

Help Us To Help You

- a guide to how to get Mutual Legal Assistance from the UK

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Introduction

Because the legal systems in the UK are very different from the legal systems of many other countries, the procedures for obtaining evidence from the UK under Mutual Legal Assistance are unique.

This guidance note is designed to provide practical advice to our counterparts in other countries on how to use the Mutual Legal Assistance system to best effect, in order to obtain the optimum help from the UK. Please note that more detailed guidance on obtaining Mutual Legal Assistance from the UK is available in the UK Central Authority (UKCA) MLA Guidelines which are on the Home Office website (please see the link below):

<http://police.homeoffice.gov.uk/operational-policing/mutual-legal-assistance/>

The Guidelines can be found by clicking on:

- Mutual Legal Assistance;
- Getting assistance from the UK;
- Mutual Legal Assistance Guidelines; and again on
- Mutual Legal Assistance Guidelines.

When sending a request for Mutual Legal Assistance (MLA) to the UK, it is vital to include all the necessary information and to ensure that the request is compliant with UK legislation. This will enable the UK authorities to execute the request in the most effective way possible and will help to reduce delays which can occasionally be caused by the need to seek further information from the author of the request.

Legal basis for Mutual Legal Assistance between countries

Mutual Legal Assistance can be provided on the basis of comity (good relations) and reciprocity between countries. It is therefore not essential to be a party to any particular international convention in order to give or request/receive Mutual Legal Assistance. Please see paragraph H on page 6 of this guidance note for more information about reciprocity.

UK legislation relating to Mutual Legal Assistance

The receiving and executing of incoming requests from overseas authorities for evidence in criminal matters is governed, in the UK, by the Crime (International Co-operation) Act 2003 (CICA 2003).

Sections 13 and 14 of CICA 2003 provide that a UK territorial authority can arrange for evidence to be obtained (*at the request of a foreign authority which is competent to make MLA requests, i.e. a court exercising criminal jurisdiction, or a prosecuting authority, or any other authority which appears to the UK territorial authority to have the function of making such requests for assistance*), if the request is made in connection with '**criminal proceedings** or a **criminal investigation**, being carried on outside the United Kingdom...' and if the UK territorial authority is satisfied: '(a) that an offence under the law of the country in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and (b) that proceedings in respect of the offence have been instituted in that country or that an investigation into the offence is being carried on there'.

Coercive powers

The execution of MLA requests often involves the exercise of coercive powers e.g. the powers to require a bank or telephone company to produce evidence or the powers to search and to seize evidence – these powers can only be exercised in the UK subject to judicial approval or order and upon compliance with conditions determined and set by UK law. So this kind of assistance can only be granted if the legal conditions required by UK law are satisfied by the requesting authority. The legal requirements for search and seizure are set out in detail in the Mutual Legal Assistance Guidelines on the Home Office website, which provides a form at Annex G for completion by the requesting foreign authority. There is more information later in this document about the gathering of evidence involving the use of coercive powers. However, not all MLA requests involve the exercise of coercive judicial powers.

What can you ask for?

The most common types of evidence that may be obtained via MLA are:

- Witness interviews and voluntary witness statements.
- Summoning of witnesses to court to give evidence.
- Material held by third parties (i.e. court ordered production of materials such as telecommunications documents – e.g. mobile telephone; land line (telephone); e-mail; fax billing and subscriber information).
- Banking information (e.g. details of a person's bank account).

Other types of assistance which can be requested via MLA include:

- Oral evidence to be given under oath
- Restraint and confiscation (assistance in the restraint and confiscation of proceeds of crime is dependent upon a bilateral agreement or other international agreement)
- Search of premises and seizure of material
- Joint investigations
- Covert surveillance
- Controlled delivery
- Transfer of proceedings/investigation
- Transfer of prisoners to give evidence
- Evidence by video link. Under CICA (2003) the UK can now provide video link evidence in response to a request for mutual legal assistance. If necessary, the court can summons witnesses to attend a UK court to give evidence via video-link for a foreign authority. However, the UK cannot agree to requests for **accused** persons to give evidence via video links.
- Evidence by telephone link. The UK can arrange for a witness **voluntarily** to give evidence via telephone link in a UK court for foreign proceedings. NB if a witness is unwilling to give such evidence, the UK court has no power to summons them.

Requests involving fiscal offences

With requests involving fiscal offences the UK can, in general, assist. But if the request is for evidence on oath, for certified documentary evidence or for search and seizure of evidence, then one or more of the following conditions must be satisfied:

- criminal proceedings must have been instituted in the requesting country (meaning that a court has issued a summons or an arrest warrant; the defendant has been charged or indicted; or the facts alleged by the prosecutor have been put to the defendant and will be put before a trial court); and/or
- the request must come from a competent authority in a Commonwealth country or be made under an international agreement, or
- the conduct would constitute an offence of the same or similar nature under UK law, had it occurred in the UK (i.e. there is 'dual criminality').

What cannot be provided ?

Double jeopardy

Double jeopardy is the principle that no person can be prosecuted for a second time for an offence for which they have been previously prosecuted and for which they were either convicted or acquitted. There is now an

exception to this rule: in very serious cases (including murder) a person can be prosecuted again if fresh and compelling evidence becomes available that was not available at the time of the original trial

But, in general the UK reserves the right to refuse assistance if the person who is the subject of the request (i.e. the person being investigated or prosecuted in the requesting country) has already been prosecuted (i.e. has been convicted or acquitted) in the UK, or in a third country, for an offence which arises from the same conduct as that giving rise to the proceedings in the requesting country in respect of that person.

If there is a risk of double jeopardy, before providing assistance the UK authorities will seek a 'double jeopardy assurance' from the authorities of the requesting country in the following terms:

'The [name of requesting country] Judicial Authorities will not prosecute X for (an) offence(s) arising from the same conduct as that for which s/he has been/ or is being prosecuted in the United Kingdom [or third country], namely [details of offence]'.

If we need to ask the author of a MLA request for a double jeopardy assurance and we do not receive it, we will be unable to provide the assistance.

Prejudice to a UK investigation or prosecution

We will not be able to provide assistance if doing so is likely to prejudice an existing UK investigation or prosecution. However, your request can be reviewed at a later date, and if the risk of prejudice ceases to exist (for example, because our UK trial has taken place), it may be possible to provide the assistance that you have requested.

Legal Principles relating to MLA Requests

Account needs to be taken of common principles of substantive and procedural law when drafting requests. The following are common rules generally accepted by all legal systems, which should always be honoured when making a request for MLA to the UK:

- A. **CERTAINTY**
- B. **CONFIDENTIALITY**
- C. **DISCLOSURE**
- D. **DUAL CRIMINALITY**
- E. **DEFAMATION**
- F. **HUMAN RIGHTS**
- G. **PROPORTIONALITY**
- H. **RECIPROCITY**
- I. **NEXUS**

A. Certainty

The statement should illustrate the existence of evidence in the UK to a reasonable degree of certainty. There must be at least a reasonable probability that the evidence exists. When drafting a request it is useful to bear in mind that the UK authority may need a coercive order to execute the request. It is helpful therefore to provide the information that would be necessary to obtain such an order before a United Kingdom court. For example, in executing a request involving the use of a coercive power we would need to prove to the UK court exactly why the particular piece of evidence which you are seeking is relevant to your prosecution. This would be the absolute minimum that you would need to include in the request to satisfy the UK authority that there are sufficient grounds to execute that part of the request.

B. Confidentiality

As mentioned above, sometimes MLA requests include requests for confidential material such as details of a suspect's bank accounts. This material will always be obtained by judicial order in execution of the request. As such material is confidential it is particularly important to make it clear why the material is relevant to your prosecution.

If you require strict confidentiality in the execution of your request, please state the reasons for this. As mentioned under 'Disclosure' below, it is often not possible to guarantee complete confidentiality in the execution of a request.

C. Disclosure

When considering whether to include any sensitive information in the MLA request it is important to bear in mind that the execution of requests in the UK may take place in open court unless proper justification can be given to have the relevant hearings take place behind closed doors.

D. Dual Criminality

Dual Criminality is not usually required. The criminal conduct described in any request need not constitute an offence under UK law, had it occurred in the UK, except in cases involving the exercise of search and seizure powers or restraint and confiscation.

E. Defamation

It is advisable to beware of making unsubstantiated allegations in an MLA request. MLA requests sometimes have to be disclosed in open court (under our disclosure law) and any unsubstantiated allegations against an individual

could lead to that individual making a claim for defamation of character against the law enforcement agency.

F. Human Rights

When drafting a MLA request it is important to ensure that nothing in the terms of the request would constitute an actual or potential infringement of human rights of the subject or of any third parties.

G. Proportionality

When requesting coercive measures it is important to ensure that those measures are reasonable and proportionate, taking into account the evidence sought and the seriousness of the offence under investigation.

H. Reciprocity

In general the UK does not require reciprocity, but the UK would expect to receive assistance from countries which are parties to relevant bilateral or international agreements with the UK. As a general rule we would not expect to be asked to execute coercive measures in the UK which cannot lawfully be obtained in the requesting country. Any measure sought from the UK should be lawfully available in the requesting country. If you are requesting a form of assistance which you would not be able to provide in return (if the UK were to request the same kind of assistance from your country), please make this clear.

I. Nexus

This is establishing a direct link between the facts of the case as detailed in the request and the assistance requested – i.e. the evidence that you believe is held in the UK. For example, when requesting assistance in a money laundering case, in addition to stating that the material is relevant to your case as outlined above, it is often helpful if you are able to produce further evidence or supporting material. Examples of supporting material are as follows: evidence of recent cash transfers into the specified UK account; recent travel to the UK; suspicious funds declarations; or cash seizures made by the relevant authorities of the UK.

Format of the Letter of Request

Full details of the sender of the request

In the MLA request it is helpful if the drafting lawyer gives their full name, telephone and fax details and, where possible, e-mail address. This will enable us to communicate promptly with you if we need to seek further information.

The Main Body of the Request

Who?

In the main body of the request, please identify clearly the person(s) who is/are the subject(s) of the request by giving their full names, date of birth, place of birth, nationality (including passport number if known) and place of usual residence. You can request assistance in cases where you do not yet know the name(s) of the subject(s), but please give us as much information as possible to help us to identify them.

What?

A description of the charge/alleged offence needs to be given.

In describing the alleged offence it is helpful if you are able to give the exact wording of the charge or indictment, where available. In addition, please attach to the request an annex of the relevant law containing the exact statutory provision(s) upon which the charge is based.

Brief Statement of the Case

The brief statement of the case should highlight enough admissible evidence of the alleged offence to justify reasonable suspicion to a minimum standard. The summary should be factual and precise so that the UK authority can be satisfied that a substantial case has been established.

“Assistance Requested” Section

It is important to list very clearly the assistance that is being requested. Also, requests for assistance need to be time specific. If a matter is urgent, please state the reason for the urgency and give information about any deadlines (e.g. forthcoming court hearings).

Search of premises

If any premises are to be searched, as well as giving the address to be searched, please state the reason for the search and what items you expect will be found during the search (e.g. ‘documents relating to XXX’.) The connection between those premises and the suspect should be clearly stated in the brief statement of the case. If we are not given sufficient grounds for the search, we will not be able to obtain a search warrant and will therefore not be able to search the premises. The Home Office MLA guidance (at the website address given on page one of this note) contains, at Annex G, a search warrant form, indicating what information we need to receive from you in order to establish sufficient grounds to apply to a court for a search warrant under the law of England and Wales. It will be helpful if you can attach a completed copy of that form to your letter of request. There is also a link to

that search warrant form near the beginning of the Home Office MLA guidance.

Telephone records

A request for the production of telephone records should place limits upon the period of the records to be sought, commensurate with the time period of the alleged offence (i.e. please give the exact dates of the beginning and end of the period for which you are seeking telephone records). If the period for which telephone records are requested is relatively long (e.g. more than two months), and insufficient reasons are given to justify the lengthy period, this would offend against human rights and data protection laws (particularly in respect of the legal principle of proportionality) and we would not be able to assist. If an arrested person is in possession of telephone numbers belonging to other people (third parties), and if you ask us to obtain details of those third parties, we need you to provide strong grounds for requesting those third party details because we must seek to avoid the risk of **collateral intrusion** (i.e. the risk of intrusion into the privacy of third parties by obtaining their personal data and passing it to another country as evidence without sufficient grounds.)

Bank account details

If you make a request for UK bank account details, please include not only the account number but also the address or sort code of the branch of the bank in which the account is held. It will not be possible to obtain evidence re an account if we are only given the account number because UK banks do not have central databases that would enable them to identify which branch an account is held in. If you do not know the address or sort code of the branch of the bank, your investigating officers may be able to find out this information for you via mutual assistance (officer-to-officer co-operation).

Requests for a person (in England or Wales) to be questioned

If you ask (in your MLA request) for a person to be interviewed here in the UK, please specify whether you want that person to be interviewed as a witness or as a suspect. If you ask us to interview a person as a **witness** or as a **suspect**, they have a right to refuse to be interviewed, but we can use our coercive powers under Section 15 of CICA 2003 to arrange for them to be summonsed to court so that they can be questioned in court.

A suspect can be summonsed to court, but cannot be compelled to give any evidence before a nominated court which he could not be compelled to give in criminal proceedings in the UK. Of particular relevance in this context are:

- The privilege against self-incrimination; and

- The provisions in UK domestic law that a person charged with an offence cannot be compelled to give evidence in his own trial.

Requesting authorities should therefore consider whether it is worth making a request to compel a suspect to court if they are likely to remain silent. Ultimately it is a decision for the UK Secretary of State whether to nominate a court and the UK Central Authority will take into account all the circumstances when making this decision.

If it is not clear in the MLA request whether a person is to be interviewed as a witness or as a suspect, we may need to contact the author of the request to get this information before we can approach the person and arrange for them to be interviewed.

Officer Travel

Evidence can often be transmitted without the need for officers from the requesting state to travel to the UK. The lawyer drafting the MLA request will need to decide whether or not it is necessary for officers of the requesting country to travel to the UK to ensure the correct and speedy execution of the request. If you consider that it is necessary for an officer/officers to travel to the UK to be present at the execution of the request, please state the reasons for this in your MLA request. If the UK officers hold a very large amount of evidential material relating to a case, we may advise that it would be more practical for one or more officers of the requesting country to travel to the UK to view the materials and to identify which materials they need for their case. The visiting foreign officers can then select the case papers of which they would like to have copies. We can then arrange for those copies to be transmitted to you via the formal channels.

Transmission of MLA requests

MLA requests must be sent via the formal channels. Requests may always be sent to the United Kingdom Central Authority, Judicial Co-operation Unit, The Home Office, 5th Floor, Fry Building, 2 Marsham Street, London SW1P 4DF, United Kingdom. However, it is more expedient, if you know that the evidence is located in Scotland or if your request is one which HM Revenue and Customs are competent to receive directly, to send requests directly to those authorities (which are also formal channels): the Crown Office (for Scotland); or HM Revenue and Customs (HMRC - which can receive directly transmitted requests in certain matters, including indirect tax matters - please see further details below re direct transmission of requests to HMRC). The addresses of the Crown Office and HM Revenue and Customs can be found on the Home Office website (MLA guidance) - that website address is given on page 1 of this note.

MLA requests in matters concerning HM Revenue and Customs

HM Customs and Excise merged with the Inland Revenue on 18 April 2005 to form one new government department: HM Revenue and Customs.

HM Revenue and Customs matters include:

Duties on alcohol, tobacco or fuel (excise fraud), intellectual property rights, strategic exports, indirect taxes, e.g. value added tax (VAT) including Missing Trader Intra Community fraud (MTIC) and related money laundering.

HM Revenue and Customs (HMRC) can receive directly transmitted MLA requests in relation to most of the criminal offences which fall within its remit - i.e. in relation to all of the matters in the above paragraph.

But please note that HMRC cannot accept direct transmission in matters concerning direct tax cases e.g. income tax, corporation tax (= tax on companies), capital gains tax and national insurance contributions. Requests for evidence from England or Wales re direct tax matters must be addressed to the UKCA.

Also, HMRC can no longer accept direct transmission of MLA requests in the smuggling of prohibited and restricted items e.g. drugs; firearms and offensive weapons; chemical, biological; radiological and nuclear hazards; products of animal origin; in relation to plant health; in relation to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and in cases where large amounts of cash are detected at the border. Letters of request concerning those matters must be addressed to the UKCA, and the UKCA will forward them to the UK Borders Agency (UKBA) for execution.

Requests for the restraint of assets (in England or Wales) should also be addressed to the UK Central Authority, who will then forward those requests to the relevant executing authority.

NB If the evidence you are requesting is located in Scotland (including if the evidence is held by HM Revenue and Customs in Scotland) you should address your request to the Crown Office (which is the Central Authority for Scotland).

Supplementary Requests

Once you have sent your request to the UK, if you subsequently find that you require any further assistance from the UK or wish to amend any details given in your request, you can do this by sending us a supplementary MLA request. Equally, if it becomes clear to us that there is material relevant to your case which you have not specifically requested in your original MLA request, we may ask you to send us a supplementary request. Any supplementary request should also contain the case reference and the name of the accused (date of birth, etc) in the title.

We hope you find this guidance note helpful.

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