

DPS

Chapter 5 of the General Manual

05.20.00 Documentation, Preservation and Disclosure of Evidence

20.01 Purpose. The purpose of this policy is to ensure that Department personnel are in compliance with the landmark decisions *Brady v. Maryland* (1963), *Giglio v. United States* (1972) and related cases and state laws including the *Michael Morton Act of 2013* which revised the criminal discovery process in Chapter 39 of the Code of Criminal Procedure. This policy explains the general duties and procedures. Other policies may further explain the methods of implementing the key principles stated in this policy.

20.02 Policy. Department law enforcement officers and testifying employees shall fully document, preserve, and disclose all evidence that is gathered and prepared for criminal investigations. Complete reports, including potentially exculpatory information and witness credibility information will be provided to prosecutors in a timely manner. It is the role and responsibility of prosecutors and not that of department employees to reach conclusions regarding what will be disclosed to a criminal defendant in the discovery process. Department employees shall not, by either action or inaction, withhold material related to a case from a prosecutor responsible for that case.

20.03 Definitions.

a. Exculpatory information— includes what is commonly called "Brady Material" as well as information that must be disclosed under Code of Criminal Procedure Chapter 39. "Brady Material" is evidence in the government's possession that is favorable to the accused and that is material to either guilt or punishment, including evidence that may impact the credibility of a prosecution witness, including law enforcement officers.

b. Chapter 39 information – a broader category of information than Brady Material. It is evidence that is material to any matter involved in a criminal action that is in the possession, custody, or control of the Department or the Department's investigating officers.

c. Witness credibility information (commonly referred to as "impeachment" evidence or "Giglio/Kyles Information") – evidence that can be used to examine the veracity of the witnesses testifying on behalf of the government including cooperating civilians, informants, and investigating law enforcement officers and employees. This includes disciplinary history or sanctions of law enforcement officers and employees who are called upon to testify on behalf of the prosecution.

20.04 Duty to Document and Preserve Reports, Notes and Evidence.

a. Department personnel that prepare evidence for criminal proceedings shall completely document activities and preserve information and tangible things gathered in the course of an investigation. Documents such as field notes, working papers and electronic communications shall be preserved as part of the case file.

b. Any state record that is Chapter 39 information must be retained for at least the minimum period provided in the DPS Records Retention Schedule and may not be destroyed until a case is completely concluded even if beyond the scheduled retention. If it is unclear whether a Department record that is eligible for destruction under the DPS Record Retention Schedule is still required to be

retained under this policy as Chapter 39 information in a pending case, the Department will either continue to retain the record until the case is concluded or coordinate with the prosecutor to determine if the record may be destroyed.

20.05 Duty to Document Exculpatory Information and Witness Credibility Information.

a. Exculpatory information discovered during investigation shall be clearly documented in Department reports. The duty to document exculpatory information is comprehensive. The duty to document extends to any investigative activity regarding a specific investigation even if the investigator is not directly assigned to the specific investigative case.

b. Witness credibility information shall be documented. This is typically any information that may indicate that a civilian witness has a motivation other than civic duty to provide evidence to the officer. The following are examples of witness credibility information that must be documented:

- i. payments or assistance given to informants or witnesses;
- ii. offers or discussions regarding reducing charges against a witness in exchange for information or testimony or discussions of payments or other assistance;
- iii. offers or discussions relating to not charging the witness with a crime in exchange for testimony or information.

20.06 Duty to Disclose to Prosecutor.

a. Department employees that provide testimonial or documentary evidence for criminal prosecutions shall timely disclose all documents, reports, notes, and tangible things that were gathered or created for the case including Chapter 39 information, exculpatory information, and witness credibility information. Disclosures shall be made in the manner directed by the prosecutor.

b. A Department employee that is providing prosecution evidence for a criminal proceeding shall provide the prosecutor with a copy of the employee's most recent employee biographical datasheet generated by Human Resources and notify the prosecutor of any other matters concerning the employee that relates to the employee's credibility as a witness in the proceeding. If the data is incomplete or inaccurate, the employee is responsible for providing updated corrected information so that the prosecutor has a correct record of official Department information. The employee shall provide the prosecutor with copies of all letters or notices of discipline such as written reprimands and assessments of time off, disciplinary probation, and demotions. Full disclosure will enable the prosecutor to determine what should be disclosed to the defense.

20.07 Continuing Duty to Disclose. The law imposes a continuing duty on an officer or employee of the Department to promptly provide exculpatory, impeachment or mitigating information to the prosecutor after it is discovered or identified in a criminal case. This duty continues even after a case is considered closed by virtue of a conviction, deferred adjudication or other action.

20.08 Office of Inspector General Responsibilities. OIG has the following responsibilities under this policy as to investigations conducted by OIG:

a. OIG shall coordinate with regional commanders to provide the investigative file for any investigation by OIG for any Department officer or employee to a prosecutor if it is requested by the prosecutor for a criminal case.

b. OIG shall provide a prosecutor with unsustainable, unfounded, and exonerated complaints against a Department employee if the prosecutor specifically requests those records in writing. Although complaints against law enforcement officers that have not resulted in discipline are usually confidential by state law, prosecutors may have a responsibility to provide such information to representatives of criminal defendants in order to comply with more specific constitutional requirements.

c. OIG may provide a prosecutor with a copy of a notice of investigation that is open but not completed if the prosecutor specifically requests open investigations.

20.09 Department Responsibilities.

a. The regional commander or the designee of the regional commander shall coordinate with prosecutors to establish appropriate procedures for Department personnel to provide and preserve evidence and information under this policy.

b. The Department shall train all employees who have responsibilities to routinely testify in criminal proceedings regarding the requirements of this policy as well as the state and constitutional requirements.

20.10 Discipline Relating to this Policy.

a. The failure to properly document, preserve, and disclose all evidence gathered in the course of an investigation constitutes serious misconduct warranting disciplinary action against the officer or employee up to and including discharge from employment.

b. The act of knowingly withholding exculpatory information or witness credibility information from a prosecutor by either failing to document or failing to disclose that information constitutes serious misconduct warranting disciplinary action against the officer or employee up to and including discharge from employment.

Tarrant County Criminal District Attorney's Office
Law Enforcement
Disclosure Compliance

The United States Supreme Court has long held that evidence that could potentially assist in the defense of an individual accused of a crime *must* be disclosed to the defense. Failure to disclose can result in the reversal of a conviction and, for extreme violations of the rule, prosecution of violators. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The duty to disclose rests primarily with prosecuting attorneys but information known to law enforcement agencies – even if never disclosed by those agencies to the prosecution -- is still imputed to the prosecution. Timely disclosure of exculpatory, impeachment and mitigating information is also required under the "Michael Morton Act", TEX. CODE CRIM. PROC. art. 39.14(h). Article 39.14 contains no materiality provision for disclosing exculpatory or impeachment evidence.

The goal of the Criminal District Attorney is to exercise due diligence in light of our responsibility under the Brady doctrine and Article 39.14 and ensure that all defendants receive a fair trial. Therefore, it is a critical inquiry whether an officer's conduct, personnel history or information from a personnel file might constitute exculpatory, impeachment or mitigating information in a particular criminal case.

We confidently rely on the professional policing practices of our partners in law enforcement in notifying us about any conduct of officers which meets our legal obligations.

This procedure applies to "officers," herein defined as peace officers, jailers, and civilian employees acting in a law enforcement capacity and employed by county or city law enforcement or the Tarrant County Criminal District Attorney's Office (CDA), as well as arson investigators employed by county or city fire agencies within Tarrant County.

Law Enforcement Agency Obligation to Notify

Each respective Law Enforcement Agency ("Agency") should determine whether there are any such instances listed below about which the Tarrant County Criminal District Attorney's Office ("CDA") should be made aware. In that regard, the Agency should examine current and future officers' personnel files and current and future officers' conduct and notify the CDA as soon as possible when:

- 1) an officer has a pending criminal complaint or indictment or is the subject of an ongoing criminal investigation for any crime other than a Class C misdemeanor traffic violation;
- 2) an officer has a disposed felony or misdemeanor, other than a Class C misdemeanor traffic violation, committed at any time that resulted in a final conviction, probation, deferred adjudication, or pretrial diversion;
- 3) an officer has a pending formal investigation, sustained finding, or conclusion by the Agency for any of the following:

- a. misrepresentation or failure to disclose a material fact on the officer's application;
 - b. untruthfulness or deception regarding facts in a report, statement, hearing, or official proceeding;
 - c. violation of an individual's constitutional rights;
 - d. bias or prejudice to an individual, class, or group of persons;
 - e. improper use of force against an individual; or
 - f. altering, tampering, concealing, or use of evidence with the exception of legitimate manipulation in the normal scope of law enforcement business;
- 4) an employee resigns, receives a demotion, or disciplinary action when an investigation is imminent or pending involving any matter listed in subsection 1,2, 3 (a) - (f) above or in relation to 5 below;
- 5) the Agency has information related to an expert witness's performance deficiencies that affect the integrity of the expert's conclusion or opinions.

Compliance Procedure

Agency Process

- Furnish to the CDA discovery compliance attorney the officer's name, TCOLE number, badge number and a brief description of the finding and relevant related information.
- Notify whether the disclosure is classified as a "pending formal investigation" or "sustained finding." Pending formal investigation or sustained finding is defined in a manner consistent with the agency's individual rules and procedures.
- Update the CDA of any changes to classifications or if removal from the database is warranted after the completion of the investigation.
- Contact the CDA if in doubt about whether the conduct requires disclosure.

Criminal District Attorney Process

- Rely on the due process provided by the Agency through disciplinary proceedings and will not re-litigate findings.
- Categorize the disclosure as either "Pending" or "Final" as relayed by the Agency and notify the Agency of inclusion in the database. The Pending category will contain information submitted about pending formal investigations. If Pending allegations are sustained, the inclusion will be re-categorized as Final. If the allegations are not sustained, the case will be removed from the database.

- **Update agencies regarding any reclassification or removals.**
- **Classify any allegations that, if sustained would lead to a "Final" classification, but in which the officer resigns before the investigating body makes formal findings as "Final" and maintain this information in the database unless and until good cause is shown for its removal.**
- **Notify the Agency of information independently discovered by the CDA, which may warrant inclusion in the database. If a prosecutor initiates a claim of untruthfulness from conduct occurring during judicial proceedings, the individual prosecutor must also immediately report such incident to the prosecutor's supervisor for the investigation and initiation of a charge of perjury against the officer.**
- **Each ACDA shall check the database and notify opposing counsel of inclusions. "Pending" notices should be made to the defense but not filed in the records of the court unless done under seal or with the appropriate requests to the trial court for inspection and orders.**
- **Disclosure information will be used to meet the State's obligation under the law with respect to cases that we prosecute.**
- **Sponsorship of an officer in the database will be made on a case by case basis.**
- **Disclosure does not equal admissibility and, when appropriate, the CDA will object to the admissibility of the disclosed evidence through written motions and argument.**
- **Disclose upon employee written request his or her own inclusion in the database for any "Final" disclosure.**
- **Disclose a person's inclusion in the database to a potential employer agency with an executed waiver by applicant to the Agency.**