

## TeCSA / SCL / TECBAR eDISCLOSURE PROTOCOL

Version 0.2  
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- (1) *This Protocol should be used to record the result of discussion between the parties on disclosure which is required by CPR Rule 31.5(5) and PD31B, and this Protocol should so far as possible be finalised not less than 7 days prior to the first Case Management Conference.*
- (2) *Except where otherwise expressly stated, this Protocol is not a contractually binding legal agreement between the parties. It is recognised that circumstances may arise which may make it appropriate for there to be variations to the matters set out in this Protocol. Such variations should be agreed with the other party or parties or may be the subject of an application to the Court for further directions. However, it should be recognised that departure from the areas of agreement on disclosure recorded in this Protocol may have costs consequences.*
- (3) *The matters set out in this Protocol are subject to review by the Court in accordance with the Court's case management powers. Matters which cannot be agreed by the parties should be referred to the Court for directions.*
- (4) *After the first Case Management Conference, the parties may wish to record in this Protocol any directions of the Court made in respect of disclosure.*
- (5) *This Protocol is supported by the Judges of the Technology and Construction Court and should be considered together with the "Guidelines to eDisclosure Protocol".*

**Note:**

- *A Disclosure Report providing an outline of each party's approach to disclosure and providing a budget is required not less than 14 days before the first Case Management Conference.*
- *The Parties may wish to complete the Electronic Documents Questionnaire ("EDQ") appended (as a Schedule) to PD31B before discussing the matters set out in this Protocol. The EDQ could provide a platform on which to commence a dialogue on disclosure between the parties.*
- *Any agreements to be recorded by the parties in this eDisclosure Protocol should meet the overriding objective of the CPR (see CPR Part 1.1).*

## 1. IDENTIFICATION OF SOURCES OF DOCUMENTATION

- 1.1 The parties have identified and listed the location and key custodians of the potentially disclosable documentation which may need to be collected. These are set out in Appendix 1. Where documents are located outside the jurisdiction, these are identified.
- 1.2 The parties have identified in Appendix 1 any categories of documents which are not reasonably accessible.
- 1.3 The parties have identified in Appendix 1 any categories of documents that once existed but no longer exist. In respect of these documents, the parties agree that the following steps are [required/not required], by way of computer forensics, or otherwise, to locate any deleted documents [to be inserted].
- 1.4 The parties [have/have not] agreed on certain documents/categories of documents/locations/custodians [any documents/locations/custodians not agreed are set out in Appendix 1].

## 2. PRESERVATION OF DOCUMENTATION

- 2.1 The parties confirm that they have taken steps to preserve the potentially disclosable documentation identified in Appendix 1.

## 3. COLLECTION OF DOCUMENTS

- 3.1 The parties agree that documents will be collected in their native format and agree to ensure that no metadata is altered as a result of the collection process. To the extent that any documents cannot be collected in their native format, those documents or categories of documents should be identified in Appendix 1.
- 3.2 The parties [will/will not] use a shared service provider for electronic documents. If not, each party intends to use the following providers: [ ] [For guidance on service providers please refer to the TeCSA Guide to e-Disclosure].
- 3.3 Hard copy documents:  
  
*Where hard copy documents exist, these will be scanned and made searchable in accordance with Appendix 1.*  
  
**OR:**  
  
*Where hard copy documents exist, these will be disclosed and made available for inspection in hard copy only.*
- 3.4 The parties have agreed an approach to disclosure in accordance with CPR Rule 31.5(5) and it is as follows: [choose an option]

- ✓
- (a) Disclosure shall be dispensed with
- (b) Each party discloses the documents upon which it relies and at the same time requests any specific disclosure from any other party
- (c) Disclosure to be given on an issue by issue basis
- (d) Disclosure of any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences
- (e) Each party shall give standard disclosure
- (f) Any other approach to disclosure which the parties consider is appropriate in the circumstances

**OR:**

The Parties have not agreed on an approach to disclosure in accordance with CPR rule 31.5 because *[explain why no agreement has been possible at this time]*.

**4. PROCESSING AND REDUCING THE POOL OF DOCUMENTS**

4.1 Each party agrees to keep a detailed record of each process applied to its documentation from identification and collection onwards so as to provide a suitable audit trail for what process has been applied to each category of document, including a detailed record of the methodology and logic used to remove any documents from the collection.

4.2 The parties agree that any documents which are excluded from the pool of disclosable or potentially disclosable documents will not be discarded. Such documents will be secured and kept separately by the parties, in case further disclosure requests are made.

4.3 The date range(s) for the parties' searches *is/are [as set out in Appendix 2]*.

**4.4 Filters**

4.4.1 An agreed list of *[key words / other filters / filtering processes]* has been agreed between the parties. The purpose of the filters is to (i) exclude irrelevant documents or (ii) to identify disclosable documentation within the wider pool of documentation extracted. The key words are listed in

Appendix 2. (Section 5 below deals with the extent to which categories of documents will be reviewed following keyword-filtering.)

4.4.2 The parties agree that the filter list can be reviewed and refined if necessary, such refinement to be discussed between the parties.

4.4.3 Attachments to emails, compressed and embedded files, and imaged text will be included in all filters and automated searches (assuming they are word searchable).

4.4.4 The parties will provide each other with details of documents which are unlikely to respond to filters chosen and seek to agree how to deal with each category.

#### 4.5 ***Document/File Type***

4.5.1 It has been agreed to exclude from disclosure the following document/file types *[if any]*:

#### 4.6 ***Dealing with Duplicates***

4.6.1 The parties will take steps to ensure that duplicated documents are removed from the disclosable documentation as set out in Appendix 3.

4.7 Other methods for narrowing the pool of documents (if any) are set out in Appendix 4.

4.8 Documents which entirely or partly fail processing should be listed and such list(s) shared by each party's service providers in a processing record.

### 5. **REVIEW AND ANALYSIS**

5.1 Notwithstanding the agreement in paragraph [3.4] above, it is agreed that after the application of processing and reduction, the categories of documents listed in Appendix 5 (for example, by reference to custodian, date range(s) or type):

(a) need not be reviewed before disclosure is given to the other party or parties; and/or

(b) will (to the extent agreed) be reviewed before disclosure is given to the other party or parties to ensure that the documents do in fact fall within the scope of disclosure agreed in paragraph [3.4] above.

5.2 If the parties do not so agree, then the parties each identify (in appendix 5) which categories of documents each party will review and/or those which each party proposes not to review, after the application of processing and reduction.

5.3 Notwithstanding paragraph [5.1(a)] above, the parties are free to carry out further review of the categories of documents set out in paragraph [5.1(a)] in order to remove documents which do not fall within the scope of disclosure agreed in paragraph [3.4] above (for example privileged or irrelevant documents).

5.4 Appendix 5 sets out the review methods which the parties intend to employ (including whether they intend to use automated or computer-assisted review tools (e.g. analytical review tools such as cluster searching, predictive coding or email threading).

## 6. EXCHANGE AND INSPECTION OF DOCUMENTS

6.1 The parties have agreed to provide documents in their native format, where possible, and with available metadata. Emails in multiple formats will be converted to a single format, namely [*Microsoft .msg format; MS Outlook .pst format; .eml format...*]. Where documents exist only in PDF, all PDFs will be searchable and contain coded information (the required coded information is set out in the suggested Disclosure List in Appendix 6).

6.2 The parties have identified in Appendix 1 any native format documents which have non-standard software which may present a difficulty to the receiving party in accessing the documents.

6.3 *The parties will each prepare the List of Documents verifying the electronic data being provided and listing privileged documents by category therein.*

***OR (in cases in which Court Form N265 is being varied):***

*The List of Documents will be in the form of the document attached as Appendix 6, which sets out the required fields of information for each document.*

***OR:***

*The parties have agreed to dispense with a List of Documents.*

6.4 The parties [*have/have not*] agreed to provide a List of Privileged Documents.

6.5 The parties [*have/have not*] agreed to provide disclosure in stages [*if the parties have agreed to give staged disclosure, this should be recorded here in respect of (a) what each stage will consist of and (b) what the date is for each stage of disclosure*].

6.6 The parties will serve their respective List of Documents on [*date(s)*]

6.7 Copies of the documentation will be provided [*to be inserted.*] weeks after exchange of the lists on [*date*].

6.8 All documents will be provided in electronic format on appropriate media (portable hard disk drive, USB stick, DVD-ROM or by network transfer). As a minimum, all media will be provided in encrypted form.

6.9 Each producing party agrees to take reasonable steps to ensure that the data is useable and is not infected by malicious software.

6.10 Upon production, if data is found to be corrupted, unreadable, infected by malicious software or is otherwise unusable, the producing party will use reasonable endeavours to provide, within 5 working days of receipt of a written request from the receiving party, the receiving party with a copy of the data that is not corrupted, unreadable, infected by malicious software or otherwise unusable (as the case may be).

6.11 If (in accordance with paragraph [3.3]) disclosure is to be given of hard copy documents, the party who disclosed the document will allow inspection and/or provide copies of the same not more than 5 working days after the date on which he received the notice to inspect.

## **7. CONFIDENTIALITY AND PRIVILEGE**

7.1 The parties [*agree/do not agree*] that if the whole or part of a document is subject to a claim of privilege or that it is irrelevant but confidential it will be dealt with as follows:

- (a) It will be allocated a Document ID.
- (b) If that document is an attachment to another document (referred to as the "host" or "parent" document), the document ID of the host/parent document will be identified (unless that fact itself is privileged or confidential).
- (c) It will be given a document description that does not disclose the information that is the subject of the claim of privilege or confidentiality.
- (d) If the claim of privilege or confidentiality relates to the whole document, it will be represented by a single placeholder page with the words "Document subject to claim of privilege/confidentiality" inserted under the Document ID.
- (e) If the claim of privilege or confidentiality concerns a part of a document, that part will be clearly redacted.

7.2 The parties agree to ask the court to give a direction in the following terms (to apply in place of CPR 31.20):

- (1) If any party receives material from another party which the receiving party knows or reasonably ought to know was inadvertently produced, or if the producing party notifies the receiving party that it has inadvertently produced to the receiving party a privileged or confidential document, the receiving party will
  - (a) immediately cease to review that material,
  - (b) promptly return that material to the producing party or destroy it, and
  - (c) make no use of that material or its contents for any purpose, unless (i) the Court rejects the asserted ground for withholding production or decides that the disclosure was not inadvertent, or (ii) the claim to be entitled to withhold production is withdrawn by the producing party.
- (2) The parties have agreed that the inadvertent disclosure of such material will not amount to a waiver of privilege.

## **8. GENERAL**

8.1 No party may implement variations to the matters set out in this Protocol without notifying the other party or parties in writing.

8.2 Proposed variations to the matters set out in the Protocol should be agreed with the other party or parties, or may be the subject of an application to the Court for further directions.

## Appendix 1

### Location and Nature of Documents and Key Custodians

*[See Sections 1 and 3 of the accompanying Guidelines to the E-Disclosure Protocol for further information on identification of sources of documents and on the type and nature of documents to be collected.]*

- *[Identify locations of categories of documents and key custodians of documents]*
- *[Identify any categories of documents which are located outside the jurisdiction of England and Wales]*
- *[Identify any categories of documents which are not reasonably accessible]*
- *[Identify any categories of documents which may no longer exist]*
- *[Identify any categories documents in native format which were created using relatively unusual software (e.g. Primavera, Micro station, Microsoft Projects, AutoCAD, the BIM software or any bespoke software)]*
- *[Identify any documents that cannot be collected in native format]*
- *[Identify any documents/locations/custodians which have not been collected but which are subject to further investigation]*

#### Hard Copy Documents

- *[Identify any documents which exist in hard copy and set out the plan for dealing with hard copy documents.]*

## Appendix 2

### Key Word Filter Searches and Date Ranges

See Section 4 of the accompanying Guidelines to the E-Disclosure Protocol for further information on processing and reducing the pool of documents.

#### Keywords

*[The parties can agree all or some of the 3 principal types of key word lists for different purposes, as listed below:]*

- (1) The following key words have been agreed as a means of removing non-disclosable documentation from the wider pool of documents collected: *[list]*
- (2) The following key words have been agreed as a means of identifying disclosable documentation within the wider pool of documents collected: *[list]*
- (3) The following key words have been agreed as a means of identifying privileged documentation, subject to a privilege review, within the wider pool of documents collected: *[list]*

#### Date Ranges

The parties have agreed to apply the following date range(s) to the documents collected *[set out below the date range or ranges, and which ranges apply to which categories of documents or particular custodians].*

**Appendix 3**  
**De-duplication**

The parties will take the following steps to:

- (a) remove as many duplicates as possible from the documents to be disclosed to other parties, and/or
- (b) reduce the pool of documents by other means.

**Appendix 4**  
**Computer-assisted review or automated methods of reducing the pool of documents**  
**(detailing at what stage of the disclosure process any such review or method was undertaken)**

*[Insert details of additional steps to be taken.]*

**Appendix 5**  
**Documents to be further reviewed**

*[Insert details of categories of documents which are to be reviewed to ensure that they do in fact fall within the agreed scope of disclosure]*

*[Insert details of categories of documents which need not be reviewed at all (using any methods)]*

*[Insert details of methods of review (if any)]*

**Appendix 6**  
**Disclosure List**

*(Suggested basic format if not using unamended Form N265)*

Doc ID	Parent ID	Date	Subject	To	From	CC	Redacted