



Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

PART 6

DISCLOSURE

Orders preventing or restricting disclosure: Secretary of State

146 Order preventing or restricting disclosure: application by Secretary of State

- (1) Where the condition in subsection (2), (3) or (4) is met in relation to an item of information that the prosecutor proposes to disclose, the Secretary of State may apply to the court for an order under this section (a “section 146 order”) in relation to the item of information.
- (2) The condition is that the prosecutor proposes to disclose to the accused information which the prosecutor is required to disclose by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6)(b).
- (3) The condition is that the prosecutor proposes to disclose to an appellant or, as the case may be, a person information which the prosecutor is required to disclose by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2).
- (4) The condition is that the prosecutor proposes to disclose to an accused, appellant or person to whom section 136, 137 or 138 applies information which the prosecutor is not required to disclose by virtue of this Part.
- (5) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section 147, the court must comply with subsections (6) and (7) of that section.
- (6) Where an application is made under subsection (1), the court must—
 - (a) consider the item of information to which the application relates,
 - (b) give the Secretary of State and the prosecutor the opportunity to be heard,
 - (c) if the application relates to information which the prosecutor is required to disclose by virtue of subsection (2) or (3) and a non-attendance order has not been made, give the accused the opportunity to be heard,

Status: This is the original version (as it was originally enacted).

- (d) determine—
 - (i) where the application for the section 146 order is made by virtue of subsection (2), whether the conditions in subsection (7) apply, or
 - (ii) where the application for the section 146 order is made by virtue of subsection (3) or (4), whether the conditions in subsection (8) apply, and
 - (e) if the court determines that the conditions in subsection (7) or, as the case may be, (8) apply, determine whether subsection (9) applies.
- (7) The conditions are—
- (a) 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,
 - (b) that withholding the item of information would be consistent with the accused’s receiving a fair trial, and
 - (c) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.
- (8) The conditions are—
- (a) in the case of an application made by virtue of subsection (3), 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) 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,
 - (c) 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
 - (d) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.
- (9) 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 (a) of subsection (7) or, as the case may be, paragraph (b) of subsection (8) would not be met, and
 - (b) the disclosure (or partial disclosure) would be consistent with the accused’s receiving a fair trial.
- (10) If the court considers that subsection (7) or, as the case may be, (8) (but not subsection (9)) applies, it may make a section 146 order preventing disclosure of the information.
- (11) If the court considers that subsection (9) applies, it may make a section 146 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.
- (12) For the purposes of subsection (11) the order may in particular specify that—
- (a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),
 - (b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.
- (13) In this section and sections 147 to 149—

“accused” includes, where subsection (3) or (4) applies, 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.

- (14) In this section and sections 147 to 149, references to the accused’s receiving a fair trial include, where subsection (3) or (other than in relation to an accused) (4) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.

147 Application for ancillary orders: Secretary of State

- (1) This section applies where the Secretary of State applies for a section 146 order.
- (2) If the application under section 146 relates to solemn proceedings (whether continuing or concluded), the Secretary of State may also apply to the court for—
- (a) a restricted notification order and a non-attendance order, or
 - (b) a non-attendance order (but not a restricted notification order).
- (3) If the application under section 146 relates to summary proceedings (whether continuing or concluded), the Secretary of State may also apply to the court for a non-attendance order.
- (4) A restricted notification order is an order under section 148 prohibiting notice being given to the accused of—
- (a) the making of an application for—
 - (i) the section 146 order to which the restricted notification order relates,
 - (ii) the restricted notification order, and
 - (iii) a non-attendance order, and
 - (b) the determination of those applications.
- (5) A non-attendance order is an order under section 148(7) or 149 prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section 146 order to which the non-attendance order relates.
- (6) Subsection (7) applies where the Secretary of State applies—
- (a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or
 - (b) by virtue of subsection (2)(a) or (b) for a non-attendance order.
- (7) Before determining the application for the section 146 order, the court must—
- (a) in accordance with section 148, determine any application for a restricted notification order and a non-attendance order,
 - (b) in accordance with section 149, determine any application for a non-attendance order.

148 Application for restricted notification order and non-attendance order

- (1) This section applies where by virtue of section 147(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.
- (2) On receiving the application, the court must appoint a hearing to determine whether a restricted notification order should be made.

- (3) The accused is not to be notified of—
 - (a) the applications for the section 146 order, the restricted notification order and the non-attendance 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 Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.
- (6) Those conditions are—
 - (a) that disclosure to the accused of the making of the application for the section 146 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 restricted notification order would be consistent with the accused's receiving a fair trial.
- (7) If the court makes a restricted notification order, it must also make a non-attendance order.
- (8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.
- (9) If after giving the Secretary of State, 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 149 are met, the court may make a non-attendance order under subsection (4) of that section.
- (10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).

149 Application for non-attendance order

- (1) This section applies where by virtue of section 147(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).
- (2) On receiving the application, the court must appoint a hearing.
- (3) On the application of the Secretary of State the court may exclude the accused from the hearing.
- (4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.
- (5) Those conditions are—
 - (a) that disclosure to the accused of the nature of the information to which the application for the section 146 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 a non-attendance order would be consistent with the accused's receiving a fair trial.