



Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

PART 6

DISCLOSURE

Applications to court: orders preventing or restricting disclosure

141 Application for section 145 order

- (1) This section applies where the conditions in subsection (2) or (3) are met.
- (2) The conditions are that—
 - (a) by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6)(b) the prosecutor is required to disclose an item of information to an accused,
 - (b) section 121(3)(a) or (b) applies to the information, and
 - (c) the prosecutor considers that subsection (4) applies.
- (3) The conditions are that—
 - (a) by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,
 - (b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings, and
 - (c) the prosecutor considers that subsection (4) applies.
- (4) This subsection applies if disclosure of the item of information would be likely to cause a real risk of substantial harm or damage to the public interest.
- (5) The prosecutor must apply to the court for an order under section 145 (a “section 145 order”).

142 Application for non-notification order or exclusion order

- (1) This section applies where the prosecutor is required by section 141(5) to apply to the court for a section 145 order.
- (2) If the application for a section 145 order relates to solemn proceedings (whether continuing or concluded), the prosecutor may also apply to the court for—
 - (a) a non-notification order and an exclusion order, or
 - (b) an exclusion order (but not a non-notification order).
- (3) If the application for a section 145 order relates to summary proceedings (whether continuing or concluded), the prosecutor may also apply to the court for an exclusion order.
- (4) A non-notification order is an order under section 143 prohibiting notice being given to the accused of—
 - (a) the making of an application for—
 - (i) the section 145 order to which the non-notification order relates,
 - (ii) the non-notification order, and
 - (iii) an exclusion order, and
 - (b) the determination of those applications.
- (5) An exclusion order is an order under section 143 or 144 prohibiting the accused from attending or making representations in proceedings for the determination of the application for a section 145 order to which the exclusion order relates.
- (6) Subsection (7) applies where the prosecutor applies—
 - (a) by virtue of subsection (2)(a) for a non-notification order and an exclusion order, or
 - (b) by virtue of subsection (2)(a) or (b) for an exclusion order.
- (7) Before determining in accordance with section 145 the application for the section 145 order, the court must—
 - (a) in accordance with section 143, determine any applications for a non-notification order and an exclusion order,
 - (b) in accordance with section 144, determine any application for an exclusion order.
- (8) In this section and sections 143 to 145—

“accused” includes, where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information,
“appellant” has the meaning given by section 132.

143 Application for non-notification order and exclusion order

- (1) This section applies where the prosecutor applies for a non-notification order and an exclusion order.
- (2) On receiving the application, the court must appoint a hearing to determine whether a non-notification order should be made.
- (3) The accused is not to be notified of—

- (a) the applications for the section 145 order, non-notification order and exclusion order, or
 - (b) the hearing appointed under subsection (2).
- (4) The accused is not to be given the opportunity to be heard or be represented at the hearing.
- (5) If, after giving the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a non-notification order.
- (6) Those conditions are—
 - (a) that disclosure to the accused of the making of the application for the section 145 order would be likely to cause a real risk of substantial harm or damage to the public interest, and
 - (b) that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused's receiving a fair trial.
- (7) If the court makes a non-notification order it must also make an exclusion order.
- (8) If the court refuses to make a non-notification order the court must appoint a hearing to determine the application for an exclusion order.
- (9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section 144 are met, the court may make an exclusion order under subsection (4) of that section.
- (10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).
- (11) In this section and sections 144 and 145, references to the accused's receiving a fair trial include, where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.

144 Application for exclusion order

- (1) This section applies where by virtue of section 142(2)(b) or (3) the prosecutor applies for an exclusion order (but not a non-notification order).
- (2) On receiving the application the court must appoint a hearing.
- (3) On the application of the prosecutor the court may exclude the accused from the hearing.
- (4) If after giving the prosecutor and, subject to subsection (3), the accused an opportunity to be heard on the applications for the exclusion order and the section 145 order to which it relates the court is satisfied that the conditions in subsection (5) are met, the court may make an exclusion order.
- (5) Those conditions are—
 - (a) that disclosure to the accused of the nature of the information to which the application for the section 145 order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and

- (b) that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

145 Application for section 145 order: determination

- (1) This section applies where—
 - (a) the prosecutor applies for a section 145 order, and
 - (b) any application for a non-notification order or an exclusion order has been determined by the court.
- (2) The court must—
 - (a) consider the item of information to which the application for a section 145 order relates,
 - (b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and
 - (c) determine—
 - (i) where the application for the section 145 order is made by virtue of section 141(2), whether the conditions in subsection (3) apply, or
 - (ii) where the application for the section 145 order is made by virtue of section 141(3), whether the conditions in subsection (4) apply, and
 - (d) if the court determines that the conditions in subsection (3) or, as the case may be, (4) apply, determine whether subsection (5) applies.
- (3) The conditions are—
 - (a) that by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6)(b) the prosecutor is required to disclose the item of information,
 - (b) that section 121(3)(a) or (b) applies to the information,
 - (c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
 - (d) that withholding the item of information would be consistent with the accused's receiving a fair trial, and
 - (e) that the public interest would be protected only if a section 145 order were to be made.
- (4) The conditions are—
 - (a) that by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,
 - (b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings,
 - (c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
 - (d) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and
 - (e) that the public interest would be protected only if a section 145 order were to be made.
- (5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—
 - (a) the condition in paragraph (c) of subsection (3) or, as the case may be, paragraph (c) of subsection (4) would not be met, and

- (b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.
- (6) If the court considers that subsection (3) or, as the case may be, (4) (but not subsection (5)) applies, it may make a section 145 order preventing disclosure of the information.
- (7) If the court considers that subsection (5) applies, it may make a section 145 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.
- (8) For the purposes of subsection (5) the ways in which the item of information might be disclosed or partly disclosed include in particular—
 - (a) providing the information after (whether by redaction or otherwise) removing or obscuring parts of it,
 - (b) providing extracts or summaries of the information or part of it.