



# Justice and Security Act 2013

## 2013 CHAPTER 18

### PART 2

#### DISCLOSURE OF SENSITIVE MATERIAL

##### *Closed material procedure: general*

#### **6 Declaration permitting closed material applications in proceedings**

- (1) The court seized of relevant civil proceedings may make a declaration that the proceedings are proceedings in which a closed material application may be made to the court.
- (2) The court may make such a declaration—
  - (a) on the application of—
    - (i) the Secretary of State (whether or not the Secretary of State is a party to the proceedings), or
    - (ii) any party to the proceedings, or
  - (b) of its own motion.
- (3) The court may make such a declaration if it considers that the following two conditions are met.
- (4) The first condition is that—
  - (a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or
  - (b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following—
    - (i) the possibility of a claim for public interest immunity in relation to the material,
    - (ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,

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- (iii) section 17(1) of the Regulation of Investigatory Powers Act 2000 (exclusion for intercept material),
  - (iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section.
- (5) The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration.
- (6) The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all of the material that might meet the conditions or on material that the applicant would be required to disclose).
- (7) The court must not consider an application by the Secretary of State under subsection (2)(a) unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based.
- (8) A declaration under this section must identify the party or parties to the proceedings who would be required to disclose the sensitive material (“a relevant person”).
- (9) Rules of court may—
- (a) provide for notification to the Secretary of State by a party to relevant civil proceedings, or by the court concerned, of proceedings to which a declaration under this section may be relevant,
  - (b) provide for a stay or sist of relevant civil proceedings (whether on an application by a party to the proceedings or by the court concerned of its own motion) where a person is considering whether to apply for a declaration under this section,
  - (c) provide for the Secretary of State, if not a party to proceedings in relation to which there is a declaration under this section or proceedings for or about such a declaration, to be joined as a party to the proceedings.
- (10) Rules of court must make provision—
- (a) requiring a person, before making an application under subsection (2)(a), to give notice of the person’s intention to make an application to every other person entitled to make such an application in relation to the relevant civil proceedings,
  - (b) requiring the applicant to inform every other such person of the outcome of the application.
- (11) In this section—
- “closed material application” means an application of the kind mentioned in section 8(1)(a),
  - “relevant civil proceedings” means any proceedings (other than proceedings in a criminal cause or matter) before—
    - (a) the High Court,
    - (b) the Court of Appeal,
    - (c) the Court of Session, or
    - (d) the Supreme Court,
  - “sensitive material” means material the disclosure of which would be damaging to the interests of national security.

## **7 Review and revocation of declaration under section 6**

- (1) This section applies where a court seised of relevant civil proceedings has made a declaration under section 6.
- (2) The court must keep the declaration under review, and may at any time revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.
- (3) The court must undertake a formal review of the declaration once the pre-trial disclosure exercise in the proceedings has been completed, and must revoke it if it considers that the declaration is no longer in the interests of the fair and effective administration of justice in the proceedings.
- (4) The court may revoke a declaration under subsection (2) or (3)—
  - (a) on the application of—
    - (i) the Secretary of State (whether or not the Secretary of State is a party to the proceedings), or
    - (ii) any party to the proceedings, or
  - (b) of its own motion.
- (5) In deciding for the purposes of subsection (2) or (3) whether a declaration continues to be in the interests of the fair and effective administration of justice in the proceedings, the court must consider all of the material that has been put before it in the course of the proceedings (and not just the material on which the decision to make the declaration was based).
- (6) Rules of court must make provision—
  - (a) as to how a formal review is to be conducted under subsection (3),
  - (b) as to when the pre-trial disclosure exercise is to be considered to have been completed for the purposes of subsection (3).
- (7) In relation to proceedings before the Court of Session—
  - (a) the reference in subsection (3) to the completion of the pre-trial disclosure exercise is a reference to the fixing of a hearing to determine the merits of the proceedings, and
  - (b) the reference in subsection (6)(b) to when the pre-trial disclosure exercise is to be considered to have been completed is a reference to what constitutes a hearing to determine the merits of the proceedings.

## **8 Determination by court of applications in section 6 proceedings**

- (1) Rules of court relating to any relevant civil proceedings in relation to which there is a declaration under section 6 (“section 6 proceedings”) must secure—
  - (a) that a relevant person has the opportunity to make an application to the court for permission not to disclose material otherwise than to—
    - (i) the court,
    - (ii) any person appointed as a special advocate, and
    - (iii) where the Secretary of State is not the relevant person but is a party to the proceedings, the Secretary of State,
  - (b) that such an application is always considered in the absence of every other party to the proceedings (and every other party’s legal representative),

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- (c) that the court is required to give permission for material not to be disclosed if it considers that the disclosure of the material would be damaging to the interests of national security,
  - (d) that, if permission is given by the court not to disclose material, it must consider requiring the relevant person to provide a summary of the material to every other party to the proceedings (and every other party's legal representative),
  - (e) that the court is required to ensure that such a summary does not contain material the disclosure of which would be damaging to the interests of national security.
- (2) Rules of court relating to section 6 proceedings must secure that provision to the effect mentioned in subsection (3) applies in cases where a relevant person—
- (a) does not receive the permission of the court to withhold material, but elects not to disclose it, or
  - (b) is required to provide another party to the proceedings with a summary of material that is withheld, but elects not to provide the summary.
- (3) The court must be authorised—
- (a) if it considers that the material or anything that is required to be summarised might adversely affect the relevant person's case or support the case of another party to the proceedings, to direct that the relevant person—
    - (i) is not to rely on such points in that person's case, or
    - (ii) is to make such concessions or take such other steps as the court may specify, or
  - (b) in any other case, to ensure that the relevant person does not rely on the material or (as the case may be) on that which is required to be summarised.

## **9 Appointment of special advocate**

- (1) The appropriate law officer may appoint a person to represent the interests of a party in any section 6 proceedings from which the party (and any legal representative of the party) is excluded.
- (2) A person appointed under subsection (1) is referred to in this section as appointed as a "special advocate".
- (3) The "appropriate law officer" is—
- (a) in relation to proceedings in England and Wales, the Attorney General,
  - (b) in relation to proceedings in Scotland, the Advocate General for Scotland, and
  - (c) in relation to proceedings in Northern Ireland, the Advocate General for Northern Ireland.
- (4) A person appointed as a special advocate is not responsible to the party to the proceedings whose interests the person is appointed to represent.
- (5) A person may be appointed as a special advocate only if—
- (a) in the case of an appointment by the Attorney General, the person has a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,
  - (b) in the case of an appointment by the Advocate General for Scotland, the person is an advocate or a solicitor who has rights of audience in the Court of Session

or the High Court of Justiciary by virtue of section 25A of the Solicitors (Scotland) Act 1980, and

- (c) in the case of an appointment by the Advocate General for Northern Ireland, the person is a member of the Bar of Northern Ireland.

## **10 Saving for normal disclosure rules**

Subject to sections 8, 9 and 11, rules of court relating to section 6 proceedings must secure that the rules of disclosure otherwise applicable to those proceedings continue to apply in relation to the disclosure of material by a relevant person.

## **11 General provision about section 6 proceedings**

- (1) A person making rules of court relating to section 6 proceedings must have regard to the need to secure that disclosures of information are not made where they would be damaging to the interests of national security.
- (2) Rules of court relating to section 6 proceedings may make provision—
  - (a) about the mode of proof and about evidence in the proceedings,
  - (b) enabling or requiring the proceedings to be determined without a hearing,
  - (c) about legal representation in the proceedings,
  - (d) enabling the proceedings to take place without full particulars of the reasons for decisions in the proceedings being given to a party to the proceedings (or to any legal representative of that party),
  - (e) enabling the court concerned to conduct proceedings in the absence of any person, including a party to the proceedings (or any legal representative of that party),
  - (f) about the functions of a person appointed as a special advocate,
  - (g) enabling the court to give a party to the proceedings a summary of evidence taken in the party's absence.
- (3) In subsection (2) references to a party to the proceedings do not include the relevant person concerned and (if the Secretary of State is not the relevant person but is a party to the proceedings) the Secretary of State.
- (4) The following proceedings are to be treated as section 6 proceedings for the purposes of sections 8 to 10, this section and sections 12 to 14—
  - (a) proceedings on, or in relation to, an application for a declaration under section 6,
  - (b) proceedings on, or in relation to, a decision of the court to make a declaration under that section of its own motion,
  - (c) proceedings on, or in relation to, an application for a revocation under section 7, and
  - (d) proceedings on, or in relation to, a decision of the court to make a revocation under that section of its own motion.
- (5) In proceedings treated as section 6 proceedings by virtue of subsection (4), a relevant person, for the purposes of sections 8 to 10, this section and sections 12 to 14, is a person who would be required to disclose sensitive material in the course of the proceedings.

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## 12 Reports on use of closed material procedure

- (1) The Secretary of State must—
  - (a) prepare a report on the matters mentioned in subsection (2) for—
    - (i) the period of twelve months beginning with the day on which section 6 comes into force, and
    - (ii) every subsequent twelve month period, and
  - (b) lay a copy of each such report before Parliament.
- (2) The matters are—
  - (a) the number of applications made during the reporting period—
    - (i) by the Secretary of State under section 6(2)(a)(i) or 7(4)(a)(i), and
    - (ii) by persons other than the Secretary of State under section 6(2)(a)(ii) or 7(4)(a)(ii),
  - (b) the number of declarations made by the court under section 6(1), and the number of revocations made by the court under section 7(2) or (3), during the reporting period—
    - (i) in response to applications made by the Secretary of State during the reporting period,
    - (ii) in response to applications made by the Secretary of State during previous reporting periods,
    - (iii) in response to applications made by persons other than the Secretary of State during the reporting period,
    - (iv) in response to applications made by persons other than the Secretary of State during previous reporting periods, and
    - (v) of the court’s own motion,
  - (c) the number of final judgments given in section 6 proceedings during the reporting period which are closed judgments, and
  - (d) the number of such judgments which are not closed judgments.
- (3) The report may also include such other matters as the Secretary of State considers appropriate.
- (4) The duty under subsection (1) in relation to the preparation and laying of a report must be carried out as soon as reasonably practicable after the end of the twelve month period to which the report relates.
- (5) In this section—
  - “closed judgment” means a judgment that is not made available, or fully available, to the public,
  - “final judgment”, in relation to section 6 proceedings, means a final judgment to determine the proceedings.

## 13 Review of sections 6 to 11

- (1) The Secretary of State must appoint a person to review the operation of sections 6 to 11 (the “reviewer”).
- (2) The reviewer must carry out a review of the operation of sections 6 to 11 in respect of the period of five years beginning with the day on which section 6 comes into force.

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- (3) The review must be completed as soon as reasonably practicable after the end of the period to which the review relates.
- (4) As soon as reasonably practicable after completing a review under this section, the reviewer must send to the Secretary of State a report on its outcome.
- (5) On receiving a report under subsection (4), the Secretary of State must lay a copy of it before Parliament.
- (6) Before laying a copy of a report before Parliament under subsection (5), the Secretary of State may, after consulting the reviewer, exclude from the copy any part of the report that would, in the opinion of the Secretary of State, be damaging to the interests of national security if it were included in the copy laid before Parliament.
- (7) The Secretary of State may pay to the reviewer—
  - (a) expenses incurred by the reviewer in carrying out functions under this section, and
  - (b) such allowances as the Secretary of State determines.

#### **14 Sections 6 to 13: interpretation**

- (1) In sections 6 to 13 and this section—

“enactment” means an enactment whenever passed or made and includes—

  - (a) an enactment contained in this Act,
  - (b) an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978,
  - (c) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament,
  - (d) an enactment contained in, or in an instrument made under, Northern Ireland legislation, and
  - (e) an enactment contained in, or in an instrument made under, a Measure or Act of the National Assembly for Wales,

“the Human Rights Convention” means the Convention within the meaning of the Human Rights Act 1998 (see section 21(1) of that Act),

“relevant civil proceedings” has the meaning given by section 6(11),

“relevant person” has the meaning given by section 6(8) and includes any person treated as a relevant person by any enactment,

“section 6 proceedings” has the meaning given by section 8(1) and includes any proceedings treated as section 6 proceedings by any enactment,

“sensitive material” has the meaning given by section 6(11),

“special advocate” has the meaning given by section 9(2),

and references to a party’s legal representative do not include a person appointed as a special advocate.
- (2) Nothing in sections 6 to 13 and this section (or in any provision made by virtue of them)—
  - (a) restricts the power to make rules of court or the matters to be taken into account when doing so,
  - (b) affects the common law rules as to the withholding, on grounds of public interest immunity, of any material in any proceedings, or

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- (c) is to be read as requiring a court or tribunal to act in a manner inconsistent with Article 6 of the Human Rights Convention.