public sector is of concern. As Altman indicated in his report recommendation 2: *the SFO must continue to consider the means by which it can adequately staff and resource case teams to ensure, so far as possible, that undue time and resource pressures minimise the risk of human error.* From what we have seen in GRM02 and to a lesser extent in BGC01 this risk existed in both the cases we examined and both senior managers and staff working on current cases were very clear that pay, rewards and market forces were resulting in high staff turnover (in both key and other roles). While we commend the SFO for tightening the internal procedures and processes to help with case continuity, the fact that salary disparity increases the risk to delivery is something that needs to be urgently addressed by government.

Document reviewers

9.21. The issue of pay and retention is not confined to those case team roles discharged by permanent staff of the SFO. The sifting of seized material narrowed down by search terms is usually completed by document reviewers employed specifically for that role.

9.22. There were large numbers of document reviewers employed throughout the life of both cases we examined. In our interviews CCs did not indicate that there was a major difficulty in securing the services of document reviewers. However, the experience of those who could be secured for the money paid by the SFO was exceptionally limited; many of those engaged were often recently

qualified and had limited to no experience of disclosure or criminal justice. Then many of those who worked on the cases and gained experience left to go onto other places where the role for those with experience paid much more than that offered by the SFO, which had provided them with a good training ground.

9.23. The experience in GRM02 is a perfect example of the challenges faced by the SFO in securing and retaining document reviewers. Document reviewers were employed to work on the case from about August 2019. Between 2019 and 2022 the number varied, as some left and others were employed to back-fill. It is apparent that by November 2022 the CC was so concerned about the loss of experienced document reviewers, (between August and October 2022 GRM02 had lost 17 document reviewers) to the extent that he submitted a business case to enhance document reviewer pay by classifying those working on the case as 'senior document reviewers', in an effort to stem the attrition.

9.24. In BGC01 it was also evident that maintaining a consistency of document reviewers was somewhat of a challenge. Given the consistency of disclosure counsel and case controller the impact of turnover of document reviewers was less than that in GRM02, but still proved to be an issue for case progression, with resource gaps inevitably resulting in slower progress as documents awaited review.

9.25. The SFO resourcing model has historically been one that has included a high degree of temporary posts, as there is a head-count limit imposed. This model allows the SFO a degree of flexibility as it is not always clear the extent of resources that may be needed to progress and manage cases, the model was also agreed at a time when funding was secured using a different cost basis model. In our conversations with senior management there was a clear view that the historical resourcing model was not working as effectively as it had. This was partly because of the issue of pay disparity and the challenge of securing enough temporary staff of suitable experience but there was also as a recognition that the demands of SFO cases have changed. The head-count limit is also a problem and makes long term resourcing decisions difficult.

9.26. Recent discussion at Executive Committee[19] has resulted in a strategic change to resourcing. A decision has been made to recruit a permanent cadre of document reviewers. The current thinking is to recruit something in the order of 40 to 60 permanent document reviewers. The benefits package that comes with a permanent post in the civil service is likely to be attractive and should mitigate some of the risk of high turnover. This change to the overall resourcing model

[19] Executive Committee (Exco) this is a senior management committee of the most senior roles in the SFO. It includes the DSFO, General Counsel, Chief Operating Officer, Chief Capability Officer.

may produce some immediate benefits, but in the long term is unlikely to address the pay disparity and head count limit issue faced by the SFO. The SFO will also need to reassess its strategy in light of recent government restraints on headcount.

Disclosure counsel

9.27. In both GRM02 and BGC01 the SFO engaged large numbers disclosure review counsel. They were used both on the case and for the assessment of Legal Professional Privilege (LPP) material.

9.28. In BGC01 lead disclosure counsel was engaged throughout. We comment elsewhere about how having this degree of consistent knowledge of the case and overall understanding of disclosure was of benefit.

9.29. We heard from those we interviewed that securing and retaining disclosure counsel was becoming more of a challenge because of the rates of pay being offered by SFO. In BGC01 there were examples of disclosure counsel joining the team, reading into the case and leaving before undertaking any meaningful work. The case papers highlight “an ongoing problem with recruitment.”. In August 2020 it is recorded that there were seven appointments made of disclosure counsel, of whom three left very quickly and two were “not successful”. As outlined above the fact that other organisations across the public sector paid much more than the SFO presented a risk to the effective management of cases.

9.30. Altman recommendation 1 highlighted how the remuneration for disclosure reviewers brought challenge and risk to GRM01. He recommended the remuneration for disclosure reviewers is not reasonable remuneration for the work done, or expected to be done, and should be increased to bring it in line with other equivalent organisations.

9.31. To overcome some of the challenge, an increase to fees for some counsel in some cases has been authorised, on an exceptional basis. This authorisation comes from HM Treasury. An exceptional basis business case must be submitted for each case every three months, which is resource intensive, both to those on the case team who must draft the business case and to those who have to approve it. General Counsel told us that the SFO is trying to secure a ‘temporary easing’ to stop having to make and authorise business cases every three months while a long-term solution is found.

9.32. CCs told us that the rates of pay offered by the SFO means that it often attracts counsel with limited experience. A number of counsel who have worked for the SFO in the past no longer do so as the rate of pay is not attractive. We heard that counsel on cases will work for the SFO in the evenings or weekends,

in reality working for the SFO as a secondary role. In GRM02 we are aware that this was such an issue that disclosure counsel were moved onto the case from other SFO cases. Our findings highlight that securing and retaining experienced counsel has over the past few years become more difficult and the challenge is now increasing the degree of risk in the effective management and handling of disclosure on cases. The SFO has, where possible, tried to mitigate this risk by making use of exceptional circumstances business cases, but it is clear that securing counsel of the right experience and for the length of time necessary in long running cases is not always possible.

9.33. More needs to be done to address the pay disparity that has developed if the SFO is to be able to manage and effectively discharge its disclosure obligations. This is a matter that the government needs to address in any long-term funding model to support the SFO.

Recommendation
By October 2024, the government, through its economic and finance ministry must develop a long-term funding strategy to support the Serious Fraud Office to discharge its disclosure obligation to allow it to compete in the open market to secure enough experience to deal with its cases.

Core counsel team (trial counsel)

9.34. As well as document reviewers and disclosure counsel both GRM02 and BGC01 engaged a core counsel team. It is SFO practice to engage trial (key) counsel at the earliest opportunity. In both cases there was a consistency of core counsel, which brought with it the benefit of case knowledge and understanding of the issues. However, in GRM02, with the heavy turnover of key SFO roles meant that the case teams were overly reliant on counsel. We discuss the issue of responsibility for case accountability elsewhere in the report.

9.35. While there was a consistency in the core counsel team, we were made aware that in both cases the rates paid to counsel had to be increased to keep them engaged. In BGC01 LPP counsel were paid rates that were outside of the norm to ensure that they could be retained.

9.36. Again, the evidence points to the lower rates that the SFO can pay in the open market bringing risk to its ability to manage disclosure and progress its cases.

The contribution of E-discovery and Digital Forensic Unit to the disclosure process

9.37. The Altman review into GRM01 expressed some concern that the delays and problems in the document review and evidence handling management office

were a cause of delay and reduced the effectiveness of the disclosure process. Altman Recommendation 3 stated: *the SFO should consider the resourcing of its Document Review Systems and Evidence Handling Management Office to ensure the timeliness, efficiency and accuracy of ingestion and processing of bags of evidence for review by case teams*. As we set out previously the systems and processes that exist in the SFO to ingest, manage, and process evidence are sound and fully effective. Since the publication of the Altman report there has been an increase in the resources within the Digital Forensic Unit (DFU) and the eDiscovery team, however this inspection has highlighted some issues which have an impact on their resources that may need to be considered and addressed by the SFO.

9.38. While there was no evidence to support what Altman had found about the accuracy of the ingestion of material and processing of bags of evidence in the DFU and the eDiscovery team, we did hear in interviews with staff that requests for the processing of material would be 'queued' and depending on the case priority may be held as material was processed for other, more urgent, cases. More recently the SFO has introduced a 'ticketing' system to monitor and manage requests for work through the eDiscovery team. While staff we spoke to acknowledge that there is a new system for controlling requests, in many interviews with case teams we heard of delay that impacted the management of the disclosure process.

9.39. Management recognise that challenges remain with the role that the eDiscovery team play in the handling and processing of material. With the migration to the new system (Axcelerate) many of the manual processes that needed to be undertaken by the eDiscovery team to support cases have been automated. This has been a significant programme of development and has resulted in releasing significant amounts of the eDiscovery team time to deal with other requests. However, the eDiscovery team continues to suffer from recruitment issues and is under resourced. Recruiting system developers and technical staff has been an on-going issue and there are still a number of vacancies in the team that remain unfilled. The move to Axcelerate, somewhat mitigates the risk of not being able to fill the developer posts, but the current vacancy rate in the team is also exacerbated by the fact that the eDiscovery team is responsible for the management and control of LPP material.

9.40. There is a legal requirement that LPP material is quarantined and not seen by case teams. We cover elsewhere in the report the legal requirements for the management of LPP material. Historically given the involvement of the DFU and Evidence Handling Management Office (EHMO) in the processing of LPP material the system for control of this material has fallen to the eDiscovery team. This separation allows for the SFO to meet its legal requirements and

ensures that there is a clear delineation of material which is outside of the remit of the case teams. It is understandable why the current organisational structure developed, but given the size of the eDiscovery team, the pressures and priorities that come with the handling of case material and supporting case teams, it does seem that dealing with, releasing and being the controllers of LPP material adds additional pressures to an already pressed team. Having spoken to other organisations who have the requirement to manage and control LPP material, we question whether the current SFO structures are the most effective and efficient model for the management of LPP material.

Recommendation
By October 2024, the Serious Fraud Office should review the current model for the management of Legal Professional Privilege (LPP) material. Consideration should be given to whether, due to the risks associated with the delivery of the core business by the eDiscovery team, a different system for the management and control of LPP material should be implemented. The Serious Fraud Office should engage with others who have similar requirements to consider how it might manage and control LPP material.

Strategic resourcing challenges

Making the most of technology

9.41. There are a number of additional resourcing issues that we have identified from the two cases we examined and through interviews with staff and stakeholders. The strategic challenges are more about how the SFO operates and reacts to some of the opportunities that come from the move of cases onto the Axcelerate system. As we have set out in other parts of the report the migration to Axcelerate brings with it much more control and opportunities for the management of disclosure on a supported platform and with a much-increased functionality than that existed on the Autonomy system. We have heard in this inspection and in our previous case progression inspection that some staff thought that the training to accompany the change to the new Axcelerate system was not effective and could have been better.

9.42. There is no question that the move to Axcelerate brings an increased level of functionality and many more tools to better control and manage the disclosure process. In some interviews we heard from staff who were clearly using the increased levels of functionality to improve the efficiency and control of the disclosure process. The management of work allocation for document review, quality assurance processes and the ability to use more advanced techniques for searching material were all cited as clear benefits compared to the Autonomy system.

9.43. However, there were also a number of staff we interviewed who clearly were not using Axcelerate to its full potential. Some CCs, lawyers and DOs remained of the opinion that it was not part of their role to be operating an IT system to the full extent of its functionality. They believed EHMO or someone else should be carrying out search terms or developing management information for them to be able to use. This is clearly a challenge of expectation that the SFO needs to address. Our view is that Axcelerate presents many more opportunities for the effective management and control of disclosure, our findings indicate that there is still a clear lack of clarity of expectation and this needs to be addressed as resource efficiency and case management will suffer if staff do not use the system to gain the benefits of the advanced functions (as compared to Autonomy).

9.44. We acknowledge that historically case team staff were used to EHMO running search terms across the material and providing the output back to the case team for review. The reluctance of some staff may be in part down to experience and also in part to the fact that Axcelerate training was not always provided at the time when there was a need to use the functionality of the new system and that many staff viewed Axcelerate training as inadequate. In a number of interviews, we heard concerns from staff that the levels of data literacy and capability in case teams were not of the standard needed to gain the most benefit from the additional functionality of Axcelerate.

9.45. Given our findings there are some perceived and real cultural barriers which need to be addressed before some of the opportunities presented by Axcelerate can be fully realised. The SFO may need to consider whether the current case team resourcing model will be able to make the most of the technology and whether the current expectation placed on case staff to use the full functionality of the system is the most effective way to deliver the business benefits associated with the full functionality of Axcelerate.

Issue to address
The Serious Fraud Office to address the staff perception of the limited capabilities of Axcelerate and their ability to navigate it, considering what the best model maybe to ensure that case teams have the right balance of expertise and capability.

Resourcing cases

9.46. In both cases we examined that there were stages where the CCs needed to secure more resources to progress the case and deal with pinch points and pressures. Some of these requests were as a result of external factors and in terms of effective resource planning may not have been entirely obvious, while some were more clear and proactive resource requests could

have been made. As set out above as both GRM02 and BGC01 were priority cases, so resource requests were mostly approved and as the cases came towards trial resources were significantly increased, this was particularly evident in GRM02.

9.47. We set out in the case progression inspection report we published in May 2023 cases would benefit from clearer focus at the scoping stage, and that we had heard from staff, and in some cases seen, a degree of awareness at the SFO of the benefits of a more focused approach. We found that changes made to the development of mandatory documents, (including the investigation plan and DSD) along with more effective pre and post charge assurance were all helping to drive this change in more recently opened cases. Interviews in this inspection confirmed that the concept of an improved focus on scope and developing a case strategy that clearly set out the remit of an investigation is continuing to gain traction. There was an acknowledgement in some interviews that the scoping of the case had a clear link to resource requirements.

9.48. In BGC01 and GRM02 it was not clear that there was any strategic view of what resources would be needed. It seemed that the desire to ensure court deadlines were met and the cases got to trial was the only real driver of case resourcing. We acknowledge that it is very difficult for the SFO to have a one size fits all model for case resourcing. The development of a minimum model for core roles in case teams is probably about as far as they can go. Establishing the practice of including resources in investigation plans and other core documents should allow for case teams to better understand and manage resourcing needs. To accompany this change, the SFO needs to develop better and more formal resource planning, linked to the role and responsibilities of HODs and Deputy HODs. More effective challenge should be possible under the new assurance arrangements.

Recruiting document reviewers

9.49. We reported in the case progression inspection that the burden of recruitment of document reviewers often fell to the case team, adding additional pressures and abstraction. In both GRM02 and BGC01 there was evidence of case team involvement in the recruitment, training and support of document reviewers. This issue of additional burden was amplified by the pay differential (as set out above) resulting in somewhat of a revolving door of document reviewers in both cases. There has recently (since the conclusion of both BGC01 and GRM02) been a change in the approach of how document reviewer recruitment is undertaken, with Deputy HOD now taking on the role of recruitment for case teams. The issue of document reviewer turnover should be understood and factored into any resourcing plans.

Retaining staff on cases and experience of core roles in SFO

9.50. The Altman report indicated that there is a balance needed between being able to resource a case with those who have the relevant experience to carry out the role and allowing staff to develop the skills they need to be proficient. It was evident in both GRM02 and BGC01 that at times staff were put into roles where they lacked the necessary experience. This was evident in GRM02 where some CCs and DOs had either no or limited experience of ever undertaking a similar role or experience of handling cases of a similar size and complexity. As we cover elsewhere in the report the rationale for the appointment to the roles may have been considered appropriate for practicality and expediency, but this approach, in our view, significantly increased case risk and likely had some bearing on the final outcome.

9.51. In BGC01 there were DOs appointed who had never previously undertaken the role including a lawyer with no criminal background who was appointed to manage and control disclosure in a highly complex criminal case. The risk of these appointments was somewhat mitigated by the fact that external disclosure counsel was with the case from the outset through to completion and would have been able to offer advice and guidance on disclosure issues. Exposure to this degree of support would no doubt help with the development of those less experienced staff. However, our conversations with key case team members did not convince us that there was any thought to development in the decision to appoint such people to roles on the case.

9.52. In GRM02 there was not the luxury of consistency and experience of an external disclosure counsel to help mitigate some of the appointments of less experienced staff into core roles. The SFO needs as part of a resourcing strategy to consider how it will manage the risk of staff development alongside the need to effectively resource cases. It is not always effective to have staff in post when they do not have the necessary experience to undertake the requirements of the role.

Annex

Glossary

Altman Review

The independent review by Brian Altman KC, commissioned by the Director of Serious Fraud Office (SFO) in April 2021, to assess the handling of R v Woods and Marshall.

The Attorney General's Guidelines on Disclosure for investigators, prosecutors and defence practitioners

The Guidelines outline the high-level principles which should be followed when the disclosure regime is applied throughout England and Wales. They are not designed to be an unequivocal statement of the law at any one time, nor are they a substitute for a thorough understanding of the relevant legislation, codes of practice, case law and procedure.

Automony Introspect

The Document Review System (DRS) used since 2009 by the SFO to review digital material seized during investigations. It was replaced by Axcelerate in 2018.

Axcelerate by OpenText

The DRS purchased by the SFO to replace its existing system Autonomy Introspect. Axcelerate went live during 2018.

Barrister/Counsel

A lawyer with the necessary qualifications to appear in the Crown Court and other criminal courts, who is paid by the SFO to advise on and prosecute cases at court, or by the representative of someone accused of a crime to defend them.

BGC01

The SFO case involving Balli Group Companies (BGC).

Calvert-Smith Review

The independent review by Sir David Calvert-Smith, commissioned by the then Attorney General in February 2022, to identify the failings of the Unaoil case.

Case Controller

Either a senior prosecutor or senior investigator who is in charge of managing and progressing the case following acceptance by the Director of SFO. They are responsible for directing the case team.

Case Learning Events

A review following the conclusion of a case to assess what lessons can be learned and shared across the organisation.

The Criminal Procedure and Investigations Act 1996

The Criminal Procedure and Investigations Act 1996 (CPIA) is the overriding authority on disclosure in all criminal cases, including those prosecuted by the SFO. All criminal investigations commencing on or after the 4 April 2005, are governed by the Act and the amendments to it introduced by the Criminal Justice Act 2003.

Code for Crown Prosecutors (the Code)

A public document, issued by the Director of Public Prosecutions, that sets out the general principles SFO lawyers should follow when making decisions about prosecutions. Cases should proceed to charge only if there is sufficient evidence against a defendant to provide a realistic prospect of conviction and it is in the public interest to prosecute.

Deferred Prosecution Agreement

A UK Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge.

Digital Forensics Unit

The SFO unit which is responsible processing digital material acquired during the course of an investigation.

Director of SFO

The head of the SFO, who is appointed by the Attorney General under section 1 of the Criminal Justice Act 1987.

Disclosure/unused material

Investigators have a duty to record, retain and review material collected during an investigation which is relevant but is not being used as prosecution evidence, and to reveal it to the prosecutor. The prosecutor has a duty to provide the defence with copies of, or access to, all material that is capable of undermining the prosecution case and/or assisting the defendant's case.

Disclosure Decision Log (DDL)

A case document used by the SFO to record a log of disclosure decisions.

Disclosure Management Document (DMD)

A DMD is a case document used by the SFO which records the proposed approach to disclosure. The document is shared with the court and defence. DMDs are intended to assist the court in case management and will also enable the defence to engage from an early stage with the prosecution's proposed approach to disclosure.

Disclosure Review Meeting

A meeting between the Head of Division and key members of the case team to review the disclosure progress and strategy on a case.

Disclosure Strategy Document (DSD)

A case document used by the SFO to record the case disclosure strategy. The disclosure strategy must be kept under review and be updated throughout the lifetime of an investigation and must be reconsidered in the light of changing information.

E-Discovery (Electronic Discovery)

E-discovery is a form of digital investigation that attempts to find evidence in email, business communications and other data that could be used in litigation or criminal proceedings. The traditional discovery process is standard during litigation, but e-discovery is specific to digital evidence. The evidence from electronic discovery could include data from email accounts, instant messages, social profiles, online documents, databases, internal applications, digital images, website content and any other electronic information that could be used during civil and criminal litigation.

Evidence Handling Management Office

The unit responsible for recording, storing and tracking all evidence seized during investigations.

General Counsel

The most senior legal position in the SFO. General Counsel provides oversight, advice and quality control on SFO cases and preparations for trials.

GRM02

The SFO case involving G4S.

Head of Division

A senior leader within the SFO who leads one of the SFO's operational casework divisions.

Legal Professional Privilege

Legal Professional Privilege (LLP) is a principle in UK law that ensures certain confidential communications between legal professionals and their clients remain confidential.

Operational Handbook

The internal document which provides guidance to SFO staff on how to manage and progress investigations and prosecutions.

Plea and Trial Preparation Hearing

The first hearing at Crown Court is called the Plea and Trial Preparation Hearing (PTPH).

Roskill Model

The organisational structure of the SFO as recommended in the Roskill report published in 1986. The model has investigators and prosecutors working together from the start of a case.

Search terms

A word or phrase entered into the SFO DRS to find documents or information which could be relevant to the investigation.

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