

Original citation:

Sukumar, Divya, Hodgson, Jacqueline and Wade, Kimberley A. (2016) *Behind closed doors : live observations of current police station disclosure practices and lawyer-client consultations*. *Criminal Law Review*, 12. pp. 900-914.

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*****ACCEPTED FOR PUBLICATION IN 'CRIMINAL LAW REVIEW' ON
SEPT 30, 2016*****

Behind closed doors: Live observations of current police station disclosure practices and
lawyer-client consultations

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Word count: 5857

Author note: The authors are extremely grateful to the law firms and police forces that kindly allowed a researcher to observe their practices.

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Summary

Drawing on recent observational fieldwork as well as existing research studies in the fields of law and of psychology, this article examines the nature of police practices in the disclosure of evidence before and during custodial interviews of legally represented suspects. Whilst police pre-interview disclosure to lawyers was a fixed practice, the format of disclosure varied and lawyers were rarely permitted to inspect the evidence, relying instead on the officer's account. Disclosure was sometimes provided in stages, either as a deliberate tactic or when evidence was lacking. Officers occasionally exaggerated the strength of their case to suspects and resisted providing more detail to lawyers – an approach that seemed designed to elicit an admission from the suspect. In line with past research, lawyers relied on the evidence that police disclosed when advising clients before the interview and occasionally argued with the police for more disclosure. Taken together, these findings suggest that police are complying with the minimum disclosure requirements set out by legislation, and that police may be more open with lawyers than previous research suggests. Some of our findings warrant concern, however, and raise questions about risks to vulnerable suspects in custody and risks to suspects without legal representation.

LT: Police disclosure of evidence; Police station legal advice; Police interviews with suspects

Introduction

When the police question a suspect about a crime, they can disclose their evidence to the suspect or their lawyer if they are represented, either before or during the interview. They can even do a combination of the two. Alternatively, the police may choose to withhold their evidence from the suspect and their lawyer until a later interview. Indeed, how and when the police disclose their evidence to suspects and their lawyers during the interview process is largely unregulated by the law in England and Wales.¹ So, how do the police in England and Wales currently disclose their evidence to suspects and their lawyers? In this paper, we draw upon live observations of police disclosure to lawyers, the lawyer-client consultation, and the suspect interview, to offer a close look at how police disclose their evidence both before and during the suspect interview.

Until June 2014, the police in England and Wales were entirely free to decide how much evidence they disclose and whether to disclose it before questioning the suspect, while questioning the suspect, or not at all.² Field research, as well as interviews with police officers and lawyers, suggest that in practice, there is substantial variation in the level of pre-interview evidence disclosure. Some police are completely forthcoming with evidence, disclosing extensive details of the case matters to lawyers, while others reveal no evidence at all prior to the suspect interview.³ In these studies, the different disclosure practices depended

¹ J. Clough & A. Jackson, "The game is up: Proposals on incorporating effective disclosure requirements into criminal investigations" (2012) *The Criminal Lawyer* 3, p.4.

² *R v. Imran and Husain* [1997] Crim. L.R. 754.

³ See J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova, & T. Spronken, *Inside police custody: An empirical account of suspects' rights in four jurisdictions* (Cambridge: Intersentia, 2014) Ch. 7; M. McConville & J. Hodgson, *Custodial legal advice and the right to silence* (London: Home Office Research Study No. 16, 1993); K. Quinn & J. Jackson, "Of rights and roles police interviews with young suspects in Northern Ireland" (2007) *British Journal of Criminology* 234, p.241; V. Kemp, *Bridewell legal advice study: Adopting a 'whole systems'*

on factors such as how forthcoming individual officers were and whether the officer had a good relationship of trust with the lawyer.⁴

The purpose of disclosure is understood differently from the police and defence perspectives. Defence lawyers (and many criminal justice scholars) understand disclosure within a fair trial rights context in which suspects need to know the case against them in order to determine how and whether to respond.⁵ This has become increasingly important given the weight attached to the suspect's responses or silence, both for inferences at trial and the possibility of alternative forms of case disposition. For the police, disclosure is understood in the context of their investigation; it is used as a tool to undermine the credibility of uncooperative suspects and obtain admissions. The police may hold back evidence to test the veracity of a suspect's story.⁶ As a result, police and lawyers tend to disagree over what is an appropriate level of police disclosure.⁷

More recent field research suggests that the police do routinely offer lawyers a summary of the evidence in a case before questioning suspects.⁸ The police may be motivated to make some pre-interview disclosure to lawyers because the police know that if they do not, lawyers may protest the lack of disclosure and advise their client to make no comment during

approach to police station legal advice: BLAST II Final Report (2013) London: Legal Services Research Centre, p.5.

⁴ For example, Blackstock et al., n.3, pp.340-341.

⁵ Both criminal justice scholars and lawyers have highlighted the difficulty in deciding on an interview strategy for the suspect when disclosure is limited, see A. Sanders, R. Young, & M. Burton, *Criminal justice* (New York: Oxford University Press, 2010), pp. 267-268; Blackstock et al., n.3, pp.290-291; 355.

⁶ See ACPO, *National Policing Position Statement: Pre-Interview Briefings With Legal Advisers and Information to be Supplied to Unrepresented Detainees* (National Investigative Interviewing Strategic Steering Group, June 2014), p.2. Note that ACPO no longer exists – it has been replaced by the National Police Chiefs Council (NPCC).

⁷ See L. Skinns, “‘Let's get it over with’: Early findings on the factors affecting detainees' access to custodial legal advice” (2009) *Policing and Society* 58, p.71; V. Kemp, *Transforming legal aid: Access to criminal defence services* (2010) London: Legal Services Research Centre, p.55; Kemp, n.3, p.25.

⁸ Blackstock et al., n.3, pp.290, 319-320.

the interview.⁹ Indeed, our own research shows that lawyers who are given pre-interview disclosure are generally more cooperative, in that they are less likely to advise their clients to make no comment than lawyers who are given no disclosure before the interview.¹⁰

Alternatively, the police may choose to disclose some information before the interview so that if the suspect chooses to remain silent during interview, adverse inferences may be drawn from the suspect's silence in court.¹¹ While the police may benefit from offering lawyers some pre-interview disclosure, the extent of evidence disclosure remains ultimately at the discretion of each interviewing officer.

In June 2014, the European Union legislated the EU Directive on the right to information in criminal proceedings,¹² which, inter alia, requires the police to disclose why a person is suspected of an offence before questioning them. As the Police and Criminal Evidence Act 1984 (PACE) Code of Practice C previously only required the police to disclose the basic reasons for the suspect's arrest and detention, it was revised to encompass this new pre-interview disclosure requirement:

“Before a person is interviewed, they and, if they are represented, their solicitor must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it (see paragraphs 3.4(a) and 10.3), in order to allow for the effective exercise of the rights of the defence.

However, whilst the information must always be sufficient for the person to

⁹ Blackstock et al., n.3, p.25.

¹⁰ D. Sukumar, J. S. Hodgson, & K. A. Wade, “How the timing of police evidence disclosure impacts custodial legal advice” (2016) *International Journal of Evidence and Proof* 200, pp. 206-209; Blackstock et al., n.3, p.355.

¹¹ E. Cape, “Transposing the EU Directive on the right to information: a firecracker or a damp squid?” (2015) *Criminal Law Review* 48, p.56.

¹² Directive 2012/13 on the right to information in criminal proceedings [2012] OJ L142/1.

understand the nature of any offence (see Note 11ZA), this does not require the disclosure of details at a time which might prejudice the criminal investigation.”¹³

In addition to this broad disclosure requirement, the Notes for Guidance specify the minimum level of pre-interview disclosure as follows:

“The requirement in paragraph 11.1A for a suspect to be given sufficient information about the offence applies prior to the interview and whether or not they are legally represented. What is sufficient will depend on the circumstances of the case, but it should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly.”¹⁴

Thus, the revised Code of Practice essentially allows the police to decide the level of disclosure and whether it is sufficient for each case. Put another way, the police are still at liberty to withhold the majority of their evidence before or while questioning a suspect.¹⁵

This may not allow “for the effective exercise of the rights of the defence” as set out in COP C, but will fulfil the minimum requirements as set out in the Notes for Guidance. For example, consider a murder case that involves DNA samples, CCTV footage, and the suspect’s fingerprints. The police need only disclose that they found the suspect’s fingerprints at the crime scene for the suspect to understand why they are suspected of committing the crime. The police could withhold any DNA evidence and CCTV footage, and choose to reveal it only after questioning the suspect so as not to prejudice their investigation. Indeed,

¹³ Code C para 11.1A. Revised Codes of Practice retrieved from: <https://www.gov.uk/guidance/police-and-criminal-evidence-act-1984-pace-codes-of-practice>.

¹⁴ Police and Criminal Evidence Act 1984, Code of Practice C, n.13, Notes for Guidance, note 11ZA.

¹⁵ Cape, n.11, p.58.

the Association of Chief Police Officers (ACPO) responded to the new disclosure requirement by emphasizing the importance of withholding some evidence to test the suspect's account.¹⁶ Meanwhile, the College of Policing have not issued any guidance or taken a clear stance on police disclosure practices. In essence, the police prefer to get the suspect's version of events first before disclosing their evidence to the suspect.¹⁷ Thus, even with the implementation of the EU Directive on the right to information, the police can withhold much of their evidence before questioning a suspect.

Like ACPO, some psychologists recommend that the police should strategically withhold evidence from the suspect until they have obtained an initial account during the interview – an approach known as the Strategic Use of Evidence.¹⁸ The reasoning is that the police might detect whether a suspect is lying by checking how consistent the suspect's account is with the evidence.¹⁹ Indeed, there is some psychological research to suggest that questioning a suspect first and then strategically disclosing evidence helps interviewers detect lies.²⁰ In these psychology studies, people take on the roles of suspects and interviewers. The

¹⁶ ACPO, n.6, p.4. Note that the ACPO's guidance is contrary to the EU Directive and Code C in that the new disclosure requirement applies irrespective of whether a suspect is legally represented.

¹⁷ V. Kemp & J. Hodgson, "England and Wales: Empirical findings" in M. Vanderhallen, M. van Oosterhout, M. Panzavolta, & D. de Vocht (Eds.), *Interrogating young suspects: Procedural safeguards from an empirical perspective*, (Cambridge: Intersentia, 2016), p.137.

¹⁸ M. Hartwig, P. A. Granhag, & T. Luke, "Strategic use of evidence during investigative interviews: The state of the science" in D. C. Raskin, C. R. Honts, & J. C. Kircher (Eds.), *Credibility assessment: Scientific research and applications*, (Oxford: Academic Press, 2014), p.21.

¹⁹ M. Hartwig, P. A. Granhag, L. A. Strömwall, & O. Kronkvist, "Strategic use of evidence during police interviews: When training to detect deception works" (2006) *Law and Human Behavior* pp.603-619; T. J. Luke, M. Hartwig, E. Joseph, L. Brimbal, G. Chan, E. Dawson, S. Jordan, P. Donovan, & P. A. Granhag, "Training in the Strategic Use of Evidence technique: Improving deception detection accuracy of American law enforcement officers" (2016) *Journal of Police and Criminal Psychology* pp.1-9.

²⁰ See, for example, M. Hartwig, P. A. Granhag, L. A. Strömwall, & A. Vrij, "Detecting deception via strategic disclosure of evidence" (2005) *Law and Human Behavior* 469; Hartwig et al., n.19, (2006); F. Clemens, P. A. Granhag, L. A. Stromwall, A. Vrij, S. Landstrom, E. R. A. Hjelmsater, & M. Hartwig, "Skulking around the dinosaur: Eliciting cues to children's deception via strategic disclosure of evidence" (2009) *Applied Cognitive*

suspects either commit a mock crime — such as taking a wallet from a bookshop — and lie about it to the interviewer, or they complete a benign act — such as visiting the bookshop in search of a book — and tell the truth about it to the interviewer. These suspect behaviours are intended to mimic the behaviours of lying and truth-telling suspects, though in reality, not all lying suspects are guilty of a crime and not all innocent suspects are truthful during the interview. All suspects are then implicated in the mock crime by circumstantial evidence such as CCTV footage showing the suspect entering the bookshop. The interviewers, equipped with this evidence, typically question a suspect in one of two ways: by disclosing all of their evidence to the suspect early in the interview or by disclosing their evidence strategically late in the interview, after the suspect has provided an account. Generally, when lying suspects know the evidence against them, they fabricate an account to fit the evidence and interviewers have a harder time identifying whether the suspect is lying or telling the truth. In contrast, when suspects are unaware of the evidence against them, lying suspects contradict the evidence more than truth-telling suspects. For instance, a lying suspect might deny entering the bookshop to distance themselves from the crime, whereas a truth-telling suspect might admit to being in the bookshop.²¹ As a result of these inconsistencies between what the suspect says and what the evidence shows, interviewers are better able to detect whether a suspect is lying or telling the truth when they withhold and strategically disclose evidence.²²

Of late, psychologists have developed ways to withhold and strategically disclose even a single piece of evidence for the purposes of deception detection: the interviewer might

Psychology 925; F. Clemens, P. A. Granhag, & L. A. Stromwall, “Eliciting cues to false intent: A new application of strategic interviewing” (2011) *Law and Human Behavior* 512.

²¹ For a review of the psychological theories regarding why lying and truth-telling suspects might behave this way, see Hartwig et al., n.18.

²² For a comparison of the psychological and legal research and arguments on the strategic disclosure of evidence during police interviews, see D. Sukumar, K. A. Wade, & J. S. Hodgson, “Strategic disclosure of evidence: Perspectives from psychology and law” (2016) *Psychology, Public Policy, and Law* 306.

initially introduce a piece of evidence in very general terms, but as the interview progresses, the interviewer might present that piece of evidence as increasingly precise and strong.²³ Returning to our murder case example, the interviewer might initially tell a murder suspect that they have information suggesting that the suspect visited a certain location, such as a hotel. Over the course of the interview, the interviewer might gradually reveal that they actually have CCTV footage showing the suspect entering the victim's hotel room with a weapon. This gradual release of increasingly precise and compelling evidence is to encourage lying suspects to contradict the evidence or to change their own account during the interview, thus making the suspect's attempt at deceit apparent. Again, psychological studies with people playing the roles of suspects and interviewers suggest that gradually reframing a single piece of evidence makes it easier for interviewers to identify which suspects are lying and which suspects are telling the truth.²⁴ Proponents of the Strategic Use of Evidence approach highlight that it fits well with English and Welsh interviewing protocols.²⁵ Holding back precise details of the evidence is certainly compatible with the current disclosure requirements for police.²⁶ These psychology experiments, however, do not take account of the custodial context within which the criminal suspect is questioned, nor the legal and evidential factors to be considered, which may affect how and whether a suspect should answer police questions. Innocent suspects may lie to protect others, or because they do not

²³ P. A. Granhag, L. A. Strömwall, R. M. Willén, & M. Hartwig, "Eliciting cues to deception by tactical disclosure of evidence: The first test of the Evidence Framing Matrix" (2013) *Legal and Criminological Psychology* 341, pp.343-344.

²⁴ See Granhag et al., n.23; P. A. Granhag, J. Rangmar, & L. A. Strömwall, "Small cells of suspects: Eliciting cues to deception by strategic interviewing" (2015) *Journal of Investigative Psychology and Offender Profiling* 127-141.

²⁵ P. A. Granhag & M. Hartwig, "The Strategic Use of Evidence (SUE) technique: A conceptual overview" in P. A. Granhag, A. Vrij, & B. Verschuere (Eds.), *Deception detection: New challenges and cognitive approaches* (Chichester: John Wiley & Sons, 2015), p.246.

²⁶ Cape, n.11, p.58.

understand the accusation, or they have insufficient information around which to frame an accurate response.

In light of the introduction of a limited formal disclosure requirement and the growing body of psychology research that recommends delaying evidence disclosure, we wondered how the police currently disclose evidence in practice. Although many studies have analysed electronically recorded police interviews,²⁷ fewer studies have examined pre-interview disclosure and lawyer-client consultations as they occur.²⁸ This is partly because lawyer-client consultations are private and confidential—typically, the lawyer’s notes are the only record of the consultation. Moreover, police forces vary in their practices of recording the police disclosure that is provided to lawyers,²⁹ so some police forces might have audiotaped records of their disclosure to lawyers, some might only have handwritten notes of their disclosure meeting with the lawyer, and others, no record at all. Thus, we observed police disclosure briefings and lawyer-client consultations live at the police station. Our observations took place in late 2015, following the revisions to PACE, Code of Practice C requiring the police to provide some pre-interview disclosure. In this paper, we offer a glimpse into pre-interview disclosure practices, lawyer-client consultations, and the police questioning of suspects at a sample of police stations in England and Wales.

²⁷ For example, J. Pearse & G. H. Gudjonsson, “Police interviewing techniques of two south London police stations” (1996) *Psychology, Crime and Law* 63; J. Pearse & G. H. Gudjonsson, “Measuring influential police interviewing tactics: A factor analytic approach” (1999) *Legal and Criminological Psychology* 221; S. Soukara, R. Bull, A. Vrij, M. Turner, & C. Cherryman, “A study of what really happens in police interviews with suspects” (2009) *Psychology, Crime and Law* 493; D. W. Walsh & R. Bull, “What really is effective in interviews with suspects? A study comparing interviewing skills against interviewing outcomes” (2010) *Legal and Criminological Psychology* 305. More recently, Kemp & Hodgson, n.17 p.137; D. W. Walsh & R. Bull, “Interviewing suspects: Examining the association between skills, questioning, evidence disclosure, and interview outcomes” (2015) *Psychology, Crime & Law* 661.

²⁸ For example, McConville & Hodgson, n.3; M. McConville, J. Hodgson, L. Bridges, & A. Pavlovic, *Standing Accused* (Clarendon: Oxford University Press, 1994); Blackstock et al., n.3.

²⁹ E. Shepherd, *Investigative Interviewing: The Conversation Management Approach* (New York: Oxford University Press Inc., 2007), p.334.

Research Methodology

Negotiating Access

Two law firms allowed the first author to shadow all of their police station attendances for two weeks each. The study was given ethics approval by the University of Warwick's School of Law and both law firms were informed of the measures in place to ensure the confidentiality of their lawyers and their clients in the consent forms. The lawyers were also informed that the researcher would be guided by what the lawyer considered to be in the best interests of their client – for example, if it was appropriate for the researcher to be present when the client was vulnerable.

Nature of Observations

The first author was based at the law firm during the study period and accompanied any lawyers who attended the police station. As noted in other field studies, the caseload was unpredictable – even during days when the firm was on call as duty solicitor there were often no cases.³⁰ On other days, several cases came in simultaneously. On these occasions, the researcher shadowed the lawyer who attended the first case that was ready. To maximise observations and to gather a representative sample, the researcher made herself available to attend cases that came in after working hours, as well as during the day.

Upon arrival at the police station, the lawyer introduced the researcher to the custody sergeant and the interviewing and disclosure officers on the case as an observing PhD student. The police had no objections to the presence of the researcher. The researcher observed any interactions between the lawyer and police, including the pre-interview disclosure briefing, as well as lawyer-client consultations. The client was fully informed of the researcher's role and interest in evidence disclosure, that the researcher was not part of the police nor the law firm, and that the client could ask for the researcher to leave at any

³⁰ For example, Blackstock et al., n.3, p.51.

point during the consultation or interview. Only one client was uncomfortable with the researcher's presence and requested that she left. Information from that case has not been included in this study. Following the pre-interview consultation, the researcher observed the police interview. The researcher did not participate in the disclosure briefing, the client consultations, or the interview, other than to introduce herself on the interview recording. Following the interview, the police often informed the lawyer whether the client would be bailed, charged, or cautioned.

Recording Data

For each case, the researcher completed a case log pro forma that included quantitative details about the lawyer, police station, case, suspect, consultation, and interview. This included the timings of the initial client consultation and police interview. The researcher also recorded detailed notes in a field diary throughout the police station attendances.

Findings and Discussion

Sample of Cases

A total of 17 police station attendances (17 suspects, 16 cases) were observed over a four week period in 2015 with two law firms in two large, metropolitan cities in England. Five lawyers, including three police station accredited representatives and two solicitors, attended the cases. In total, three police forces were observed at nine police stations.

Suspects were aged between 16 – 64 years old ($M = 30.76$, $SD = 12.67$ years), 16 suspects were male, one was female. Suspect ethnicities, as recorded by lawyers, included British – White (47.1%), British – Mixed (17.6%), British – Asian (5.9%), British – Black (5.9%), Bangladeshi (5.9%), Caribbean – Black (5.9%), Jamaican – Black (5.9%), and Other – Black (5.9%). Suspects were arrested (64.7%), attended voluntarily (17.6%), or attended on bail (17.6%). All three juvenile suspects in the sample, as well as one suspect who had

learning difficulties, had an appropriate adult present. The suspected offences varied widely across cases, ranging from arson, rape, and grievous bodily harm to theft and possession of drugs.

When consulting with their lawyer, most suspects (94.1%) made claims about whether they were innocent or guilty. Six suspects claimed to be guilty (35.3%), one of which claimed to be guilty of a lesser offence and another claimed to have committed the offence by accident. Ten suspects claimed to be innocent (58.8%), although, one suspect did not understand that his actions amounted to a criminal offence. Once this particular suspect provided his account to the lawyer, the lawyer informed the suspect that he was guilty of the offence according to the law. The remaining suspect did not make any statement regarding his guilt or innocence.

The length of the pre-interview consultations between the lawyer and client ranged from 8 – 73 minutes ($M = 25.2$, $SD = 17.4$ mins). The length of the police interview ranged from 6 – 62 minutes ($M = 25.8$, $SD = 18.5$ mins). Finally, the outcomes of detention for suspects were as follows: bailed to return (41.2%), bailed and cautioned (5.9%), charged (5.9%), charged and remanded (5.9%), left station (voluntary suspects, 11.8%), no further action taken (17.6%), recalled to prison (5.9%), and unknown (5.9%). Thus, in some cases, the observed interview led the police to make a decision, such as charging the suspect, which moved the case forward.

Key Findings

Using the qualitative data collected in the field diary, we describe key insights into police disclosure practices and the lawyer-client consultations in this study.

Pre-interview disclosure was a fixed practice. Pre-interview disclosure, whether it was minimal or comprehensive, always took place – in both cities, across nine police stations, and three police forces. It was a fixed practice, as the officer in charge of the case would be

ready to provide pre-interview disclosure as soon as the lawyer arrived at the police station. This was a shared expectation of those involved in the custody procedure. For instance, one custody officer checked whether the lawyer had been given pre-interview disclosure yet.³¹ Moreover, the police typically had a consultation room ready for the purpose of pre-interview disclosure once the lawyer arrived at the police station.³²

Pre-interview disclosure encompassed both disclosure of evidence and other case matters, thus serving as a general pre-interview briefing. Before arriving at the police station, lawyers often received only a brief email or phone call informing them that a client was arrested. During pre-interview disclosure, the police briefed the lawyer about the allegation, the arrest, the offence(s), the evidence, and the client (including their fitness, drug test results, and criminal record). Such information, aside from the evidence, is highly useful as lawyers may rapidly gain an understanding of the case and the client's situation.³³

Notably, in one case, while waiting for the lawyer to arrive at the police station, the researcher observed the police make full disclosure directly to the suspect.³⁴ In this case, the suspect was attending voluntarily and the interviewing officer disclosed the victim's allegation of criminal damage, the lack of forensic and eyewitness evidence, and that the interview was simply to gain an initial account. Note that ACPO have discouraged the police from making disclosure directly to a suspect as the suspect might have questions about the information disclosed, and as a result, the suspect may mistake the disclosure process for the interview.³⁵ Overall, the police in this sample complied with the revised PACE Codes of

³¹ Case 1.

³² Cases 1 - 3, 5 - 9 [both co-suspects], 11 - 15.

³³ E. Cape, *Defending suspects at police stations: The practitioner's guide to advice and representation* (London: Legal Action Group, 2011), Chapter 4.

³⁴ Case 15.

³⁵ ACPO, n.6, pp. 5-6.

Practice and briefed lawyers on at least basic case information before the interview as routine practice.

Format of pre-interview disclosure. Pre-interview disclosure was given to lawyers either verbally (52.9%) or in a typed document (41.2%; format unknown for 5.9% suspects). Sometimes, the disclosure documents included more than just the case evidence and information. In one disclosure document, the police reinforced their role as gatekeepers to the case evidence by reminding the lawyer that they were under no obligation to provide disclosure but they were offering it to help the lawyer advise their client.³⁶ In another disclosure document, the police encouraged lawyers and their clients to provide an account to the police. Specifically, the disclosure document informed the lawyer of the topics that would be covered in the interview before reminding the lawyer that this was an opportunity for the client to put forward a defence and alibi and that the police remained open-minded and unbiased – that the police were concerned only with truth and accuracy.³⁷ Such statements from the police are standard practice as illustrated by earlier research.³⁸

Notably, even when disclosure was given in a typed document, detectives were still open to questions from the lawyer. With the exception of one case,³⁹ all lawyers asked further questions when given pre-interview disclosure. In the exceptional case, the lawyer clarified to the researcher that they did not ask any questions because they assumed that the police would not provide further information for a rape case. Moreover, the police disclosure document informed the lawyer that if they did require further information, they would have to put this request in writing for the police to consider. As the police intended to interview the suspect

³⁶ Case 5.

³⁷ Case 10.

³⁸ For example, see Blackstock et al., n.3, p.284. This research found that lawyers also often advised suspects to tell the truth (see chapter 7).

³⁹ Case 10.

immediately, even if the lawyer did request further information, the lawyer may not have received further disclosure before the initial interview with the suspect.

In the remaining cases, lawyers asked the police several probing questions, for example, whether there was any CCTV footage of the incident,⁴⁰ whether the client's clothing matched the victim's description,⁴¹ whether the client's clothing would be tested for the victim's DNA,⁴² and whether the victim had made any allegations against the client in the past.⁴³ Through these questions about the existing evidence, or lack thereof, and the evidence the police were still investigating such as DNA samples, lawyers acquired case information that was not included in the disclosure document and established the strength of the case against their client. Subsequently, when advising their clients on an interview strategy, lawyers tended to refer to the overall amount and strength of evidence that the police held. For instance, when a lawyer judged the evidence to be weak she advised the client that there was no need to submit a defence at this stage and recommended making no comment in the interview.⁴⁴ In sum, lawyers maximised how much information they received before the interview, regardless of the format of disclosure, and in turn, used this information to deliver advice to their clients.

Lawyers rarely saw the actual evidence before the interview. The police rarely released victim or witness statements, CCTV footage, or photographs to the lawyer before the interview. Exceptions included showing the lawyer the knife the client allegedly carried⁴⁵ and photographs of a repaired door that the client allegedly damaged.⁴⁶ As in other studies, the

⁴⁰ Case 9.

⁴¹ Case 11.

⁴² Case 11.

⁴³ Case 15.

⁴⁴ Case 11.

⁴⁵ Case 8.

⁴⁶ Case 13.

police typically informed lawyers that such evidence existed and whether or not it would be presented to the client during the interview.⁴⁷ Likewise, lawyers rarely asked to see the evidence, although they did ask about the details and quality of evidence. In one instance, the detective openly admitted that the evidence was a “crap package” and through questioning, the lawyer established that the CCTV footage of the affray between the client (who was arrested at the scene) and alleged victim did not capture the full incident.⁴⁸ The police’s openness regarding the lack of evidence is surprising but such frank disclosure has been attributed to good working relationships between the police and lawyers in past research.⁴⁹

Notably, withholding the actual evidence from the lawyer may also have been part of an evidence disclosure tactic. When one lawyer was not shown the witness statements before the interview, it was unclear whether the witnesses only heard or also saw the client damage the property – this key detail determined how incriminating the witness statements were.⁵⁰ Given that lawyers rarely see the CCTV footage or witness statements before the interview, the police may easily withhold specific details of the evidence as some psychologists recommend.⁵¹ In other words, the police might withhold the strength and precision of their evidence initially while the suspect answers questions, and later, gradually disclose the details of their evidence in order to catch a suspect lying.

Lack of pre-interview disclosure was not always a tactic. Sometimes, when the lawyer was unhappy with the pre-interview disclosure, it was not because the police were tactically withholding evidence, but because the investigation was still on-going and the police had not yet gathered and processed all the evidence. In one case, the lawyer highlighted to the client that the police still needed to record some witness statements and

⁴⁷ For example, Blackstock et al., n.3, p.320.

⁴⁸ Case 14.

⁴⁹ See Blackstock et al., n.3, p.291.

⁵⁰ Case 13.

⁵¹ See n.24.

reformat the CCTV footage.⁵² The police in this case used the first interview simply to get an initial account from the suspect; no evidence was presented during this interview. Likewise, in another case, the police confirmed that they still needed to check phone records to prove the timing, number, and content of the phone calls that the suspect allegedly made to the victim.⁵³ Thus, while psychologists recommend withholding evidence to test a suspect's account, this might not be practical; the police might simply not have much evidence to disclose or to compare with a suspect's account in the initial interview.

Evidence disclosure tactics used. In this study, three evidence disclosure tactics came to light: withholding information from the lawyer before the interview (35.3% of suspects),⁵⁴ exaggerating the evidence to the suspect before the lawyer arrived at the police station (17.6% of suspects),⁵⁵ and introducing new information during the interview (29.4% of suspects).⁵⁶

It was apparent when the police withheld evidence from the lawyer before the interview because the police either refused to answer the lawyer's questions about the evidence during the pre-interview briefing or the police released such information during the interview. Sometimes they did both. The type of information being withheld varied widely, from whether there were screenshots of alleged phone calls from the suspect, to whether fingerprint results would come back immediately, to whether a key witness had made a statement.⁵⁷ One lawyer reported that the police often withheld information to create a sense of ambiguity in the hope of frightening a client into confessing to the crime.⁵⁸

⁵² Case 5.

⁵³ Case 12.

⁵⁴ Cases 3, 9 [both co-suspects], 12, 13, 16.

⁵⁵ Cases 9 [first co-suspect], 11, and 16.

⁵⁶ Cases 3, 9 [both co-suspects], 13, and 16.

⁵⁷ Case 12, 9, and 3.

⁵⁸ Case 9.

The most worrying tactic was the police exaggerating the evidence to the suspect. Giving suspects false information is dangerous – psychological studies have demonstrated that innocent suspects are at risk of making wrongful confessions when they are faced with false evidence.⁵⁹ In one study, for instance, when students were informed about fake video evidence of them cheating in a gambling task, almost all of them confessed to cheating, even though none of them actually cheated.⁶⁰ The courts have also excluded as unfair a confession made in response to the presentation of false evidence to the suspect and their solicitor.⁶¹ Yet, some police – though not necessarily the interviewing officers – may speak to the suspect informally when arresting or detaining the suspect and exaggerate the evidence they have. This is before the suspect is legally represented and afforded further protection (such as an electronic recording of the interview) against such tactics. This was an unexpected finding and we recommend caution in interpreting it given that the researcher did not observe this tactic directly. Instead, the tactic came to light when observing the private consultations between the lawyer and the client. In these consultations, three separate clients each asked their lawyers for further details of evidence that the police had informed the clients about, but not the lawyers. For instance, one suspect claimed the police had suggested they had CCTV footage of him during the incident.⁶² This contradicted the pre-interview disclosure that the interviewing officer gave to the lawyer in which the police clarified that there was no CCTV

⁵⁹ See R. A. Nash, & K. A. Wade, “Innocent but proven guilty: Using false video evidence to elicit false confessions and create false beliefs” (2009) *Applied Cognitive Psychology* 624-637; S.M. Kassin, S. A. Drizin, T. Grisso, G. H. Gudjonsson, R. A. Leo, & A. D. Redlich, “Police-induced confessions: Risk factors and recommendations” (2010) *Law and Human Behavior* 3, p.16-17; D. Wright, K. A. Wade, & D. Watson, “Delay and Déjà Vu: Timing and Repetition Increase the Power of False Evidence” (2013) *Psychonomic Bulletin & Review* 812-818.

⁶⁰ Nash & Wade, n.59, pp.624-637.

⁶¹ For example, see *R v. Mason* [1987] 3 All E. R. 481 C.A. The confession was excluded under s.78 Police and Criminal Evidence Act 1984 (PACE) as it was unfair even though it had not been obtained by oppression, nor was it likely to be unreliable, and so s.76 PACE did not apply.

⁶² Case 9 [first co-suspect].

footage evidence in this case. In another case, too, the suspect was concerned about CCTV footage that the police had told him about – the lawyer then clarified that the CCTV footage simply placed the suspect in the area and did not capture the offence.⁶³ Although some police officers may have made the case against the suspect seem stronger and more serious, it is important to note that the interviewing officer did not claim that such evidence existed during the suspect interview or during disclosure to the lawyer. Moreover, lawyers tended to inform clients immediately that such evidence did not exist.

The final tactic involved the disclosure of new information during the interview, such as the client's belongings being found near stolen vehicles or earlier victim allegations of assaults.⁶⁴ One lawyer suggested that the police did this to surprise or pressure clients into speaking when they were exercising their right to silence.⁶⁵ In some cases, only minor details, such as the suspect allegedly insulting the victim, were revealed during the interview and it was unclear whether this was done tactically or such details were simply not important enough to include in the pre-interview briefing with the lawyer.⁶⁶

Based on the lawyers' comments, it seemed that all three evidence disclosure tactics aimed to pressure the suspect into speaking or making an admission of guilt. In this study, around half the suspects (52.9%) remained silent or responded with 'no comment' during the interview.⁶⁷ Meanwhile, 35.3% of suspects answered all the police's questions, either to deny committing the crime⁶⁸ (23.5%) or to make a full admission⁶⁹ (11.8%). The remaining 11.8% of suspects answered only some of the police's questions and on the advice of their lawyer,

⁶³ Case 11.

⁶⁴ Case 9; Case 3.

⁶⁵ Case 9.

⁶⁶ Case 16.

⁶⁷ Cases 2, 3, 5, 6, 8, 9 [both co-suspects], 11, 13.

⁶⁸ Cases 4, 10, 12, 15.

⁶⁹ Cases 1, 7.

invoked their right to silence for other police questions.⁷⁰ While it is beyond the scope of this study to evaluate whether the police's evidence disclosure tactics were effective in making the suspect speak during the interview, it is important to note that the police employed one or more of the three aforementioned evidence disclosure tactics with 41.2% of suspects in this study.

Lack of disclosure caused tension between lawyers and police. In line with past research findings,⁷¹ lawyers argued with the police over the limited pre-interview disclosure in two cases.⁷² For instance, when a detective refused to disclose whether the victim had made a statement, the lawyer refused to provide the client's details on tape during the interview, insisting that the detective could check the custody record.⁷³ In another case, the lawyer, unhappy with the pre-interview disclosure document, argued with the police regarding their knowledge of the case law on pre-interview disclosure.⁷⁴ Eventually, one of the officers ended the argument by agreeing to provide further information about the suspect's alleged obstruction. Thus, the lawyers and police in this study occasionally disagreed on the level of pre-interview disclosure the police provided.

Advising the client during consultation. When advising the client, most lawyers (94.1%) presented the client with the evidence first before inviting an explanation from the client. This is a common approach when getting an account from the client.⁷⁵ In contrast, one lawyer preferred to ask for the client's account first to test it against the evidence, and then

⁷⁰ Cases 14, 16.

⁷¹ See n.7.

⁷² Cases 3, 5.

⁷³ Case 3.

⁷⁴ Case 5.

⁷⁵ For example, see Blackstock et al., n.3, p.316.

present the client with the evidence.⁷⁶ In both approaches, lawyers relied on the police's evidence to elicit an account from the client.

Lawyers advised 58.8% of suspects to make no comment during the interview for the following stated reasons: to avoid self-incrimination, since the evidence disclosed was not strong⁷⁷ or the police still needed to gather further key evidence;⁷⁸ to try and avoid prosecution;⁷⁹ and to avoid any new charges since the client was definitely going to prison.⁸⁰ Lawyers advised a few suspects (11.8%) to make no comment during interview and also wrote a prepared statement for the police setting out the suspect's denial of the offence.⁸¹ Lawyers advised some suspects (23.5%) to deny the offence during the interview since the suspect had a full defence.⁸² Finally, one suspect (5.9%) was advised to make a full admission to the police so that he would receive only a caution and avoid going to court.⁸³ Thus, as in past research, lawyers' advice generally depended on the evidence disclosed and the client's instructions.⁸⁴

Notably, not all suspects followed their lawyer's recommended course of action for the police interview. Indeed, two suspects disregarded their lawyer's advice to make no comment and instead answered the police's questions during interview, despite continuing reminders from their lawyer to respond with "no comment".⁸⁵ Meanwhile, one suspect found it difficult to submit a prepared statement and remain silent during interview. So, during the interview, the suspect wrote his responses down on paper and requested that his lawyer read

⁷⁶ Case 15.

⁷⁷ Cases 1, 6, 11.

⁷⁸ Cases 3, 5, 9 [both co-suspects], 14.

⁷⁹ Case 2.

⁸⁰ Case 13.

⁸¹ Cases 8, 16.

⁸² Cases 4, 10, 12, 15.

⁸³ Case 7.

⁸⁴ Kemp & Hodgson, n.17, p.138.

⁸⁵ Case 1, 15.

them to the police.⁸⁶ Thus, even with a lawyer present to advise them before and during the police interview, suspects may find it difficult to invoke their right to silence during police questioning. This finding is consistent with past research on suspects in police custody.⁸⁷ During consultation, suspects also expressed concerns about getting out of police custody quickly and that remaining silent during the interview would make them appear guilty⁸⁸ – such concerns are standard suspect responses.⁸⁹

Conclusions

Based on four weeks of observations of police disclosure briefings with lawyers, lawyer-client consultations, and suspect interviews, this study offers an unfiltered, detailed snapshot of current police disclosure practice. Not only did the police comply with the minimum disclosure requirements set out by the revised Codes of Practice, the police were generally quite open with lawyers compared to past research in which there has been a large variation in levels of pre-interview disclosure.⁹⁰ Regardless of the seriousness of the offence and amount of evidence in the case, the police in this study briefed the lawyer on case matters before questioning the suspect. Perhaps it was to ensure that adverse inferences may be drawn from a suspect's silence or to elicit cooperation from the lawyer and suspect during interview. Moreover, the police typically answered lawyers' questions even if disclosure was officially provided in writing. Lawyers rarely had the opportunity, however, to see the actual evidence before the interview and while the police are under no general obligation to disclose their case file to lawyers, any documents relevant to the legality of arrest and detention must be made available to them. Subsequently, lawyers drew upon the police disclosure in advising their clients. When the police did withhold evidence or information, it tended to be a

⁸⁶ Case 16.

⁸⁷ McConville & Hodgson, n.3, pp.176-177.

⁸⁸ Cases 3, 14, and 16.

⁸⁹ See McConville & Hodgson, n.3, pp. 86-7; Skynns, n.7, p.63; Blackstock et al., n.3, p.323.

⁹⁰ See McConville & Hodgson; Quinn & Jackson, p.241; Kemp p.5, all at n.3.

single piece of evidence or specific details of the evidence. Thus, as recent psychological research suggests, the interviewing method of strategically withholding a single piece of evidence from the suspect would fit with current police questioning practice in England and Wales.⁹¹ On a practical note, the police did not always have any further evidence to disclose or, alternatively, to withhold strategically during the first interview.

Few empirical studies in recent years have used live observations of real police interviews, and fewer still have accessed police disclosure meetings and lawyer-client consultations. The generalizability of our findings, however, is limited by the use of a small sample of police station attendances from three police forces in England and Wales. It is possible that other police forces in the jurisdiction vary in their evidence disclosure practices given the limited official guidance regarding disclosure. In addition, our study focused on pre-interview briefings to lawyers and relied exclusively on police station attendances by lawyers. Future research should explore cases with legally unrepresented suspects in which the police may disclose all or most of the evidence directly to the suspect during the interview.

Overall, the study is consistent with findings from recent research, including routine police disclosure to lawyers, tension arising between lawyers and police over lack of disclosure, and lawyers' reliance on the information disclosed by police when consulting with clients.⁹² This suggests that revisions to the PACE Code of Practice have had little impact in changing police practices around pre-interview disclosure. Troublingly, however, our study found that some police officers may give suspects the impression that they possess stronger, more damning evidence than they actually do. This is problematic for all suspects, but given the vulnerability of suspects in custody and the risks of false confessions, whether this occurs

⁹¹ See n.25.

⁹² See Quinn & Jackson, n.3; Skinns, n.7; Kemp, n.7 and n.3; Blackstock et al., n.3.

with legally unrepresented suspects, who will not have a lawyer to inform them of the true nature of the evidence, is worthy of further investigation.