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JUDICIARY OF
ENGLAND AND WALES

THE HON MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

'CLOSED HEARINGS' AND 'CLOSED MATERIAL': GUIDANCE

In November 2022, following the decision in *Re A (Covert Medication, Closed Proceedings),* [2022] EWCOP 44, I convened a sub-committee of the Court of Protection Rules Committee to help me in formulating guidance to establish a clear procedure in those, relatively limited number of cases, in which closed material and closed hearings fall to be considered in the Court of Protection. The sub-committee, Alex Ruck Keene KC (Hon) (Chair), Michael Mylonas KC, Joseph O'Brien KC and Fiona Paterson, have reported back to me with both thoroughness and efficiency. I am extremely grateful to each of them. The sub-committee also received helpful submissions from Professor Celia Kitzinger, Open Justice (Court of Protection).

APPLICATION

1. This practice guidance applies to 'closed hearings' and 'closed material,' defined as follows:

    a. "Closed hearings" are hearings from which (1) a party; and (2) (where the party is represented) the party's representative is excluded by order of the court. For the avoidance of doubt, this is different to a "private hearing," which is a hearing at which all the parties are present (or represented), but from which members of the public and the press are excluded;

    b. "Closed material" is material which the court has determined should not be seen by the party (and/or their representative).

2. The practice guidance also applies to situations where an order may be made that a party (and/or their representative) is not to be told of the fact or outcome of a without notice application.

PURPOSE

3. In situations which are rare, but which do occur from time to time, it is necessary for the court to consider whether a hearing should be closed and/or for material be closed. Nothing in this guidance is intended to increase the number of closed hearings or applications for material to be closed. Rather, its purpose is to provide clarity as to the principles to be applied and considerations to be taken into account in the very limited circumstances under which such steps may be appropriate.

4. It is emphasised that this document is intended to be by way of **guidance only**.

THE POWER TO HOLD CLOSED HEARINGS AND ORDER THAT MATERIAL BE CLOSED

5. It is clear[1] that:

    a. The Court of Protection has powers to exclude parties from hearings and to withhold information from parties;

    b. Those powers have to be exercised in accordance with the overriding objective, common law obligations of fairness, and the European Convention on Human Rights;

    c. A decision by the Court of Protection either to direct a closed hearing or the closure of material is a case management decision, governed by the overriding objective contained in COPR r.1.1, not a best interests decision for purposes of s.1(5) Mental Capacity Act 2005.

THE STARTING POINT

6. The starting point is that, in principle, all parties (and, if not joined as a party, P) to proceedings before the Court of Protection should be able to participate in all hearings, and have sight of all materials upon which the court will reach its conclusions. There are several reasons for this:

    1. The principle of open justice, "*fundamental to the dispensation of justice in a modern, democratic society*," [2] normally requires that a judge cannot read or hear evidence, or receive argument which is not before all the parties to the proceedings;

    2. Securing the full participation of parties to proceedings, including by way of disclosure, not only enables them to present their case fully but also ensures that the court has the assistance of those parties in arriving at the right decision in relation to P's capacity and best interests;[3]

    3. In any case where there is a suggestion that the court may in reaching its decision proceed on the basis of materials adverse to a party, both common law fairness and Article 6 of the ECHR normally requires that that party should be able to answer that material by way both of evidence and argument.[4]

WHEN A DIFFERENT COURSE MAY BE JUSTIFIED

7. There are two (logically distinct) bases for derogation from the starting point set out above:

    1. The most likely to arise in practice is where such is required to secure P's rights under the ECHR;

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[1] *Re P (Discharge of Party)* [2021] EWCA Civ 512.
[2] *Bank Mellat v HM Treasury (No.2)* [2013] UKSC 38 at paragraph 2.
[3] By analogy with the observations made by Lord Devlin in *In re K (Infants)* [1965] AC 201, approving the words of Ungoed-Thomas J at first instance [1963] Ch 381, 387.
[4] Lord Mustill in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171.

2. Where there is another compelling reason for non-disclosure. It could be that a party seeks to justify non-disclosure of material (or a closed hearing) in their own interests or on the basis of a wider public interest (for instance protecting operational details of policing or national security). It is likely that the former will be more difficult to justify than the latter.

THE GOVERNING PRINCIPLE

8. Any judicially crafted solution to the situation where either a party is excluded from a hearing, or is prevented from seeing material upon which the court will rely in making its determination, will always be imperfect.[5] This means that any derogation from the starting point must (1) be as limited as possible; and (2) kept under review to ensure that it is only maintained for as long as strictly necessary.

CLOSED HEARINGS

Considerations when ordering a closed hearing

9. A closed hearing in the Court of Protection must always be a matter of last, as opposed to first resort, in common with all jurisdictions. Intrinsic to this principle is a requirement that the parties must explore – and must demonstrate to the court that they have explored – all other less restrictive methods of conducting the hearing.[6]

10. Ordinarily, it will be for the party (or parties) seeking a closed hearing to set out, well in advance of the hearing and with appropriate evidence, why it is justified. However, the ultimate decision is one for the court, and the court could, of its own motion, identify that a closed hearing is required.

11. The court must consider both common law fairness and the ECHR rights of the party or parties being excluded, but from a starting point that the purpose of the Court of Protection's jurisdiction is to protect and promote the best interests of P, and the proceedings must not become an instrument of harm to P.[7]

Applications for a closed hearing

12. In addition to setting out the basis upon which a closed hearing is sought, the application should set out all steps that the applicant has considered short of a closed hearing. Precisely what those steps will include will depend upon the basis upon which it is sought but may include such matters as providing redacted or 'gisted' material so that the party[8] in question is appraised of the salient points. For the avoidance of doubt, experience has shown that in this context disclosing

[5] As per both Lord Bingham and Lord Hoffman in *Secretary of State for the Home Department v MB* [2007] UKHL 46.
[6] As per the observation of Sir Nicholas Wall P in family proceedings *in Re A (Forced Marriage: Special Advocates)* [2010] EWHC Fam 2438.
[7] As per Cobb J in *KK v Leeds City Council* [2020] EWCOP 64, adopting dicta of Lady Hale in *Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60.
[8] Where more than one party will be excluded, the interests of each of those parties will need to be addressed.

materials and/or limiting access to a party's legal representatives alone is not a practical step, as it generally gives rise to all but insuperable problems for both the legal representatives and the party in question.

13. The application should also set out steps that the applicant proposes should be taken to minimise any interference with the common law or ECHR rights of the party to be excluded.

14. Where the party to be excluded is a litigant in person, the application should both set out steps to minimise the interference with their rights, and contingency plans in the event that the litigant in person learns of the fact of the application.

The Applicant's Duty

15. Given the gravity of the decision that the court is being asked to make, where an application is made at short notice, the burden is on the applicant to explain why it was not reasonably possible to provide the court with full notice.

Procedural matters where an application for a closed hearing has been made

16. The expectation is that any closed hearing should be conducted before a Tier 3 judge.

17. The listing of any closed hearing should take place in such a way as not to defeat its purpose. Precisely what this will entail will depend on whether the court considers:

    1. that it is possible to list the hearing on notice to the excluded party so that they are at least aware that there is a hearing taking place to which they cannot have access; or

    2. whether it is necessary that the very fact of the hearing has to be kept from the excluded party.

18. In the latter case, it is necessary then (1) to list it so that it is not possible for any person other than those entitled to be at the hearing to identify it; and (2) to list it so that it is not possible to link it to any extant open proceedings.

Transparency

19. The expectation is that a hearing which is to be closed will fall outside the usual transparency provisions provided for in Practice Direction 4C and should therefore be heard in private. This is consistent with the position in relation to closed hearings in other jurisdictions in which they occur. Further, given the very limited circumstances in which a closed hearing can appropriately be ordered, it is very likely to be the case that enabling public access would defeat the purpose of the hearing.

20. The requirements of open justice still weigh heavily and require the publication of a reasoned

judgment at the earliest possible opportunity to explain both the rationale for the holding of the closed hearing and (insofar as possible) the substantive decision reached at the hearing. See further paragraphs 23 and 25.

SITUATIONS WHERE A PARTY (AND/OR THEIR REPRESENTATIVE) IS NOT TO BE TOLD OF THE FACT OR OUTCOME OF A WITHOUT NOTICE APPLICATION

21. The same considerations as set out above apply without notice applications. It is important to reiterate the onerous obligations on parties seeking to make without notice applications (including emergency ones made out of hours).[9]

22. If the without notice application is made before the issue of proceedings, there will technically be no other parties to the proceedings than the applicant at the point that the court is deciding what steps to take. The court will therefore need to determine at the hearing of the application (1) who will be joined as a party; and (2) what information is to be given as to that person as a party about the fact or outcome of the application. If court decides that the person is to be joined as a party, they should be treated *as if* they were already as a party for purposes of considering their common law and ECHR rights to receive information.[10]

CLOSING MATERIAL

23. In any case where the basis for withholding disclosure is identified as being necessary to secure the rights of P, the following staged approach applies to the court's consideration (and hence to the matters which must be set out in any application for material to be closed):[11]

    1. When deciding whether to direct that a party should not be able to inspect the part in question, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to P;

    2. If it would, the court should next consider whether the overall interests of P would benefit from non-disclosure, weighing on the one hand the interest of P in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur;

    3. If the court is satisfied that the interests of P point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case;

    4. In all cases, the test for non-disclosure is whether it is strictly necessary to meet the risk

[9] Summarised, by reference to the inherent jurisdiction, by Court of Appeal at paragraph 74 of its judgment in *Mazhar v Birmingham Community Healthcare Foundation NHS Trust & Ors* (Rev 1) [2020] EWCA Civ 1377.
[10] The observations of Cobb J about the lesser status of a non-party as regards their rights to receive information identified *KK v Leeds City Council* [2020] EWCOP 64 were addressed to a different situation, where a non-party was seeking to be joined to existing proceedings.
[11] Following *RC v CC & Anor* [2014] EWCOP 131.

identified by the court.

24. If the basis for resisting disclosure is not the interests of P but some other compelling reason (see paragraph 3 above), the staged approach will remain relevant as regards the testing of risk, and the requirement that non-disclosure be strictly necessary to meet the identified risk. However, the factors to put in the balance will include the nature of the interest relied upon, the interest of the party in question, and the impact of non-disclosure on the court's ability to discharge its obligations towards P.

25. In either case, experience has shown that, in this context, disclosing materials and/or restricting access to a party's legal representatives alone is likely to generate significant ethical problems and cannot, comfortably, be reconciled with the profession's Codes of Conduct.

CONSEQUENTIAL STEPS DURING THE CURRENCY OF THE PROCEEDINGS

26. In any of the situations set out above, there is a need to record why the decision has been taken in a judgment to be kept on file, for two reasons:

    1. to enable disclosure at an appropriate point in the future;

    2. to enable the speedy and proportionate determination of any appeal in the event that the relevant party brings an appeal.

27. In the case of a closed hearing, the following considerations are of particular importance:

    1. The need for the court to consider whether it is possible to give even a short open judgment whilst the proceedings are still ongoing about the fact of a closed hearing having taken place;

    2. The need for the court to determine, and record with much as clarity as possible, the answer to the questions of what is to be said to the excluded party in the subsequent hearings that they attend; and what is to be said in the event that non-parties (including members of the public, bloggers and reporters) attend subsequent hearings. In this regard, particular consideration needs to be given to any situation which may cross the line from silence to active deception as to what has taken place. Active deception should be a last resort as it has the potential fundamentally to undermine the confidence of parties and the public in the judicial system;

    3. It is difficult, if not impossible, to contemplate circumstances where 'closed' and open' proceedings will be compatible with the relevant common law and ECHR rights in play;

    4. The 'included' parties and the court should keep under review whether it is possible to disclose the fact and outcome of any closed hearing during the currency of proceedings, and, if it is to, determine how best to manage the consequences of that disclosure, in particular for P.

28. In the case of closure of material, the guiding principles as regards the continuation of the proceedings are that:

    1. Insofar as possible, substantive matters relating to P should only be determined on the basis of information available to all parties.

    2. It is necessary for the 'included' parties and the court always to keep under review whether the justification for the material remaining closed remains valid, and whether circumstances have changed so that all or part it (of a 'gist' thereof) can be disclosed. Any advocates meetings held between the 'included' parties should be minuted and include specific consideration of these issues.

AT THE CONCLUSION OF PROCEEDINGS

29. The starting point is that all matters relating either to closed hearings or the fact of closure of materials should be addressed in an open judgment at the close of proceedings. That open judgment may need to be accompanied by a closed judgment (for instance if the closed materials formed a material part of the court's determination as to P's capacity or – more likely – best interests). However, such should be an exceptional course of action, as it would mean that there would be no public record of why the court reached its ultimate conclusions.

6th February 2023