Position Paper on Disclosure Applications

Forensic Identification (FI) sections within Canadian police agencies are receiving extensive disclosure requests from defense lawyers especially when the court case centres on a single fingerprint as evidence. In 2016 the RCMP received such a request prior to the re-trial of Mr. Bornyk[1].

There are two general categories of disclosure: first-party disclosure often described as "fruits of the investigation"; in other words, all relevant evidence gathered during the investigation that comprises the case against the accused, is in the possession or control of the Crown and not subject to some exception (privileged, clearly irrelevant or its disclosure is otherwise governed by law: see *R v McNeil* 2009 SCC 3 @ 17-18); and, third-party disclosure materials not in the possession of Crown (and/or in many cases not in the possession of the police) but "likely relevant" to the defence. In order to obtain access to a third party record the defence is required to make an *O'Connor* application to the Court and serve the application on the record holder. The record holder's consent to provide the material is not determinative of the issue. The Crown, the record holder and other persons whose privacy interests are at stake each have the right to be heard on the application. The decision on whether some, all or none of the record will be disclosed is made by the Court based on considering (i) whether the material is likely relevant and (ii) if so, whether on balance its production is favoured by the accused's rights over the privacy interests at stake.

CanFRWG is aware of other agencies in British Columbia receiving similar *Bornyk*-type disclosure requests and has prepared the following recommended responses to assist Canadian forensic identification field members. The red text outlines the disclosure requests made for *Bornyk* and the text below is the CanFRWG recommended response:

1) Bench notes: Please provide a copy of all bench notes recorded by the latent print examiners in the course of analyzing any and all evidence in this case.

Should be disclosed as first-party disclosure.

2) Protocols: Please provide a copy of all Fingerprint Technician Quality Assurance and Training Guidelines and Protocols used in the laboratory that analyzed the fingerprint evidence. This includes, but is not limited to, materials with respect to the ACE-V procedure, the Quality Manual [see SWGFAST (Scientific Working Group on Friction Ridge Analysis Study and Technology), Quality Assurance Guidelines for Latent Print Examiners, version 2.11 (Aug. 22, 2002)], and any further policies or quality control procedures employed by the RCMP. To minimize any burden duplicating these items, we invite you to provide them in electronic form.

[1] *R v Bornyk*, 2015 BCCA 28: Bornyk was acquitted after trial on a charge of break and enter. Independent of the evidence led at trial the judge conducted his own research and performed his own comparison of the prints in questions. The Crown appealed. The British Columbia Court of Appeal ordered a new trial. It held: (i) the trial judge's personal research into the domain of the expert had a material impact on the acquittal - moreover, the areas of concern identified by the trial judge were never put to the expert witness [@16]; (ii) a trial judge is not entitled to conduct their own comparison of the prints and rely on those personal observations without the assistance of the expert [@18]. "The very point of having an expert witness in a technical area, here fingerprint analysis, is that the specialized field requires education in order for the court to form a correct judgement" [@18]. **NOTE**: Bornyk was convicted at the second trial see 2017 BCSC 849

The response to this will be agency specific.

If there are no such policy or guidelines the response is simple: “No such material exists”.

If there are such policy or guidelines the response must be considered and the consideration includes the following points: (i) the materials are third-party records; their production is not mandated and access will generally only be granted by way of an *O’Connor* application; (ii) if the agency views the materials to be obviously relevant, they should provide them to the Crown with this explanation and the Crown should disclose – this may be the case where, for example, the material is a protocol that is to be followed by an examiner, such protocols would be obviously relevant to the examination of the witness and likely should be produced; (iii) if the material is not obviously relevant production is not necessary and the onus is on the accused to seek production.

3) Software: Please provide a list of all Automated Fingerprint Identification System (AFIS) used on this case, including name of software program, manufacturer, and version used in this case.

Third-party records and should only be produced after an application by defence and order by the court.

4) Data Files: If AFIS was used in any way in this case, please provide the following:

a) Latent prints: All electronic images of any and all “latent” prints (prints recovered as evidence in this case) entered into an AFIS in this case in standard (.eft or .wsq) format.

Latent prints relevant to the case should be disclosed in a protected format as first-party disclosure.

b) Encoding: Please provide the encoding record, indicating ridge details (or “minutiae”) marked by laboratory personnel prior to any and all AFIS searches.

Third-party records and should only be produced after an application by defence and order by the court.

c) Search Results: Hard copy printout or electronic output in easily readable format of the results of any and all AFIS searches run in connection with this case. Information provided should include, but is not limited to:

i) Ranked list of “candidate matches”.

ii) Identification numbers of all images appearing on the “candidate list”, and,

iii) “Match scores” of all images appearing on the “candidate list”.

All impressions that the expert searched should be disclosed as first-party disclosure. For agencies where experts receive several known standards as part of a blinded analysis protocol then all known standards seen by the expert should be disclosed once the personal information has been redacted.

d) Candidate matches: Electronic images of all items appearing on the candidate list in standard (.eft or .wsq) format.

Only those images seen by the fingerprint examiner should be disclosed as first-party disclosure.

e) Client's records: Electronic images of any and all ten-print records associated with or identified to Mr. Bornyk in standard (.eft or.wsq) format.

Disclosed as first-party disclosure.

Please note that these files should include all data necessary to, (1) independently reanalyze the raw data, and (ii) reconstruct the analysis performed in this case.

5) Digital Enhancement: If the fingerprint evidence in this case was digitally enhanced at any time for any reason, please provide:

a) A list of all software used for digital enhancement in this case, including name of software program, manufacturer and version used in this case.

Third-party records and should only be produced after an application by defence and order by the court.

b) Any existing validation studies of software.

Third-party records and should only be produced after an application by defence and order by the court; or otherwise publically available.

c) Documentation that the enhancement process complied with the requirements and the guidelines recommended by the Association for Information and Image Management (AIM). If the enhancement process did not comply with AIIM guidelines, it is sufficient to respond: "The enhancement process did not comply with the AIIM guidelines."

Third-party records and should only be produced after an application by defence and order by the court.

6) Documentation of Corrective Actions for Discrepancies and Errors:

a) According to SWGFAST, Quality Assurance Guidelines for Latent Print Examiners, version 2.11 (Aug, 22, 2002), section 8.2, "The specific policies, procedures, and criteria for any corrective action taken as a result of a discrepancy in a technical case review should be clearly documented in writing." Please provide a copy of all documentation of corrective actions maintained by the laboratory that performed fingerprint analysis in this case. If the laboratory does not comply with the SWGFAST requirement that it maintain this documentation, it is sufficient to respond: "The laboratory does not comply with the SWGFAST requirement that it document corrective actions."

Those changes that were made as a result of a review of the fingerprint examiner's work in this case that would have impacted on the work done are perhaps obviously relevant and thus despite the fact that they are third-party records should be produced. Any changes made before or after the examiner's work unrelated to the examiner's work are not relevant and as a third-party record should not be produced.

b) Please provide any and all laboratory records of erroneous individualizations, erroneous verifications, clerical or administrative errors, or missed individualizations committed by the laboratory. [For definitions of these terms, please see SWGFAST, Quality Assurance Guidelines for Latent Print Examiners, version 2.11 (Aug, 22, 2002), section 2.2]. Please provide the name(s) of the case(s), the name(s) of the examiner(s) involved, the reported cause(s) of the error(s), the resolution(S) of the case(s), and any corrective action(s) taken.

These are third-party records and should not be produced. They are not relevant.

First, they are not legally relevant. It is not permissible to examine a witness on prior accuracy or proficiency as a means of challenging current reliability. This type of examination would require a consideration of collateral matters and would inevitably violate the collateral evidence rule. It is impermissible: see *R v Ghorvei*, 1999 CarswellOnt 2763 (CA); *R v Karaibrahimovic*, 2002 ABCA 102; *Banff-Murphy v Gunawardena*, 2017 ONCA 502; *R v Bookout*, 2017 SKQB 41.

Second, they are not logically relevant. Historical proficiency is not a relevant measure of current reliability of an expert's opinion. Moreover, discipline error rates are not relevant to the case at hand as they will vary depending on the quality, quantity and rarity of the data represented in each specific fingerprint impression. This is supported by the President's Council of Advisors on Science & Technology (PCAST) who published a report titled: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods"[2] in which they state "*The false positive rate for latent fingerprint analysis may depend on the quality of the latent print."* Furthermore the Organization of Scientific Area Committees Friction Ridge Subcommittee[3] in their response to the PCAST report state "*… the error rate should not be generalized as a single rate of error for all latent fingerprint casework; rather, the error rate should be relevant to the quality of the fingerprint in the case at hand…"*.

7) Accreditation: Please provide copies of all licenses or other accreditation in fingerprint analysis held by the laboratory.

To qualify as an expert in court the certification of the fingerprint examiner should be disclosed.

8) Laboratory Personnel: Please provide background information about each person involved in conducting or reviewing the latent print analysis performed in this case, including:

a) Current resume,

[2] President's Council of Advisors on Science & Technology (PCAST) Report "Forensic science in criminal courts: ensuring scientific validity of feature-comparison methods", September 2016, page 50. Available at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (accessed 2018-07-13).

[3] OSAC Friction Ridge Subcommittee's Response to the President's Council of Advisors on Science & Technology (PCAST) request for additional references. Available at: https://theiai.org/president/20161214_PSAC-FR_PCAST_response.pdf (accessed 2018-07-13).

To qualify as an expert witness at trial, section 657.3 of the *Criminal Code* requires that the witness provide, amongst other things, a current resume, so this should be disclosed in every case.

b) Job description,

c) All proficiency test results, and,

d) All Testimony Reviews [see SWGFAST Quality Assurance Guidelines for Latent Print Examiners, version 2.11 (Aug, 22, 2002), section 10].

Third-party records and should only be produced after an application by defence and order by the court; or otherwise publically available.