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# **Guidance on disclosure of Unused Material under the Audit Enforcement Procedure**

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## Guidance disclosure of Unused Material under the Audit Enforcement Procedure

### 1. Introduction

- 1.1 This Guidance is issued by the Board of the Financial Reporting Council (the “**FRC**”) under the Audit Enforcement Procedure (the “**AEP**”). This document provides guidance with respect to the disclosure of unused material in FRC enforcement cases under the AEP. There is separate guidance for cases taken under the Accountancy Scheme and the Actuarial Scheme.
- 1.2 This Guidance is subject to the provisions of the AEP dated 5 January 2022 and should be read in conjunction with the AEP. In the event of any conflict, the provisions of the AEP prevail.

### 2. Definitions

- 2.1 This Guidance adopts the definitions used in the AEP. In addition, the Guidance uses the following definitions:
- a) **Evidence:** material which Executive Counsel relies on to prove or disprove a matter in issue.
  - b) **Unused Material:** material in Executive Counsel’s possession which has been obtained in connection with, and is relevant to, the investigation, but which Executive Counsel does not rely upon as Evidence.
  - c) **The Disclosure Test:** whether the Unused Material is capable of assisting the Respondent’s case or undermining Executive Counsel’s case.
  - d) **Disclosable Material:** material which meets the Disclosure Test.

### 3. Provision of material prior to Tribunal proceedings

- 3.1 If Executive Counsel provides an Investigation Report, pursuant to Rule 16 of the AEP, it will be accompanied by:
- a) The Evidence referred to in the Investigation Report; and
  - b) Any Disclosable Material which has by then been identified as such in the course of the investigation to date.
- 3.2 At the stage of service of a Proposed Decision Notice, Executive Counsel will consider whether there is any further Evidence referred to in the documents served and/or any further Disclosable Material which has by then been identified as such, and if so, provide it accordingly.

### 4. Provision of Unused Material following appointment of the Tribunal

- 4.1 Following the appointment of a Tribunal, Executive Counsel shall, in accordance with, and subject to, any Case Management Directions issued by the Chair:
- a) provide the Respondent with a list of the categories of Unused Material in Executive Counsel’s possession, identifying those which contain Unused Material which has not been provided to the Respondent to date;
  - b) provide a disclosure protocol setting out Executive Counsel’s proposed approach to the review of the categories of the Unused Material;

- c) following the review process, serve copies of or provide access to the Disclosable Material; and
  - d) provide the Respondent with all documents and instructions given to the expert which are material to the opinions expressed in any served expert report, or upon which those opinions are based.
- 4.2 The Disclosable Material may be provided in hard or soft copy or via access to a secure electronic data hosting site. In cases where there is more than one Respondent, Executive Counsel will provide the Disclosable Material to all Respondents where appropriate and permitted by law.
- 4.3 When considering an application for disclosure of documents the Disclosure Test shall apply.
- 4.4 The duty of disclosure is a continuing one. Throughout the course of the Tribunal proceedings and, in particular, after receipt of documents setting out the Respondent's defence, Executive Counsel will keep under review the question of whether there is further Disclosable Material.
- 5. Obtaining material from third parties**
- 5.1 Executive Counsel has no obligation to seek material from a third party.
- 5.2 Executive Counsel will consider a request from a Respondent to do so, where the Respondent can establish there are reasonable grounds to believe the material sought is relevant and will meet the Disclosure Test.
- 5.3 In determining whether or not to accede to such a request, Executive Counsel will consider the following (non-exhaustive) factors:
- a) any steps taken by the Respondent to obtain the material;
  - b) if Executive Counsel has specific powers to seek the material or has available a statutory gateway for information sharing; or is otherwise better placed than the Respondent to request the material;
  - c) whether the request imposes a disproportionate resource burden on Executive Counsel and/or the third party from whom the material is being sought; and
  - d) whether there are any restrictions on the use of the material imposed by the third party.
- 5.4 Executive Counsel will seek the material where, in all the circumstances, the fairness of the proceedings require it.
- 5.5 Where Executive Counsel declines to seek material from a third party, following a request from a Respondent to do so, written reasons will be provided to the Respondent.

**Issued by the Conduct Committee with effect from 5 January 2022**



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