

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 unsustained, 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.