

# CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

---

## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 6 - Disclosure**

#### ***Section 146 – Order preventing or restricting disclosure: application by Secretary of State***

648. Sections 146 to 149 establish a system, similar to that available to the prosecutor, to enable applications to be made to the court by a Minister of the UK Government (a “Secretary of State”) for orders prohibiting the disclosure of information which the prosecutor is either required to disclose or proposes to disclose. This recognises that there may be public interest issues which arise in criminal proceedings in which Secretaries of State may have an interest.
649. Section 146 enables the Secretary of State to apply to the court before which the criminal proceedings are taking place for an order preventing or restricting the disclosure of information which the prosecutor would otherwise be required to disclose or which the prosecutor, otherwise, intends to disclose. Subsection (6) provides that the court must consider the information that the application relates to and give the prosecutor and, unless excluded, the accused the opportunity to make representations to the court. The Secretary of State is, also, entitled to be heard.
650. Under subsections (7) and (8) the court must consider whether, if the item of information were to be disclosed, there would be real risk of substantial harm or damage to the public interest, whether withholding the item of information would be consistent with the accused’s receiving a fair trial and whether the only way of protecting the public interest is by making such an order. The court must then engage in a two-step process. First, it must determine (depending on whether the application is made by virtue of subsection (2) or subsection (3) or (4)) whether the conditions in subsection (7) or (8) are met. Second, if it determines that the conditions in either of those subsections are met then it must go on to determine whether subsection (9) applies.
651. The intention is that the court requires to put itself back to the time of the trial and assess the evidence that is before the court for and against the accused in order to determine whether this particular information, which is the subject of the application is central to the accused receiving a fair trial. The effect of this may be that the court will require to reconsider the record of evidence from the original trial to determine this issue.
652. Subsections (10) and (11) enable the court to make an order requiring the information to be disclosed, in the manner specified in the order (i.e. in whole or in part), if its disclosure would not cause a real risk of substantial harm or damage to the public interest and the disclosure (or partial disclosure) would be consistent with the accused receiving a fair trial.

*These notes relate to the Criminal Justice and Licensing (Scotland)  
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

653. Subsection (14) makes provision in relation to the interpretation in sections 146-149 of references to the consideration of the accused receiving a 'fair trial'. Where the trial is ongoing the reference obviously relates to that trial. In the case of the appellant proceedings however the reference relates to the original trial which is now the subject of the appeal. The court therefore has to consider whether the accused would have received a fair trial at the time of the original trial if the information had not been disclosed.