The Forensic Institute

Cabinet Secretary, Kenny MacAskill MSP, The Scottish Parliament

Chief Executive of the Scottish Legal Aid Board, Mr Lindsay Montgomery CBE

Chair of Justice Committee, Mr John Lamont MSP

SCCRC, Chief Executive, Mr Gerard Sinclair

11th March 2011

Disclosure of police laboratory files in criminal cases

Sirs,

The Forensic Institute undertakes the scientific review of Crown reports which are normally produced by the forensic science laboratories of the Scottish Police Services Authority (SPSA). Although small in comparison with SPSA, we are the largest independent organisation employing full time scientific staff providing expert scientific support to solicitors. Until recently, our review process primarily involved a first stage of obtaining copies of the laboratory casefiles, preferably by making our own electronically-scanned copies. This was quick, efficient, effective, and professionally acceptable as a diligent and thorough assessment of the evidence adduced against the citizen. That system continues in our work outside Scotland. For no stated reason, the SPSA have changed their approach to our requests, adopting what they have termed a 'National Defence Access Policy' (which we have not seen nor been consulted about, nor we suspect any other non-Prosecution entities). **We believe that this new approach is antithetical to the much-vaunted fairness and justice supposedly central to Scots Law.** In the matter of disclosure, we are now clearly behind other jurisdictions, including our nearest neighbours. We have published the attached articles, one being a précis of the other, which set out our position. I would be obliged if you would take the time to read and consider the full case set out therein.

This week, the SPSA instructed its own Counsel (a step which we can neither afford nor see that we have a duty to provide) in a bid to prevent us having proper access to the case files of the cases involved. The High

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Court, in two separate and unexplained judgements, decided in favour of the SPSA. Neither judge took evidence from our scientist who was there specifically to explain the necessity for our request. Aside from the clear inequality of arms involved in the court debate, **we consider that, notwithstanding what may be the legal position, common fairness and justice demands that all of the material used by the Crown scientists should be made available to the defence** to conduct such inquiry as the defence deem fit, not as deemed acceptable to the Crown or the SPSA.

The proposal from the SPSA is essentially that the defence scientist attends the laboratory and has then to precognose the Crown scientists, or at best is able to see SPSA-selected parts of the casefile; **it is also intended that the SPSA charge hourly fees to attend such meetings or to 'supervise' the defence scientist if they are permitted to look at the case files.** This is rather like the defence lawyers having to go to the Fiscal's Office and browse the Crown evidence in the presence of the Fiscal, but not being permitted to take it back to their offices for discussion with colleagues or even the defendant – and being charged for the opportunity. **This proposal will**

1. **increase costs**, as not only will the defence often be sending more than one scientist in order to facilitate discussion, but more time will be spent carefully considering any files seen in the knowledge that a second visit, perhaps as new information or a re-considered Prosecution opinion comes to light, becomes more likely. Where we currently use consultants in England, we send the files to them electronically; the consultant will now have to travel and probably be accommodated (we are of course now completely compromised in seeking other professional opinion through our international networks). Furthermore the SPSA will be charging for supervision time spent by any staff member being taken away from other duties (unless they will be charging effectively double-time for 'supervision' while still doing other work, even if only paperwork). If we subsequently make a request for copies of specific parts of any

material within the casefile, such copy may be made – but only at the discretion of the SPSA, who effectively become the gatekeeper of the defence case! We would then have recourse to further application to the court, another waste of public money and court time.

2. **reduce effectiveness**, as the necessary collegiate approach to our consideration of the evidence, which can involve several scientists using our current system, will be completely compromised as they will not all have access to the original data (other than by sending everyone back to the laboratory).

3. **increase report delivery times**, as it is likely that we must spend considerable time at the laboratory in the knowledge that a return visit will be expensive and cause delays. We must then return to the Institute to consider our findings, and then possibly arrange yet another meeting with the Crown scientist to resolve any outstanding issues. Arranging defence expert schedules are bad enough in a busy timetable, let alone being restricted to over-lapping availability of SPSA staff for the 'supervision'.

4. **Increase the risk of appeals** caused by an insufficiently diligent and thorough investigation of the scientific evidence by the defence (we have examples of same).

Our proposal is a simple one; give the defence scientist the same facility as the Crown scientists had to consider all of the evidence by having it readily and constantly available, and permitting discussions with colleagues using the original material (or copies thereof). This is fair, effective, efficient, and is working not only in all of the other UK jurisdictions, but in the USA. It should be noted that in the USA the police also operate many laboratories, and errors and corruption are being increasingly discovered as proper scrutiny of their work becomes more widespread.

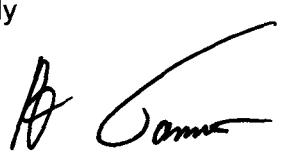
Mr MacAskill has been quoted as saying, "Fairness for the victim and the accused is at the heart of any good justice system. *But so is public*

confidence. ... It is no threat to our justice system to reappraise historic principles such as double jeopardy. It is to ensure our law remains fit for purpose". Perhaps the law relating to disclosure needs similar review to ensure public confidence. The Courts may not currently consider our request to have legal merit (albeit we have not been permitted the same representation as the SPSA), but the 'court of public opinion', if these facts were to enter that arena, may take a different view.

In summary, although the legal position may be that the SPSA are not compelled to disclose copies of their case files, **justice, fairness, cost-efficiency, cost-effectiveness, and scientific effectiveness demand that, as a matter of public policy, they should be compelled to do so.**

I would be happy to meet with you to clarify any aspect of this, and/or welcome you to The Forensic Institute to demonstrate our system.

Yours faithfully



Professor Allan Jamieson,

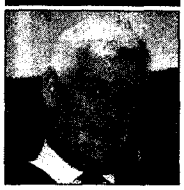
Director,

for and on behalf of The Forensic Institute

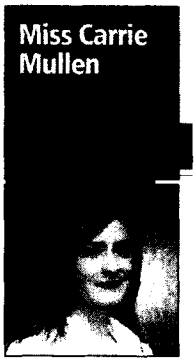
Why are Scotland's police laboratories alone in refusing full disclosure of laboratory case files to defence experts?

Show us the files

Professor Allan Jamieson



Miss Carrie Mullen



The Forensic Institute, Glasgow

Scientific evidence is appearing in more criminal cases than ever before. It is therefore of vital importance that the basis of any scientific opinion is subject to proper scrutiny.

Of all UK jurisdictions, only Scotland has laboratories owned and operated by the police, under the Scottish Police Services Authority (SPSA). Is it coincidental that this is the only jurisdiction that refuses to fully share, as a matter of "SPSA policy", the case files generated in the examination of physical evidence?

The case file can extend to thousands of pages. The request for copies of these is resisted by the SPSA.

We have sought:
(1) full disclosure of all of the laboratory case files;
(2) the right to copy these files to our computerised case management system; and
(3) the right to retain such disclosed material.

The constraints of legal aid, and the understandable reluctance of courts to delay trials while the experts wrangle, conspire to prevent this important matter from being resolved once and for all.

We consider that the main purpose of the defence expert is to review the basis of the opinion offered by the Crown scientist.

The scientists' work, including correspondence with the police, is recorded in a document called a case file. Traditionally, defence experts have either simply visited the lab for what can amount to a flick-through of the file, or have "retested" the item.

Retesting is expensive, time consuming, and it is frequently impossible to retest exactly the same material. A diligent and thorough study of the case files can take many hours and involve discussions with other scientists and the necessity to revisit the files as new information or theories come to light.

We understand that the SPSA laboratories are accredited to a quality standard termed ISO 17025. That standard requires that the laboratory has written procedures for the performance of any tests that it performs. The SPSA resists disclosure of these.

So what should experts for the defence be seeking? The SPSA wishes to restrict access to only certain parts of the case files. Such a blanket policy is unacceptable because it is sometimes necessary to know what instructions and/or information have been received by the scientist when they make decisions affecting the tests to be performed or the interpretation of the results. We therefore require unrestricted access to the complete file in principle, redaction being by exception and each redaction justified.

It is essential for any scientist reviewing another scientist's work to be aware of the limitations of the examination and why they were limited.

SPSA appears to accept in principle that we can receive copies of some material. However, they insist that we cannot copy those copies. This inhibits our ability to work with the material.

We therefore would prefer the right, which may be exercised at our option, to copy the entire case file as we do in other jurisdictions. This enables immediate access to the case file by our own scientists, and by our consultants who may be anywhere in the world.

The terms now sought by the SPSA specifically prohibit our copying of the case file. This is, in our opinion, unjustified and inhibitory to our full consideration of the files.

We wish to retain what is disclosed unless there are *prima facie* reasons for not retaining it. This is in line with other defence material held by solicitors.

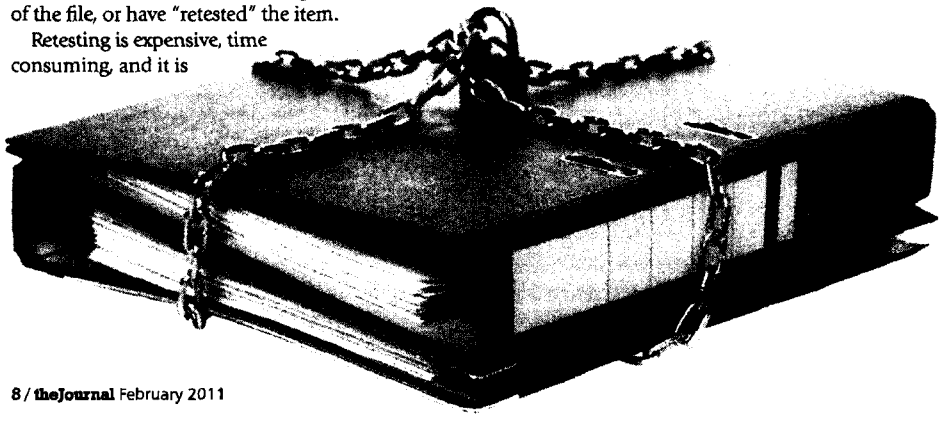
It is common professional practice to use case material in presentations at conferences or educationally. We are seeking the right to the same opportunities.

We comprehend the argument that material is normally disclosed only for the purposes of the instant case. Scientific information is a fundamentally different form of information than, for example, eyewitness statements or the labels, in that:
(a) it becomes part of the experts' specific expertise;
(b) it may form evidence in other cases;
(c) it may contain material of scientific or educational interest.

We are seeking to establish these principles of disclosure to ensure a right, exclusively denied in Scotland, on behalf of the defence which will enable a thorough and diligent analysis of the Crown findings and opinion. This right may not be exercised in full in every case, but we believe that it is essential to have it established rather than to have to endure a prolonged and wasteful battle every time such a right is sought.

Other jurisdictions take the necessity for thorough investigation seriously enough to require that their experts make a declaration that the expert has made all inquiries which the expert believes desirable and appropriate and that no matters of significance which the expert regards as relevant have been withheld from the court.

Regrettably, in Scotland, we must now incorporate a declaration to the opposite effect.



● A fuller version of this article can be read at www.journalonline.co.uk/extras

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The case for full disclosure of laboratory case files

14 Feb 11

Fuller version of the opinion article in the February 2011 Journal

by Allan Jamieson, Carrie Mullen

Scientific evidence is appearing in more criminal cases than ever before. Its significance as evidence, in the era of DNA profiling and crime scene examiners, has never been greater. It is therefore of vital importance to the defence, and indeed to the fairness of the criminal justice system, that the bases of any scientific opinion proffered by the Crown is subject to proper scrutiny.

It is a principle endorsed as long ago as 1953 that: "Expert witnesses, however skilled or eminent, can give no more than evidence. ...Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing *and tested*, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor *independently appraised*, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert" (Davie v Edinburgh Corporation Magistrates 1953 SC 34 at 40; 1953 SLT 54 at 57, from www.expertwitnessscotland.info/role.htm, our emphasis).

Of all UK jurisdictions, only Scotland has laboratories owned and operated by the police, under the Scottish Police Services Authority (SPSA). Is it coincidental that this is the only jurisdiction that refuses to fully share, as a matter of "SPSA policy", the case files generated in the examination of physical evidence to obtain, for example, DNA profiles? It would appear that Scottish accused are being deprived the same access to scientific critique of the Crown scientist's opinion as those in England, Wales, and Northern Ireland. Can this be just?

Recent attempts to obtain disclosure of scientific case files in criminal cases in Scotland have been resisted by the Scottish Police Services Authority, apparently supported by the Crown, which wishes to place unique restrictions on not only what is disclosed, but what can be done with it.

The case file can extend to thousands of pages. The request for copies of these is resisted by the SPSA, which now also wants to levy a charge on the defence for "supervision" in attending to the needs of the defence, thereby simply moving public funds from one part of the system to another and adding to the administrative burden of all.

We have sought:

1. full disclosure of all of the laboratory case files;
2. the right to copy these files to our computerised case management system; and
3. the right to retain such disclosed material.

If the equality of arms and fairness of process is to be accommodated within the duty of the defence expert to conduct a full and thorough review of the basis of the Crown experts' opinion, then it is essential that the requirements of the defence are explicitly and comprehensively described and facilitated.

The constraints of legal aid, the time and cost pressures under which solicitors and counsel operate, and the understandable reluctance of courts to delay trials whilst the experts wrangle over what may appear obscure technical issues, conspire to prevent this important matter from being resolved for once and for all. In at least one case the path of least resistance appears to have been followed by solicitors instructing another expert who was, presumably, less demanding on disclosure. How this squares with declarations in Anderson and the defendant's ECHR rights may become apparent in due course.

Why

We consider that the main purpose of the defence expert is to review the basis of the opinion offered by the Crown scientist. This is done by:

a. discovery of what material was available for testing

b. verification of the testing that was performed, including verification that: (i) the methods are appropriate; (ii) they have been properly performed; (iii) the results have been correctly derived; (iv) the opinion can be reliably inferred from the result.

What

It is well recognised in forensic scientific practice that the recording of all of these has to be done in a document called a case file. The content, and its potential importance, has been obscure to solicitors. Traditionally, defence experts have either simply retested or visited the lab for what can amount to a flick-through of the file. This is unsatisfactory for many reasons.

Retesting is expensive, time consuming, and it is frequently impossible to retest exactly the same material. If a different result is obtained it still leaves the Crown with its evidence intact. There is no obligation on the defence to retest: it is for the Crown to provide its evidence.

A diligent and thorough study of the case files can take many hours and involve discussions with other scientists and the necessity to revisit the files as new information or theories come to light.

Professional standards

Forensic scientists are required by good professional practice, and by the accreditation that the laboratories pay taxpayers' money to have, to record everything that they do which contributes to the opinion expressed in their reports. Recently, in response to concern about standards in forensic science, a forensic regulator was appointed. The SPSA contributes to his advisory board. The regulator is explicit on what should be recorded and the purpose for which it is recorded:

"As a minimum, the technical records shall contain all information relating to:
a. the collection and movement of material (physical exhibits and information), including the date on which the material was taken or received; the date of subsequent movement of the material to another party; from whom or where and to whom or where the material was moved; and the means by which the material was received or passed from/to another party...
b. sufficient detail to be able to trace any analytical output to: (i) a specific instrument; (ii) a specific version of software/firmware; (iii) the operator; and (iv) the date of the run;
c. any witnesses' accounts or explanations provided, or any other information received;
d. the examination of exhibits, and materials recovered from exhibits, whether made by the practitioner or an assistant;
e. verbal and other communications, including reports and statements;
f. all meetings attended and telephone conversations, including points of agreement, or disagreement, and agreed actions; and
g. all emails and other electronic transmissions (e.g. images), sent or received....
...traceability should be maintained for all names, intials/or identifiers and for these to be legible" (A Rennison (July 2010), "Forensic Science Regulator Overseeing Quality: Codes of Practice and Conduct for forensic science providers and practitioners in the criminal justice system (Second Consultation Draft)).

An American prosecuting attorney, when asked recently what should be disclosed, stated: "Usually we will turn over the entire case file that was generated by the state or city forensic laboratory. This will include all of the reports, case notes, vouchers, electropherograms, case contacts, police vouchers, requests for laboratory analysis by the relevant law enforcement agency, etc" (B Leventhal, comments made at the 20th International Symposium on Human Identification 2010, available at www.promega.com/profiles/1301/1301_03.html).

Are Scots accused to be denied what appears to be the rights accorded those in other advanced judicial systems?
We understand that the SPSA laboratories are accredited to a quality standard termed ISO 17025. That standard requires that the laboratory has written procedures for the performance of any tests that it performs. It states: "The laboratory shall retain records of original observations, derived data and sufficient information to establish an audit trail, calibration records, staff records and a copy of each test report or calibration certificate issued, for a defined period. The records for each test or calibration shall contain sufficient information to facilitate, if possible, identification of factors affecting the uncertainty and to enable the test or calibration to be repeated under conditions as close as possible to the original. The records shall include the identity of personnel responsible for the sampling, performance of each test and/or calibration and checking of results."

A published paper, "National recommendations of the Technical UK DNA working group on mixture interpretation for the NDNAD and for court going purposes", Forensic Science International: Genetics 2 (2008), 76–82, to which representatives of the SPSA laboratories are signatories, in relation to DNA profiling, states:

"Key to achieving this is development of guidelines and defining their use. Guidelines are currently applied in association with thresholds. These thresholds are determined experimentally and are specific to each process or method used and may be specific to a particular laboratory. The most important is the 'dropout' threshold. ... The determination of this threshold is derived experimentally. The threshold is a guideline....

"It is recommended that laboratories make their own Stmax determinations since the effects may be technique dependent".

We may wish to assess the experiments that the SPSA laboratory should have performed in this regard in order to inform their guidelines (operating procedures) and understand their treatment of thresholds in the interpretation of profiles in casework. This enables an assessment of whether the laboratory's own guidelines are based on sufficient data, and that they were applied appropriately in a particular case. Additionally, it enables an assessment of whether the protocols conform to published standards.

This cannot be accomplished at precognition.

So what should experts for the defence be seeking?

Right to full disclosure

The SPSA wishes to restrict access to only certain parts of the case files. We understand the requirements for security, some types of witness, and intelligence, to be protected, and have made no complaint when such material is redacted. However, a blanket refusal is unacceptable because it is sometimes necessary to know what instructions and/or information have been received by the scientist when they make decisions affecting the tests to be performed or the interpretation of the results. We therefore require unrestricted access to the complete file in principle and redaction to be by exception and each redaction justified.

The case file contains the information upon which the scientists have based their opinion. This is explicit in the statements from SPSA laboratories which state: "The conclusion(s) included in this report are based on the scientific findings and the information provided. If the information changes we will reconsider the conclusion(s within this report."
It is patent that we must be able to have full disclosure of the material listed in order to see that information – the basis of the opinion within the report.

This point is also appreciated by the regulator: "It is expected that the expert, in assessing the results obtained, would not only consider the original proposition but other possible propositions which could equally or better explain their findings."

The defence scientist can only ensure that this has been done by looking through the correspondence of the case file, particularly between the investigating officers and the laboratory scientists.

It is therefore essential for any scientist reviewing another scientist's work to be aware of the limitations of the examination and why they were limited – this is why all of these points above must be discussed, recorded and made available.

Right to copy

SPSA appears to accept in principle that we can receive copies of material, at least that portion that they deign to release. However, they insist that we cannot copy those copies. This inhibits our ability to work with the material.
We therefore would prefer the right, which may be exercised at our option, to attend to electronically copy the entire case file as we do in other jurisdictions. This enables immediate access to the case file by scientists at TFI and our consultants, who may be anywhere in the world. This also enables easier compliance with the guidance from the regulator that "Threats to impartiality include a practitioner... being the sole reviewer of their own work."

It is often necessary to make further copies of pages from the case file to allow independent discussion between defence scientists.

The terms now sought by the SPSA specifically prohibit our copying of the case file. This is, in our opinion, unjustified and inhibitory to our full consideration of the files.

Right to retain

We wish to retain what is disclosed unless there are prima facie reasons for not retaining it. This is in line with other defence material held by solicitors. In summary:

- the material becomes part of our expertise;
- it has been disclosed before (and in other jurisdictions) without this restriction;
- it may form part of our evidence in other cases, for example to illustrate a change or inconsistency in practice;

- this material has at least the same importance as other disclosed material. There is no reason why it should not similarly be retained indefinitely.

In addition the regulator recommends, in line with good scientific practice, that correct professional approach is to "Reconsider and, if necessary, be prepared to change your conclusions, opinions or advice and to reinterpret your findings in the light of new information or new developments in the relevant field",

This is extremely difficult and often impossible without revisiting the original case file.

It is common professional practice to use case material in presentations at conferences or educationally. We are seeking the right to the same opportunities.

We comprehend the argument that material is normally disclosed only for the purposes of the instant case. Our response is that:

- it does not appear that, even though disclosure is achieved for the instant purpose, there is any legal inhibition on it being used for another purpose;
- a requirement to return all of the documentation is an additional and exceptional burden placed upon us, different to all other material in the case;
- such a requirement prevents the use of the material when there may be a substantial legal, public, or scientific reason to do so;
- the current protection of anonymity and professional standards in the handling of documents being applied by TFI are effective;
- for the reasons cited above (it may form part of our evidence in other cases, for example to illustrate a change or inconsistency in practice), scientific information is a fundamentally different form of information than, for example, eyewitness statements or the labels, in that (i) it becomes part of the experts' specific expertise; (ii) it may form evidence in other cases; (iii) it may contain material of scientific or educational interest.

Conclusion

We are seeking to establish these principles of disclosure to ensure a right, exclusively denied in Scotland, on behalf of the defence which will enable a thorough and diligent analysis of the Crown findings and opinion. This right may not be exercised in full in every case, but we believe that it is essential to have it established rather than to have to endure a prolonged and wasteful battle every time such a right is sought.

Other jurisdictions take the necessity for thorough investigation seriously enough to require their experts make a declaration that the expert has made all inquiries which the expert believes desirable and appropriate and that no matters of significance which the expert regards as relevant have been withheld from the court (Review of the criminal and civil justice system in Western Australia (at 22.17): www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/finalreport/ch22expert.pdf). Regrettably, in Scotland, we must now incorporate a declaration to the opposite effect.

Professor Allan Jamieson and Miss Carrie Mullen, The Forensic Institute, Glasgow