


VANCOUVER CITY ATTORNEY'S OFFICE  
CRIMINAL DIVISION

POLICY FOR DISCLOSURE OF POTENTIAL IMPEACHMENT EVIDENCE FOR  
RECURRING INVESTIGATIVE OR PROFESSIONAL WITNESSES

Effective Date: November 26<sup>th</sup>, 2013

Signed:   
City Attorney

This written policy is designed to achieve compliance with these requirements, and to foster city-wide uniformity in the way potential impeachment of recurring government witness issues are resolved. As used in this policy the term "Assistant City Attorney" shall refer to Assistant City Attorneys in the Criminal Division of the Vancouver City Attorney's Office. ***All Assistant City Attorneys are required to know and follow this protocol and all relevant law concerning potential impeachment of recurring government witness disclosure obligations.***

## **I. BACKGROUND**

In representing the City of Vancouver or the State of Washington, Prosecuting Attorneys function as ministers of justice. To administer justice Prosecuting Attorneys accept responsibilities for the integrity of the criminal justice system and responsibilities that run directly to a charged defendant.

One specific responsibility is an affirmative duty to disclose potentially exculpatory information to a charged defendant. There are several sources for disclosure requirements of potentially exculpatory information.

A constitutional Due Process requirement for disclosure is set out in Brady v. Maryland, 373 U.S. 83 (1983). This requirement has been explained and modified by several subsequent cases. This Due Process requirement applies to all information in the hands of governmental agencies. Prosecutors have “a duty to learn of any [exculpatory] information known to the others acting on the government’s behalf in the case, including the police.” Kyles v. Whitely, 514 U.S. 419 (1995). Impeachment evidence is especially likely to be ‘material’ under disclosure requirements. Silva v. Brown 416 F.3d 980 (9<sup>th</sup> Cir.2005). Failure to comply with these requirements can lead to reversal of a criminal conviction.

Independent of the constitutional due process requirement, there are court and practice rules that apply. Prosecutors are required by Criminal Rule 4.7(a)(3) and Local Rule 4.7(a)(3) to “disclose any material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged.” This obligation is “limited to material and information within the knowledge, possession or control of members of the prosecuting attorney’s staff.” CrR 4.7(a)(4); CrRLJ 4.7(a)(4). Once information is provided to the Prosecutor’s Office by law enforcement agencies, that material becomes subject to disclosure. Id.

A closely concurrent duty to disclose such information is also placed upon prosecutors by Rule of Professional Conduct 3.8(d).

The requirements of Due Process and those of Criminal Rule 4.7, Local Rule 4.7 and Rule of Professional Conduct 3.8 apply to evidence that could be used to impeach witnesses. The scope of the requirements addressing potential impeachment evidence is different. Due Process will focus upon evidence that raises issues of credibility or competency, and imposes an affirmative duty on prosecuting attorneys to learn of impeachment evidence for recurring witnesses for the prosecution/investigation team i.e. investigators and forensic scientists. The court and practice rules requirements are limited to information possessed by the prosecuting attorney, but categorically include any prior convictions of a recurring witness for the prosecution/investigation team.

A law enforcement officer's or forensic expert's privacy interest does not prevent disclosure of disciplinary records, as such records are considered to be of legitimate concern to the public. *See, e.g. Dawson v. Daly*, 120 Wn.2d 782, 795-96, 845 P.2d 995 (1993); *Cowles Pub'g Co. v. State Patrol*, 44 Wn. App. 882, 724 P.2d 379 (1986), *rev'd on other grounds*, 109 Wn.2d 712, 748 P.2d 597 (1988).

Thus, Prosecuting Attorney disclosure requirements cumulatively include both an affirmative duty to seek out certain impeachment information and a duty to disclose information that may impact the witnesses credibility.

## **II. GUIDELINES**

1. As required by law, this office requests law enforcement agencies to inform it of information that could be considered exculpatory to criminal defendants. For purposes of disclosure, this office must determine whether the information is potentially exculpatory and how and when to make that information available at pending and future trials. *It is a constitutional obligation that rests singularly with the prosecutor and cannot be delegated to any other agency.*

2. As required by CrR 4.7, CrRLJ 4.7 and RPC 3.8, this office will disclose to defense attorneys information that tends to negate the defendant's guilt. These requirements extend to any prior convictions as well as any information that a reasonable person, knowing all relevant circumstances, could view as impairing the credibility of an officer that will or could be called to testify in a particular criminal proceeding.

3. The potential impeachment disclosure ("PID") standard depends on what a reasonable person could believe. It does not necessarily reflect the belief of this office or a law enforcement agency. Consequently, disclosure may be required in cases where this office and/or the law enforcement agency believe that no misconduct occurred, if a reasonable person could draw a different conclusion. Even if this office concludes that an officer is subject to PID, that determination does not reflect a conclusion that the officer committed misconduct or that the officer is not credible as a witness.

4. The PID standard requires consideration of all relevant circumstances. Because this office is not an investigatory agency, it lacks the ability to ascertain those circumstances. Consequently, this office relies on law enforcement agencies to conduct investigations into allegations of officer misconduct, and to advise this office of the results of those investigations.

### **III. PROCESS**

1. The City Prosecutor is the main contact point for all information relating to PID determinations.

2. Any law enforcement agency that receives information concerning alleged misconduct relating to truthfulness, bias, or other behavior that could be exculpatory to criminal defendants, and involves an officer engaged in criminal cases such that they may reasonably be expected to offer testimony on behalf of the prosecution, is requested to investigate or arrange for the investigation of those allegations. Any law enforcement agency that employs individuals who routinely perform expert witness services are additionally asked to investigate confirmed performance errors committed by those individuals, where those errors could compromise an expert witness's opinions.

3. At the initiation and upon completion of the investigation, the agency is requested to notify the City Prosecutor of the relevant allegation and determination. It is requested that this be done whether or not the agency determined that the allegations were founded.

4. If this office obtains information about alleged misconduct by a law enforcement officer or agency expert witness that has not been fully investigated, it will ask the officer's agency to conduct an investigation. This may occur where, for example, an officer or expert witness employee has resigned from his/her agency in lieu of termination.

5. The City Prosecutor will request from the Vancouver Police Department, a list of all pending investigations being conducted by the Professional Standards Unit. The most recent version of such list shall be maintained as a "pending review" list to be monitored regularly for sustained findings of misconduct related to dishonesty or falsehood. On pending cases involving the recurring government witness, the City Prosecutor or Assistant City Attorney shall notify defense counsel of the existence of the open investigation and direct further inquiry to the investigating agency. Law enforcement is requested to advise the City Prosecutor if, at any point in the investigation, an allegation of misconduct relating to dishonesty or falsehood is confirmed or acknowledged.

6. The City Prosecutor or designee will notify the agency and the officer/employee whether or not the information meets the PID standard.

7. If the allegations are sustained and they involve misconduct related to dishonesty or falsehood, the investigating agency is requested to notify the City Prosecutor. An allegation is sustained when it is factually supported, even if discipline is not imposed. The witness may then be added to the PID Database for future disclosure. If the allegations are determined to be unfounded, the witness will be removed from the "pending review" status. If appropriate, this office will seek protective orders covering such information.

8. When information is provided to this office that may meet the PID Standard, the City Prosecutor or designee shall assemble a panel consisting of three members to determine whether the information should be added to the PID database. The three-member panel shall be comprised of the City Prosecutor or designee and two Assistant City Attorneys. The panel shall endeavor to reach a unanimous agreement as to whether it is appropriate to add the information in question to the PID database by engaging in the following inquiry:

- A. If proven true, does the allegation meet the PID Standard?
  - i. If the answer is no, the inquiry is finished.
  - ii. If the answer is yes, the formal review will continue.
  
- B. In view of the memorandum, related materials, and any additional evidence that has been obtained, is the panel convinced by a preponderance of the evidence that the allegation is true?
  - i. If the answer is no, the inquiry is finished.
  - ii. If the answer is yes, the panel will notify the appropriate agency pursuant to Section "C".
  
- C. The panel will notify the relevant agency that the City Attorney's Office has concluded that information in its possession meets the PID Standard. It will be left to the discretion of the relevant agency to notify the witness.
  - i. The witness and the relevant agency will be allowed to submit a response, with additional evidence they would like the Committee to consider, in writing within 20 days.
  - ii. In the event that a trial is pending, the panel may, in its sole discretion, decide that it may be necessary to disclose the material in its possession before a response is submitted.
  - iii. If no response is received, the government witness shall be added to the PID database and notification should be sent to the witness and the relevant agency.
  
- D. If a response is received, the panel will review the additional evidence and again as the following question:

In view of the memorandum, related materials, and any additional evidence that has been obtained, is the panel convinced by a preponderance of the evidence that the allegation is true?

- i. If the answer is no, the inquiry is finished. The witness and the agency should be informed of the decision.
- ii. If the answer is yes, the documents in the panel's possession should be added to the PID database and the individual and agency should be advised of the decision.

If, at any stage in the preceding process, unanimous agreement cannot be reached by the three-member panel, then the decision for whether to place the information into the PID database shall be referred to the Vancouver City Attorney and the Vancouver City Attorney shall make the final decision.

9. If it is uncertain whether or not the information meets the PID standard the information will be submitted to the court for an *in camera* inspection in a case in which the officer or expert witness is a listed witness.

10. The Criminal Division of the City Attorney's Office will maintain a record of the information reviewed in making the determination, which could include a copy of the law enforcement agency's final IA determination, if any.

11. These guidelines are intended for the guidance of the Criminal Division of Vancouver City Attorney's Office. It may be modified or abrogated by the City Prosecutor at any time. Exceptions may also be authorized by the Prosecutor or his designee. These guidelines do not confer legal rights on any individual or entity.

#### **IV. Assistant City Attorney and Staff Responsibilities**

1. If an Assistant City Attorney or any staff member in the Criminal Division becomes aware of PID material regarding a recurring government witness, the attorney or staff member shall inform the City Prosecutor or their designee.
2. If the City Prosecutor or their designee believes that the information could constitute PID material, he or she will direct an Assistant City Attorney to prepare a PID Worksheet summarizing the material. The Worksheet should focus *strictly* on facts and avoid all forms of speculation. An exemplary PID Worksheet accompanies this policy as Appendix A.

#### **V. Maintaining the PID Database**

A secure electronic database may be maintained with copies of all PID material. Hard copies of the PID material, if any, will be kept in a single secure location. Access to the PID materials will be monitored by the Senior Legal Assistant for the Criminal Division of the City Attorney's Office.

When a subpoena is issued, the assigned Assistant City Prosecutor should receive notice that a recurring government witness is associated with PID material. Any Assistant City Prosecutor reviewing a file for criminal charging will also be permitted to view the names contained in the PID Database to determine if any witness has PID material.

Witnesses in the PID Database will be identified by last name and first name, and further identified as having either criminal convictions that do not encompass a crime of dishonesty or false statement ("CC non-Dishon"), or potential impeachment evidence ("PID Material"). Therefore, each folder in the PID Database should appear as one of the following: "LAST, First\_PID Material" or "LAST, First\_CC non-dishon."

**VI. When an Assistant City Prosecutor Discovers That A Potential Trial Witness has a criminal conviction not involving dishonesty, or information subject to PID disclosure.**

When an Assistant City Prosecutor becomes aware that a subpoenaed witness has a criminal conviction not involving dishonesty, such attorney should request more detail about the nature of the conviction. If the attorney determines that the conviction is not discoverable, due to the specific facts of the case and the witness's anticipated testimony, the attorney shall notify the City Prosecutor or their designee of the decision and rationale for non-disclosure.

In all other instances (i.e., instances in which a witness for the prosecution has criminal convictions which may be discoverable and/or other information concerning the witness for the prosecution is designated as "PID Material"), the Assistant City Prosecutor should discuss with the City Prosecutor or their designee whether the material should be disclosed directly to the defense attorney, or if it should be submitted to the court for an *in camera* review. The Assistant City Prosecutor should also discuss with the City Prosecutor or their designee the need for a protective order. The Assistant City Prosecutor shall notify the City Prosecutor or their designee if a judge in their case makes a ruling regarding the admissibility of the PID material.

**VII. When Potential PID Material Is Discovered During Trial**

When potential PID material is discovered during trial, the Assistant City Prosecutor should talk to the City Prosecutor or their designee, if possible, to determine an appropriate action.