



CONTRACT

between

THE HEALTH AND SAFETY EXECUTIVE

and

**SIMON COX OF INDEPENDENT ARBORICULTURE & URBAN
FORESTRY LIMITED**

For

**INDEPENDENT EXPERT INPUT & REPORT REGARDING ACCIDENT
ON 08/07/2021 INVOLVING A FALLING TREE LANDING ON A
MEMBER OF THE PUBLIC– EM89**

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This Contract is made between:

The **HEALTH AND SAFETY EXECUTIVE** (acting as part of the Crown) of Redgrave Court, Merton Road, Bootle, Merseyside, L20 7HS (hereinafter called 'the HSE' of the one part) and

SIMON COX - INDEPENDENT ARBORICULTURE & URBAN FORESTRY LIMITED of Robine House, Butterrow Hill, Butterrow, Stroud, GL5 2LG (hereinafter 'the Contractor' of the other part), in accordance with the details, terms and conditions stated herein.

WHEREAS

The Contractor was selected to provide services as an Independent Expert, as detailed in Schedule A.

The Contractor agrees to adhere to the roles and responsibilities as detailed in Appendix A (where applicable).

1 STATEMENT OF SERVICES REQUIREMENT

1.1 The Services shall be carried out in accordance with the details in Schedule A.

2 MANAGEMENT OF THE CONTRACT

2.1 The Contract Managers responsible for liaison and delivery of the services are identified at Annex 1.

3 DURATION

3.1 The Work shall be deemed to have commenced prior to 12th November 2021 and shall be completed by 14th January 2022.

4 COSTS

4.1 The maximum amount to be paid by the HSE to the Contractor under this Contract shall not, without the prior written agreement of the HSE, exceed **£5,000.00**, excluding VAT.

4.2 Where appropriate, and subject to the HSE Contract Manager's approval, actual and reasonable travel and subsistence costs shall be payable in line with the rates agreed at Annex 2.

5 LIMITATION OF LIABILITY

5.1 Subject to Clause 5.2 the liability of the Contractor for any breach of this Contract or arising in any other way out of the subject-matter of this Contract, will not extend to loss of business or profit, or to any indirect or consequential damages or losses. In any event, the maximum liability of the Contractor under or otherwise in connection with this Agreement or its subject matter shall not exceed the Contract price excluding VAT.

5.2 Nothing in this Agreement limits or excludes the liability of the Contractor:

5.2.1 for death or personal injury resulting from negligence; or

5.2.2 for any damage or liability incurred by HSE as a result of fraud or fraudulent misrepresentation by the Contractor; or

5.2.3 for any breach of its obligations under the General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR) and the Data Protection Act (DPA) 2018.

6 IR35 – INTERMEDIARIES LEGISLATION

6.1 HSE has undertaken an IR35 assessment of this engagement, and the HMRC online assessment tool determined that this engagement is classed as Self



EM89 IR35 Result
121121.pdf

Employed for Tax Purposes

7 TAX STATUS

7.1 Where the Contractor, or its staff, is liable to be taxed in the UK in respect of consideration received under this contract, it shall at all times comply with the Income Tax (Earnings and Pensions) Act 2003 (ITEPA) and all other statutes and regulations relating to income tax in respect of that consideration.

7.2 Where the Contractor, or its staff, is liable to National Insurance Contributions (NICs) in respect of consideration received under this contract, it shall at all times comply with the Social Security Contributions and Benefits Act 1992 (SSCBA) and all other statutes and regulations relating to NICs in respect of that consideration.

7.3 HSE may, at any time request that the Contractor provides information which demonstrates how it, or its staff, complies with Clauses 7.1 and 7.2 above or why those Clauses do not apply to it.

7.4 A request under Clause 7.3 above may specify the information which the Contractor, or its staff, must provide and the period within which that information must be provided.

7.5 HSE may terminate this contract if

(a) in the case of a request mentioned in Clause 7.3 above

(i) The Contractor, or its staff, fails to provide information in response to the request within a reasonable time, or

(ii) The Contractor, or its staff, provides information which is inadequate to demonstrate either how it complies with Clauses 7.1

and 7.2 above or why those Clauses do not apply to it;

- (b) in the case of a request mentioned in Clause 7.4 above, The Contractor, or its staff, fails to provide the specified information within the specified period; or
- (c) it receives information which demonstrates that, at any time when Clauses 7.1 and 7.2 apply the Contractor, or its staff, is not complying with those Clauses.

7.6 HSE may supply any information which it receives under Clause 7.3 to the Commissioners of Her Majesty's Revenue and Customs for the purposes of the collection and management of revenue for which they are responsible.

8 INVOICING AND PAYMENTS

- 8.1 All invoices raised must include the relevant Purchase Order number which will be issued by HSE Procurement Unit. Failure to include the Purchase Order Number may delay payment. Invoices should be submitted electronically in PDF format to APinvoices-HAS-U@gov.sscl.com
- 8.2 Invoices should also include details of work satisfactorily carried out and any VAT properly chargeable.
- 8.3 HSE shall make payment of agreed costs, in arrears, within 30 days of the acceptance of the invoice.
- 8.4 The Contractor shall send a copy invoice along with details of any work satisfactory carried out to the HSE Contract Manager identified at Annex 1.

9 ACCESS TO HSE PREMISES

- 9.1 It shall be the Contractor's responsibility to ensure that, where access to HSE Premises or HSE confidential information is necessary, personnel engaged in the performance of this Contract shall have undergone pre-employment checks covering identity, the last three years employment history, nationality and immigration status and criminal record for unspent convictions. Such checks shall meet the requirements of HMG Baseline Security Standard.
- 9.2 HSE reserves the right, at its sole discretion, to carry out audits and spot checks at any time during the Contract Period to satisfy itself that the checks have been carried out. Guidance on pre-employment checks may be found at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/hmg-personnel-security-controls.pdf>

10 CONFIDENTIALITY

- 10.1 The Contractor shall not at any time divulge any information or material acquired during the performance of this Contract to any third party without prior permission in writing of the Executive, except where required in the course of any legal proceedings.

- 10.2 The Contractor shall keep documents and other materials produced or acquired in the course of the contract in accordance with The Criminal Procedure and Investigations Act 1996 (CPIA).
- 10.3 HSE may disclose the Confidential Information of the Contractor:
- (a) on a confidential basis to any Central Government Body for any proper purpose of the Authority or of the relevant Central Government Body;
 - (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
 - (c) to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
 - (d) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clause 10.3(a) (including any benchmarking organisation) for any purpose relating to or connected with this Agreement;
 - (e) on a confidential basis for the purpose of the exercise of its rights under this Agreement; or
 - (f) on a confidential basis to a proposed Successor Body in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement, and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Authority under this Clause.

11 INTELLECTUAL PROPERTY RIGHTS

- 11.1 All Intellectual Property Rights in any guidance, specifications, instructions, toolkits, plans, data, drawings, databases, patents, patterns, models, designs or other material (the "**IP Materials**"):
- (a) furnished to or made available to the Contractor by or on behalf of the HSE shall remain the property of the HSE; and
 - (b) prepared by or for the Contractor on behalf of the HSE for use, or intended use, in relation to the performance by the Contractor of its obligations under the Contract shall belong to the HSE; and the Contractor shall not, and shall ensure that the Staff shall not, (except when necessary for the performance of the Contract) without prior Approval, use or disclose any Intellectual Property Rights in the IP Materials.

- 11.2 The Contractor hereby assigns to the HSE, with full title guarantee, all Intellectual Property Rights which may subsist in the IP Materials prepared in accordance with clause E8.1(b). This assignment shall take effect on the date of the Contract or as a present assignment of future rights that will take effect immediately on the coming into existence of the Intellectual Property Rights produced by the Contractor. The Contractor shall execute all documentation necessary to execute this assignment. The Contractor shall not withhold the rights to any IP materials mentioned above from HSE whilst they await payment.
- 11.3 The Contractor shall waive or procure a waiver of any moral rights subsisting in copyright produced by the Contract or the performance of the Contract.
- 11.4 The Contractor shall ensure that the third party owner of any Intellectual Property Rights that are or which may be used to perform the Contract grants to the HSE a non-exclusive licence or, if itself a licensee of those rights, shall grant to the HSE an authorised sub-licence, to use, reproduce, modify, develop and maintain the Intellectual Property Rights in the same. Such licence or sub-licence shall be non-exclusive, perpetual, royalty free and irrevocable and shall include the right for the HSE to sub-license, transfer, novate or assign to other Contracting Authorities, the Replacement Contractor or to any other third party supplying services to the HSE.
- 11.5 The Contractor shall not infringe any Intellectual Property Rights of any third party in supplying the Services and the Contractor shall, during and after the Contract Period, indemnify and keep indemnified and hold the HSE and the Crown harmless from and against all actions, suits, claims, demands, losses, charges, damages, costs and expenses and other liabilities which the HSE or the Crown may suffer or incur as a result of or in connection with any breach of this clause, except where any such claim arises from:
- (a) items or materials based upon designs supplied by the HSE; or
 - (b) the use of data supplied by the HSE which is not required to be verified by the Contractor under any provision of the Contract.
- 11.6 The HSE shall notify the Contractor in writing of any claim or demand brought against the HSE for infringement or alleged infringement of any Intellectual Property right in materials supplied or licensed by the Contractor.
- 11.7 The Contractor shall at its own expense conduct all negotiations and any litigation arising in connection with any claim for breach of Intellectual Property Rights in materials supplied or licensed by the Contractor, provided always that the Contractor:
- (a) shall consult the HSE on all substantive issues which arise during the conduct of such litigation and negotiations;
 - (b) shall take due and proper account of the interests of the HSE; and

- (c) shall not settle or compromise any claim without the HSE's prior written consent (not to be unreasonably withheld or delayed).
- 11.8 The HSE shall at the request of the Contractor afford to the Contractor all reasonable assistance for the purpose of contesting any claim or demand made or action brought against the HSE or the Contractor by a third party for infringement or alleged infringement of any third party Intellectual Property Rights in connection with the performance of the Contractor's obligations under the Contract and the Contractor shall indemnify the HSE for all costs and expenses (including, but not limited to, legal costs and disbursements) incurred in doing so. The Contractor shall not, however, be required to indemnify the HSE in relation to any costs and expenses incurred in relation to or arising out of a claim, demand or action which relates to the matters in clause E8.5(a) or E8.5(b).
- 11.9 The HSE shall not make any admissions which may be prejudicial to the defence or settlement of any claim, demand or action for infringement or alleged infringement of any Intellectual Property Right by the HSE or the Contractor in connection with the performance of its obligations under the Contract.
- 11.10 If a claim, demand or action for infringement or alleged infringement of any Intellectual Property Right is made in connection with the Contract or in the reasonable opinion of the Contractor is likely to be made, the Contractor shall notify the HSE and, at its own expense and subject to the consent of the HSE (not to be unreasonably withheld or delayed), use its best endeavours to:
 - (a) modify any or all of the Services without reducing the performance or functionality of the same, or substitute alternative Services of equivalent performance and functionality, so as to avoid the infringement or the alleged infringement, provided that the provisions herein shall apply mutates mutandis to such modified Services or to the substitute Services; or
 - (b) procure a licence to use and supply the Services, which are the subject of the alleged infringement, on terms which are acceptable to the HSE, and in the event that the Contractor is unable to comply with clauses E8.7(a) or E8.7(b) within [20] Working Days of receipt of the Contractor's notification the HSE may terminate the Contract with immediate effect by notice in writing.
- 11.11 The Contractor grants to the HSE a royalty-free, irrevocable and non-exclusive licence (with a right to sub-licence) to use any Intellectual Property Rights that the Contractor owned or developed prior to the Commencement Date and which the HSE reasonably requires in order exercise its rights and take the benefit of this Contract including the Services provided.

12 PUBLICATION

- 12.1 The parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of the FOIA, the content of this Contract is not Confidential Information. HSE shall be responsible for determining in its absolute discretion whether any of the content of the Contract is exempt from disclosure in accordance with the provisions of the FOIA.
- 12.2 Notwithstanding any other term of this Contract, the Contractor hereby gives his consent for HSE to publish the Contract in its entirety, including from time to time agreed changes to the Contract, to the general public.
- 12.3 HSE may consult with the Contractor to inform its decision regarding any redactions but HSE shall have the final decision in its absolute discretion.
- 12.4 The Contractor shall assist and co-operate with HSE to enable HSE to publish this Contract.

13 GDPR DATA PROTECTION

- 13.1 The Parties acknowledge that for the purposes of the Data Protection Legislation, the Customer is the Controller and the Contractor is the Processor. The only processing that the Contractor is authorised to do is listed in Schedule B (where applicable) by the Customer and may not be determined by the Contractor.
- 13.2 The Contractor shall notify the Customer immediately if it considers that any of the Customer's instructions infringe the Data Protection Legislation.
- 13.3 The Contractor shall provide all reasonable assistance to the Customer in the preparation of any Data Protection Impact Assessment prior to commencing any processing. Such assistance may, at the discretion of the Customer, include:
 - (a) systematic description of the envisaged processing operations and the purpose of the processing;
 - (b) an assessment of the necessity and proportionality of the processing operations in relation to the Services;
 - (c) an assessment of the risks to the rights and freedoms of Data Subjects; and
 - (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of Personal Data.

13.4 The Contractor shall, in relation to any Personal Data processed in connection with its obligations under this Agreement:

- (a) process that Personal Data only in accordance with Schedule B (where applicable), unless the Contractor is required to do otherwise by Law. If it is so required, the Contractor shall promptly notify the Customer before processing the Personal Data unless prohibited by Law;
- (b) ensure that it has in place Protective Measures, which have been reviewed and approved by the Customer as appropriate to protect against a Data Loss Event having taken account of the:
 - (i) nature of the data to be protected;
 - (ii) harm that might result from Data Loss Event;
 - (iii) state of technological development; and
 - (iv) cost of implementing any measures;
- (c) ensure that:
 - (i) the Contractor Personnel do not process Personal Data except in accordance with this Agreement (and in particular Schedule B);
 - (ii) it takes all reasonable steps to ensure the reliability and integrity of any Contractor Personnel who have access to the Personal Data and ensure that they:
 - (A) are aware of and comply with the Contractor's duties under this clause;
 - (B) are subject to appropriate confidentiality undertakings with the Contractor or any Sub-processor;
 - (C) are informed of the confidential nature of the Personal Data and do not publish, disclose or divulge any of the Personal Data to any third Party unless directed in writing to do so by the Customer or as otherwise permitted by this Agreement; and
 - (D) have undergone adequate training in the use, care, protection and handling of Personal Data; and
- (d) not transfer Personal Data outside of the EU unless the prior written consent of the Customer has been obtained and the following conditions are fulfilled:
 - (i) the Customer or the Contractor has provided appropriate safeguards in relation to the transfer (whether in accordance with GDPR Article 46 or LED Article 37) as determined by the Customer;

- (ii) the Data Subject has enforceable rights and effective legal remedies;
 - (iii) the Contractor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection to any Personal Data that is transferred (or, if it is not so bound, uses its best endeavors to assist the Customer in meeting its obligations); and
 - (iv) the Contractor complies with any reasonable instructions notified to it in advance by the Customer with respect to the processing of the Personal Data;
 - (e) at the written direction of the Customer, delete or return Personal Data (and any copies of it) to the Customer on termination of the Agreement unless the Contractor is required by Law to retain the Personal Data.
- 13.5 Subject to clause 12.6, the Contractor shall notify the Customer immediately if it:
- (a) receives a Data Subject Access Request (or purported Data Subject Access Request);
 - (b) receives a request to rectify, block or erase any Personal Data;
 - (c) receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;
 - (d) receives any communication from the Information Commissioner or any other regulatory authority in connection with Personal Data processed under this Agreement;
 - (e) receives a request from any third Party for disclosure of Personal Data where compliance with such request is required or purported to be required by Law; or
 - (f) becomes aware of a Data Loss Event.
- 13.6 The Contractor's obligation to notify under clause 12.5 shall include the provision of further information to the Customer in phases, as details become available.
- 13.7 Taking into account the nature of the processing, the Contractor shall provide the Customer with full assistance in relation to either Party's obligations under Data Protection Legislation and any complaint, communication or request made under clause 12.5 (and insofar as possible within the timescales reasonably required by the Customer) including by promptly providing:
- (a) the Customer with full details and copies of the complaint, communication or request;

- (b) such assistance as is reasonably requested by the Customer to enable the Customer to comply with a Data Subject Access Request within the relevant timescales set out in the Data Protection Legislation;
 - (c) the Customer, at its request with any Personal Data it holds in relation to a Data Subject;
 - (d) assistance as requested by the Customer following any Data Loss Event;
 - (e) assistance as requested by the Customer with respect to any request from the Information Commissioner's Office, or any consultation by the Customer with the Information Commissioner's Office.
- 13.8 The Contractor shall maintain complete and accurate records and information to demonstrate its compliance with this clause. This requirement does not apply where the Contractor employs fewer than 250 staff, unless:
- (a) the Customer determines that the processing is not occasional;
 - (b) the Customer determines the processing includes special categories of data as referred to in Article 9(1) of the GDPR or Personal Data relating to criminal convictions and offences referred to in Article 10 of the GDPR; and
 - (c) the Customer determines that the processing is likely to result in a risk to the rights and freedoms of Data Subjects.
- 13.9 The Contractor shall allow for audits of its Data Processing activity by the Customer or the Customer's designated auditor.
- 13.10 The Contractor shall designate a data protection officer if required by the Data Protection Legislation.
- 13.11 Before allowing any Sub-processor to process any Personal Data related to this Agreement, the Contractor must:
- (a) notify the Customer in writing of the intended Sub-processor and processing;
 - (b) obtain the written consent of the Customer;
 - (c) enter into a written agreement with the Sub-processor which gives effect to the terms set out in this clause 12.11 such that they apply to the Sub-processor; and
 - (d) provide the Customer with such information regarding the Sub-processor as the Customer may reasonable require.

- 13.12 The Contractor shall remain fully liable for all acts or omissions of any Sub-processor.
- 13.13 The Customer may, at any time on not less than 30 Working Days' notice, revise this clause by replacing it with any applicable controller to processor standard clauses or similar terms forming part of an applicable certification scheme (which shall apply when incorporated by attachment to this Agreement).
- 13.14 The Parties agree to take account of any guidance issued by the Information Commissioner's Office. The Customer may on not less than 30 Working Days' notice to the Contractor amend this agreement to ensure that it complies with any guidance issued by the Information Commissioner's Office.

14 VARIATION TO CONTRACT

- 14.1 Except where expressly stated in this contract, no change, amendment or modification shall be effective unless in writing and signed by the duly authorised representatives of both parties.
- 14.2 Any agreed changes to the Contract or Schedule A (Programme of Work) will be in the form of a Contract Change Note (CCN), which will be raised and issued by the HSE Procurement Unit.

15 GOVERNING LAW

- 15.1 This Contract shall be governed by and interpreted in accordance with English law and the Parties submit to the exclusive jurisdiction of the courts of England and Wales.

16 TERMINATION

- 16.1 This contract may be terminated by either party by giving one months notice. In the event of termination by HSE, the contractor shall provided with any reimbursement of costs, actually and reasonably incurred, up to the date of termination, subject to the limit specified in Clause 4 above.

IN WITNESS WHEREOF THIS AGREEMENT HAS BEEN AGREED:

Signature

Name in Capitals

Position

Date

Duly authorised to sign on behalf of

SIMON COX - INDEPENDENT ARBORICULTURE & URBAN FORESTRY LIMITED
Robinia House, Butterrow Hill, Butterrow, Stroud GL5 2LG

Signature

Name in Capitals

Position

Date

Duly authorised to sign on behalf of the

HEALTH AND SAFETY EXECUTIVE
Procurement Unit, Building 2.3, Redgrave Court, Merton Road, Bootle, Merseyside
L20 7HS

STATEMENT OF SERVICE REQUIREMENTS

The Contractor shall undertake the following Statement of Service

HSE requests **Simon Cox of Independent Arboriculture & Urban Forestry Limited** to visit site with the investigating inspector with a follow up to discuss initial views and opinions. Review the material provided by the companies in relation to the work activity provide an expert report covering the job specification and attendance at meetings (via teams) at mutually agreed times to enable effective progression of the work.

1. jointly with the inspector to carry out an inspection and collect evidence to inform an opinion of the circumstances of the incident.
2. Provide advice on any remedial actions required to ensure safety of the work going forward.

Expert report to be provided by 14/01/2022:

3. Review the material provided by the Investigating Inspector (record of material supplied will be kept by the investigation team and should be referred to in your report) and produce an expert report based on the above and your findings from the site visit and your expert opinion on the following:
4. What type of tree was the tree that fell?
5. What type of fungal infection did you see on the tree? Was it old/new, and can you estimate how long it had been present? What was the extent of the damage to the tree?
6. On what parts of the tree did you identify the fungus?

Was the fungus immediately apparent or did you have to remove branches, ivy etc. to see

Regular communication to be maintained via email and/or phone.

If applicable, attendance at Court and/or Inquest to provide evidence may be required.

SCHEDULE OF PROCESSING, PERSONAL DATA AND DATA SUBJECTS

This Schedule shall be completed by the Controller, who may take account of the view of the Processors, however the final decision as to the content of this Schedule shall be with the Controller at its absolute discretion.

1. The contact details of the Controller's Data Protection Officer are Sean Egan, 0203 028 3547, sean.egan@hse.gov.uk
2. The contact details of the Processor's Data Protection Officer are Simon Cox - simon@iauf.co.uk
3. The Processor shall comply with any further written instructions with respect to processing by the Controller.
4. Any such further instructions shall be incorporated into this Schedule.

Description	Details
Identity of the Controller and Processor	The Parties acknowledge that for the purposes of the Data Protection Legislation, the Customer is the Controller and the Contractor is the Processor in accordance with Clause 1.1
Subject matter of the processing	The processing is needed in order to ensure that the Processor can effectively deliver the contract to provide a services and written report to the HSE
Duration of the processing	Duration of the contract
Nature and purposes of the processing	The processing is needed in order to ensure that the Processor can effectively deliver the contract to provide a services and written report to the HSE
Type of Personal Data	Name, address, date of birth, telephone number, personal history including medical history
Categories of Data Subject	Member of the public
Plan for return and destruction of the data once the processing is complete UNLESS requirement under union or member state law to preserve that type of data	All data would need to be returned to the HSE for either destruction or correct storage by 8th March 2022.

CONTACT LIST

HSE Contacts	Contractor Contacts
Contractual Queries	
Li	
Contract Managers / Technical Queries	

HSE UK TRAVEL AND SUBSISTENCE RATES



Travel and
Subsistence Rates.d

INDEPENDENT EXPERT OBLIGATIONS

It is important that you understand the obligations placed upon you as an independent expert. Expert evidence in criminal investigations is governed by procedural rules of court. Under these rules an expert must help the court deal with criminal cases justly by giving objective, unbiased opinion on matters within his/her expertise.

As an expert witness you have an overriding duty to assist the court and, in this respect, your duty is to the court and not to the Competent Authority instructing you. Your duty also includes obligations relating to disclosure.

The obligations, which apply to you as an expert, are to assist in ensuring that the Competent Authority can comply fully with their statutory disclosure obligations. These obligations take precedence over any internal codes of practice or other standards set by any professional organisations to which you may belong.

Your obligations are set out below but can be summarised in the key actions of retain, record and reveal.

A failure to comply with the guidelines in this letter may have a number of adverse consequences, which could include:

- A prosecution being halted or delayed;
- The appellate courts finding that a conviction is unsafe;
- The tribunal making an adverse judicial comment about you as an expert. Such an adverse judicial comment could seriously undermine your credibility as an expert and consequently your fitness to be instructed in future cases; and
- Professional embarrassment, including possible action by a professional body, loss of accreditation and the potential for civil action by an accused.

Conversely, your credibility as an expert will be enhanced by the considered application of the guidance contained within this letter and your appropriate management of the materials within the investigation.

Disclosure Obligations under the Criminal Law

The regime for disclosure is set out in the Criminal Procedure and Investigation Act 1996 and the Code of Practice, issued under it. This is designed to ensure that there is a fair system for the disclosure of unused material which assists the Defence in the timely preparation of its case, does not overburden the parties and enables the court to focus on all the important issues in the trial.

The Meaning of Unused Material

During the course of any investigation material is generated. Some of it is used as evidence and other material is not used. The material that is not used as evidence is known as unused material, to which the disclosure regime applies.

Unused material is material that is relevant to the investigation but which does not actually form part of the case for the prosecution against the accused. Even though the material may not be used as evidence, it is important that for the purposes of disclosure this material is retained.

It is not for you to determine whether the material generated in the course of an investigation is relevant to the investigation.

Discharging your Obligations

There are three key obligations arising for you, as an expert, as the investigation progresses. Your understanding of these obligations and delivering them is the key to you adequately fulfilling your disclosure obligations. The relevant steps are to **retain**, to **record**, and to **reveal**.

Retain

You should retain everything, including physical, written and electronically captured material, until otherwise instructed and the Competent Authority has indicated the appropriate action to take.

The period of time for which materials are required to be retained will vary from case to case and will depend on a number of factors. Examples include the nature of the offence; the stage and status of any legal proceedings and whether the case is of special interest. It must also be remembered that the retention requirement may alter as a result of a change of circumstances during the course of the investigation.

You should, therefore, obtain advice from the Competent Authority for the retention period that applies to this particular investigation and always before contemplating destruction of any material.

Record

The requirement for you to commence making records begins at the time you receive instructions and continues for the whole of the time you are involved.

You should keep records of all the work you have carried out and any findings you make in relation to the investigation. The guidance provided below reflects best practice and your records, as a minimum, should contain information relating to:

The collection and movement of items including

- the date on which you take or receive material (physical items and information) and the date of subsequent movement of the material to another party;

- from who or where and to whom or where material is moved; and
- the means by which you receive or pass material from/to another party.

The examination of materials

- your notes, and those of any assistant should be signed, dated, attributable to the individual and produced contemporaneously whenever practicable; and
- the notes should be sufficiently detailed and expressed in such a manner that another expert, in your field can follow the nature of the work undertaken, any assumptions made and the inferences you have drawn from the work.

Verbal and other communications

- you should keep your own notes of all meetings you attend;
- you should keep your own notes of telephone conversations and it is important that points of agreement, or disagreement and agreed actions are recorded;
- you should ensure that a record of all e-mails and other electronic transmissions (e.g. images), sent or received, is kept; and
- you should keep clear notes of any witness accounts or explanations that you have been provided with, or any other information received.

How to Record

The media you use for making your records should be capable of meeting all the requirements given above, be durable and provide a means of retrieval.

Your notes, in whatever form, should also be structured in a manner that facilitates review. Any updates, alterations or comments should be clear. It is important that your notes are clear and comprehensive.

This will allow another person who may subsequently review them to have a full understanding of the position at any given time.

Reveal

You are required to reveal everything you have recorded.

It is a necessary and important part of your disclosure obligations to make the Competent Authority aware of all the material you have in your possession in relation to the investigation. This will then enable them to make informed decisions, as to what material is relevant, and then what material satisfies the disclosure test.

There are three ways in which you will reveal material to the Competent Authority:

The Report

Your report(s) should contain information relating to the following:

- (a) details of your qualifications, relevant experience and accreditation;
- (b) details of any literature or other information which you have relied on in making the report;
- (c) contain a statement setting out the substance of all facts given to you which are material to the opinions expressed in the report or upon which those opinions are based;
- (d) make clear which of the facts stated in the report are within your own knowledge;
- (e) say who carried out any examination, measurement, test or experiment which you have used for the report and:-
 - (i) give the qualifications, relevant experience and accreditation of that person;
 - (ii) say whether or not the examination, measurement, test or experiment was carried out under your supervision; and
 - (iii) summarise the findings on which you rely.
- (f) where there is a range of opinion on the matters dealt with in the report:-
 - (i) summarise the range of opinion; and
 - (ii) give reasons for your own opinion;
- (g) if you are not able to give opinion, without qualification, state the qualification;
- (h) contain a summary of the conclusions reached;
- (i) contain a statement that you understand your duty to the court, and have complied and will continue to comply with that duty; and
- (j) contain the same declaration of truth as a witness statement.

Statements

In addition to all of the above you may be required to make a formal statement. The statement should contain all of the above and the following;

- a declaration which confirms that you understand your duty to the court in respect of disclosure; and

- an acknowledgement that you will inform all parties and, where appropriate the court, in the event that your view changes on any material issue.

When compiling your report/statement you should ensure that due regard is given to any information that points away from, as well as towards, the defendant(s).

You must not give expert opinion beyond your area of expertise.

The Index of Unused Material

In order to reveal material to the Competent Authority, it is necessary that you complete an index of unused material, (the Index) describing all the unused material in your possession. All the material not identified in your report/statement should be placed on the Index.

The Index is designed to enable you to provide to the Competent Authority a description of all the unused material in your possession in a structured, comprehensive and informative manner.

You will need to tailor the descriptions of the materials to meet your specific case requirements. Your descriptions, however, must be full enough for others to clearly understand the nature of the material. Please note that this example is neither exhaustive nor exclusive.

You should not attempt to make judgments on the significance of material when producing the Index.

Where you believe material may be confidential or sensitive, for example for commercial reasons, then this should be placed on a separate schedule and discussed with the Competent Authority.

Disclosure to the Competent Authority does not necessarily mean disclosure to the Defence.