

**PORTLAND POLICE DEPARTMENT  
STANDARD OPERATING PROCEDURE**

	Effective Date <b>4/7/2019</b>	<b>10A</b>
Subject <b>Brady Disclosure Requirements</b>		
Review Date		

**I. Purpose**

The purpose of this policy is to establish procedures and guidelines regarding Brady information that may be in the possession of the Portland Police Department or Portland police personnel. This policy also addresses employees' obligations regarding disclosure of Brady information. The department recognizes that the prosecutorial obligation to protect the constitutional due process rights of defendants also extends to police employees and is part of fair and effective police investigations.

**II. Policy**

The Portland Police Department's dedication to professionalism and integrity includes a commitment by its employees to (1) be truthful in all matters, (2) to identify and provide to the prosecution any exculpatory material that would have a reasonable probability of altering the results in a trial, or mitigating the sentencing of a defendant and (3) to disclose any material relevant to the credibility of government witnesses, including, but not limited to, police officers. It is the policy of this police department to follow evidentiary disclosure requirements consistent with the law and to provide employees with the information necessary to properly fulfill the reporting and testimonial requirements mandated by constitutional law.

**III. Definitions**

Brady material: exculpatory or impeachment information that is material to the guilt or innocence or punishment of a defendant.

Credible allegation: an allegation with sufficient supporting facts and/or details to indicate its reliability.

Duty to disclose: the affirmative duty of department personnel to notify the prosecutor of any exculpatory or impeachment evidence known to the employee.

Exculpatory evidence: evidence that is favorable to the accused; that is material to the guilt, innocence, or punishment of the accused; and/or that may impact the credibility of a government witness, including a police witness.

Final written disciplinary decision: a final written administrative decision that is not appealed within thirty (30) days pursuant to a grievance arbitration procedure; or the final written decision of an arbitrator.

Impeachment evidence: evidence that demonstrates that a witness is biased or prejudiced against a party, has some motive to fabricate testimony, has a poor reputation for truthfulness, has made prior inconsistent statements about an event or has past specific incidents that are indicators of the witness's untruthfulness.

Impeachment material: for purposes of this policy, impeachment material involving an employee is a sustained complaint regarding an employee's untruthfulness, dishonesty, or untrustworthiness or a credible allegation of untruthfulness, dishonesty, or untrustworthiness; until the allegation is disproved or not sustained.

Material evidence: evidence is "material" if there is a reasonable probability that disclosing it will change the outcome of a criminal proceeding.

Reasonable probability: a probability sufficient to undermine confidence in the outcome of the trial or sentencing of a criminal case.

Untruthfulness: deception, false reports, fabrications, intentional inaccuracies, or lying.

#### **IV. The Brady Rule**

The Brady Rule, named for Brady v. Maryland, 373 U.S. 83 (1963), requires prosecutors to disclose to the defense any materially exculpatory evidence in the government's possession. "Brady material" is any evidence favorable to the accused. This includes evidence that goes towards negating a defendant's guilt, evidence that could reduce a defendant's potential sentence, or evidence relevant to the credibility of a witness. Police personnel have an obligation to bring any known Brady material, exculpatory evidence or impeachment evidence, to the attention of the prosecutor. The withholding of Brady material, by the prosecution or the police, violates a defendant's constitutional rights whether the evidence was mistakenly or purposely withheld. If Brady evidence is withheld, it may result in the suppression of other inculpatory evidence, the dismissal of the case, the reversal of a conviction, a new trial and/or a civil suit against a police employee.

#### **V. Disclosure of Brady Material**

##### **A. Department's Duty to Report to Prosecutor**

1. The department shall exercise due diligence to ensure that material of possible Brady relevance is made available to the prosecutor. Responsibility for disclosing such material extends from arraignment through the trial and sentencing process.
2. The department will release Brady material regarding an employee in response to a specific inquiry from a prosecutor. If the department is aware of information relevant to a particular case, the department will proactively disclose that information. Discipline memos regarding a sustained complaint of untruthfulness, dishonesty, or untrustworthiness will be released to the prosecutor's office as soon as the memo becomes a public record. If disciplinary action is taken, the final written decision relating to that action, by the Chief of Police or an arbitrator, is no longer confidential after the decision is completed and it imposes or upholds discipline.
3. There is no distinction between "impeachment evidence" and "exculpatory evidence" for Brady disclosure purposes. Allegations that cannot be substantiated, are not credible, or have resulted in an individual's exoneration are not considered to be potential impeachment information. A credible allegation of untruthfulness, filing a false report or lying under oath, until disproved or not sustained is considered to be potential impeachment information and must be disclosed.
4. Information included in an employee's personnel file that is related to the matters stated above or that may affect an employee's ability to testify may be made available to the prosecution as part of a Brady disclosure with the approval of the Chief of Police. The department shall notify the officer of the prosecutor's inquiry, any disclosure of personnel information that the department has made to the prosecutor and provide an opportunity for the officer to object to the Chief of Police regarding the release of personal, non-work related information. If information is released to the prosecutor, the department will ask the prosecutor to request a protective order from the court stating that the information is to be kept confidential and limiting the use of the information, by the prosecution or the defense, to the specific case for which the information was requested.

##### **B. Employee's Duty to Report**

1. Employees of the department have a responsibility to disclose Brady material as soon as reasonably possible to the prosecutor and/or in time for effective use at trial.
2. It is the obligation of employees to include in their reports any exculpatory evidence that they are aware of when writing the report. This includes, but is not limited to, inconsistent statements by a witness; witness accounts that contradict each other, and/or a witness's inability to identify a defendant (see Section C for additional examples). It is not necessary for an employee to include speculation, rumors, or gossip in a report.

3. If an employee learns of potentially exculpatory evidence after the submission of the case, the employee shall submit a supplemental report documenting the information and transmit it to the prosecutor and the assigned detective as soon as possible.
4. If an employee believes that certain information is confidential (i.e., a confidential informant), the employee shall discuss the matter with a supervisor and the prosecutor to determine the appropriate way to handle the information.
5. In the performance of their duties, police officers may engage in deceptive conduct that is essential to public safety. Lying to a suspect or conducting undercover operations are examples of acceptable deceptive practices. These types of investigatory deceptive practices may be used when they are lawful, and when they are intended to elicit evidence. Their use shall be disclosed in the officer's report.
6. Employees should be aware that electronic communications, such as email, car to car messaging, postings on twitter or facebook and texts and photographs on cell phones or tablets may be considered Brady material and require disclosure to the court. If an officer captures case information (a witness's statement, a picture of a suspect) on an electronic device, the officer must note that fact in the report and preserve that information for future discovery.
7. It is the obligation of all personnel to inform their supervisor or Shift Commander of any elements of their employment, information contained in investigative reports, or evidence connected with a criminal indictment or trial that they believe may be subject to Brady disclosure.
8. If an employee is unsure whether something in his/her personal life should be disclosed), the employee should discuss the matter with the prosecutor prior to trial to determine if the information needs to be disclosed to the court. It is not necessary for the employee to disclose this information to the department if the court decides it does not qualify as Brady material. If the prosecutor or the court decides the information does qualify as Brady material, the employee must disclose the information to the department.
9. Supervisory officers are responsible for ensuring that they proceed with due diligence in identifying any potential Brady material connected with any criminal proceeding of which they are aware and for bringing such material to the attention of the prosecutor, Police Attorney, or CID Lieutenant in a timely manner.

C. Examples of Brady material

Examples of Brady material that, if known to an employee, may be subject to disclosure include, but are not limited to, the following:

1. Information that would directly negate the defendant's guilt concerning any alleged fact.
2. Any criminal record or criminal case pending against a witness.
3. The failure of a witness to make a positive identification of a defendant or a witness's identification of someone other than the defendant.
4. Specific information that casts doubt on the credibility or accuracy of a witness or evidence.
5. An inconsistent statement made orally or in writing by a witness.

6. Credible statements made orally or in writing by a person that are inconsistent with any statement of a witness regarding the alleged criminal conduct.
7. Public information regarding any mental or physical impairment of a witness that casts doubt on his/her ability to testify accurately and truthfully at trial.
8. Specific information that tends to diminish the degree of the defendant's culpability or the classification of the crime (i.e., A, B, C, D).
9. Documented evidence that a proposed witness has a racial, religious, or personal bias against a defendant individually or as a member of a group.
10. A finding of misconduct by the department, the Civil Service Commission or an arbitrator that reflects on a witness's truthfulness, bias, or ethics.
11. Documented evidence of an employee's untruthfulness, dishonesty, or untrustworthiness.

#### **VI. Departmental Response to Potential Testimonial Impeachment**

Adherence to department policy and rules in all matters is imperative. Violations of rules and policies related specifically to honesty may have direct bearing on an employee's ability to testify. Employees who are knowingly or intentionally untruthful or dishonest or who are at risk that their trial testimony will be impeached. This type of impeachment evidence will need to be reported to the prosecution whenever an employee is a potential witness in a criminal case. Employees who place themselves in this position are subject to disciplinary action up to and including termination of employment.

#### **VII. Administrative Concerns**

##### A. Training

All employees shall receive notification of and/or training in Brady disclosure requirements.

##### B. Records Retention

1. Employee personnel files that are related to the matters stated above may be provided to the prosecution or the court as part of a Brady disclosure, consistent with constitutional law and Maine statutory law.
2. The department will continue to purge discipline records based on the seven (7) year retention period. Records that remain in an employee's personnel file pursuant to the applicable collective bargaining agreement will not be removed.
3. Employees should be aware that there is no statutory time limit on Brady material. Destruction of records after seven years is not unconstitutional unless its exculpatory value to a criminal case is clearly apparent prior to its destruction. Destruction of records does not relieve the prosecution from its disclosure obligations when the prosecution is aware of Brady information. Prosecutors still have a duty to seek and disclose Brady information if it is constitutionally material, regardless of whether the records have been destroyed.