

# **San Francisco District Attorney's Office**

## **PROCEDURE FOR DISCLOSURE OF *BRADY* MATERIAL FROM LAW ENFORCEMENT PERSONNEL RECORDS**

### **(EXTERNAL POLICY)**

ISSUED: 8/13/2010

#### **I. INTRODUCTION**

##### **A. Purpose of Policy**

Repetitive requests by the District Attorney that the San Francisco Police Department (and other law enforcement agencies) check employee personnel files each time subpoenas are issued in a criminal case create unnecessary paperwork and personnel costs for both the Department and the District Attorney's Office. Instead, the San Francisco Police Department (SFPD) is adopting a procedure under which the Department advises the District Attorney's Office of the names of employees who have information in their personnel files that may require disclosure under *Brady*. (See SFPD Bureau Order No. 2010-01.) The District Attorney's Office then makes a motion under Evidence Code 1043 and 1045(e) for *in camera* review of the records, with respect to SFPD personnel.

With respect to other law enforcement agencies, until we develop procedures with them, we will continue to send letters to those agencies' legal contact (see attached list). Depending on their response, we may file Evidence Code 1043 and 1045 motions therein.

The purpose of this policy is to ensure that prosecutors and the defense receive sufficient information to comply with the constitutional requirements of *Brady* while protecting the legitimate privacy rights of law enforcement witnesses. This policy is not intended to create or confer any rights, privileges, or benefits to defendants or prospective or actual witnesses.

This External Policy is to be distinguished from the Office's Internal Policy. The External Policy governs *matters contained solely in law enforcement personnel files*, of which this Office is given limited notice, so that we can make the appropriate motion to the court to obtain case-specific information to use and provide to the defense. The Internal Policy governs *matters known to our own Office, and in our possession*, which contains sometimes significantly more materials, and which must be discovered in cases where such Internal listees may be witnesses.

### **B. Organization of this External Policy**

The following sections will cover the procedure to follow for judicial review of those matters we are made aware of from SFPD personnel files, dealing with historical cases (post-judgments), procedures to follow regarding outside law enforcement agencies and what investigations or sources of information are specifically excluded from this external policy.

## **II. PROCEDURE FOR JUDICIAL REVIEW OF SFPD PERSONNEL RECORDS**

### **A. Brady Material Defined**

The District Attorney is obligated to provide the defense in criminal cases with exculpatory evidence that is material to either guilt or punishment. (*Brady v. Maryland, supra*, 373 U.S. 83, 87.) Reviewing courts define "material" as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) The evidence must raise "reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different [citation] – that is to say, a probability sufficient to undermine confidence in the outcome." (*In re Sassounian* (1995) 9 Cal. 4<sup>th</sup> 535, 543-544, n. 6.)

"Exculpatory" means favorable to the accused. This obligation includes "substantial material evidence bearing on the credibility of a key prosecution witness." (*People v. Ballard* (1991) 1 Cal.App.4th 752, 758.) Such impeachment evidence must disclose more than "minor inaccuracies." (*People v. Padilla* (1995) 11 Cal.4th 891, 929, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

The government has no *Brady* obligation to “communicate preliminary, challenged, or speculative information.” (*United States v. Agurs* (1976) 427 U.S. 97, 109 fn. 16.) However, “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” (*Id.* at p. 108.) See also *Kyles v. Whitley* (1995) 514 U.S. 419, 439, which warns prosecutors against “tacking too close to the wind” in withholding evidence.

Examples of evidence that may constitute "*Brady* material" are as follows:

1. The character of the witness for honesty or veracity or their opposites. (Evid. Code § 780 (e).)
2. A bias, interest, or other motive. (Evid. Code § 780 (f).)
3. A statement by the witness that is inconsistent with the witness’s testimony. (Evid. Code § 780 (h).)
4. Felony convictions involving moral turpitude. (Evid. Code § 788; *People v. Castro* (1985) 38 Cal.3d 301, 314.) Discovery of all felony convictions is required regarding any material witness whose credibility is likely to be critical to the outcome of the trial. (Penal Code § 1054.1 (d); *People v. Santos* (1994) 30 Cal.App.4th 169, 177.)
5. Facts establishing criminal conduct involving moral turpitude, including misdemeanor convictions. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-297.)
6. False reports by a prosecution witness. (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1244.)
7. Pending criminal charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842.)
8. Parole or probation status of a witness. (*Davis v. Alaska* (1974) 415 U.S. 308, 319; *People v. Price* (1991) 1 Cal.4th 324, 486.)
9. Evidence undermining an expert witness’s expertise. (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179.)
10. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group. (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507-510.)

## **B. *Brady* Material in Police Officer Personnel Files**

For purposes of SFPD Bureau Order No. 2010-01, potential “*Brady* material” in personnel files of police officers has been defined by the SFPD to include any of the following:

1. A sustained finding of misconduct that comes within the definition of *Brady* material set forth in Section II. A. A sustained finding of misconduct occurs when (1) if charges are filed at the Chief’s level, the Chief of Police finds a complaint to be sustained, and if there is an appeal to the Police Commission, the Commission has issued a decision on the appeal that finds a complaint to be sustained, or (2) if charges are filed with the Police Commission, the Police Commission finds a complaint to be sustained. If the SFPD has notified the District Attorney’s office of *Brady* information and the officer later successfully appeals the finding of misconduct to a court, the SFPD shall provide the District Attorney’s Office with a copy of the decision and the District Attorney’s Office will reevaluate the matter.
2. Charges of misconduct filed with the Police Commission, or sustained by the Chief and on appeal to the Commission, when the charged misconduct comes within the definitions of *Brady* material set forth in Section II.A, (i) if the officer resigns or retires after the charges are filed and before the misconduct case is decided, or (ii) if the officer is still active and likely will be called as a witness in a criminal case before the misconduct case is decided. If the complaint of misconduct is later not sustained, the SFPD shall inform the District Attorney’s Office and the District Attorney’s Office will reevaluate the matter.
3. Any arrest, conviction or pending criminal charge for a felony or moral turpitude offense.

## **C. *Brady* Material in Civilian Personnel Files**

For purposes of SFPD Bureau Order No. 2010-01, potential “*Brady* material” in personnel files of SFPD civilian employees has been defined by the SFPD to include any of the following:

1. Any finding of misconduct that comes within the definition of *Brady* material set forth in Section II.A. A finding of misconduct occurs when (1) the Chief of Police has found a complaint to be sustained or (2) if a grievance has been filed, the employee has exhausted all remedies provided by MOU that governs the employee and the complaint has

been sustained. If the SFPD has notified the District Attorney's office of *Brady* information and the civilian later successfully appeals the finding of misconduct to a court, the SFPD shall provide the District Attorney's Office with a copy of the decision and that the District Attorney's Office will reevaluate the matter.

2. Official charges of misconduct filed by the SFPD when the charged misconduct comes within the definition of *Brady* material set forth in Section II.A, (i) if the employee resigns or retires after the charges are filed and before the misconduct case is decided, or (ii) if the employee is still active and likely will be called as a witness in a criminal case before the misconduct case is decided.

3. Any arrest, conviction or pending criminal charge for a felony or moral turpitude offense.

#### **D. SFPD Procedure For Notifying District Attorney's Office**

The SFPD and the District Attorney's Office have adopted a procedure by which the SFPD informs the District Attorney's Office of the identity of officers and civilian employees who may testify as a material witness in a prospective or pending case and who have information in their personnel files that may require disclosure under *Brady*.

Upon the completion of an internal review within the SFPD, the Director of Risk Management or designee shall send a written memorandum to the Chief of the Criminal Division in the District Attorney's Office that states the following: "The San Francisco Police Department is identifying [name of employee, star number if applicable, and date of separation from the Department if not a current employee] who has material in his or her personnel file that may be subject to disclosure under *Brady v. Maryland* (1963) 373 U.S. 83."

#### **E. Confidentiality of Files**

All memoranda from the SFPD to the District Attorney's Office that identify an employee as having potential *Brady* material in his or her personnel file shall be considered confidential, shall be protected as a confidential personnel record, as official information, and by any other applicable privilege or legal protection, and shall be maintained in a secure file.

The SFPD is aware that the District Attorney's Office will create a list of SFPD employees who have potential *Brady* material in their personnel files. The list shall include only the name of the employee, star number, and date of separation from the SFPD if not a current employee, and not any other information. The list resides on a secure computer drive, accessible to Assistant District Attorneys, with a "read only" feature, precluding the copying, printing or transmission of the list (only the list administrators can alter any information on the list).

Assistant district attorneys must review the list during case preparation to determine whether a law enforcement employee who is subpoenaed by or who will testify on behalf of the prosecution is on the list. "Case preparation" refers to any hearing at which that witness may testify, including (but not exclusively) preliminary examination, motion to suppress, motion to revoke, and court/jury trial.

#### **F. Motion For *In Camera* Review**

When the District Attorney's office deems that a law enforcement officer, identified by the SFPD as having possible *Brady* material in their personnel file, is a material witness in a pending criminal case or intends to call that officer as a witness, the District Attorney shall make a "*Brady*" motion under evidence Code Sections 1043 and 1045(e) to the court for *in camera* review of the records. (See *Alford v. Superior Court*, *supra*, 29 Cal.4th at 1046, *Brandon*, *supra*, 29 Cal. 4<sup>th</sup> at p. 14 *United States v. Agurs*, *supra*, 427 U.S. 97, 106; *U.S. v. Dupuy* (9th Cir. 1985) 760 F.2d 1492, 1502). As to non-sworn employees, the request shall be made pursuant to Evidence Code sections 1040 and 915(b). (See *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 525-526; *Johnson v. Winter* (1982) 127 Cal.App.3d 435.) At the time of application, the defense, the involved employee and the employing law enforcement agency will be notified of the request for *in camera* review.

#### **G. Disclosure**

If following *in camera* review, the Court orders disclosure of personnel file information, disclosure of the information shall be made to all parties as ordered by the Court. The SFPD and District Attorney's Office will work with the Court on an efficient method for disclosure. The SFPD and District Attorney's Office will urge the Court to adopt a procedure under which all parties, the SFPD, the District Attorney's Office and the defense, receive the information at the same time in conjunction with a protective order. The prosecuting attorney shall request that the Court issue a

protective order against disclosure of the material in other cases pursuant to Evidence Code section 1045, subdivision (e). (See *Alford v. Superior Court*, *supra*, 29 Cal. 4<sup>th</sup> 1033.)

#### **H. File Control**

Upon completion of a criminal case, the District Attorney's Office shall return to the SFPD all material from employee personnel files obtained pursuant to this Procedure for Disclosure. The District Attorney's office shall not maintain a depository organized by officer name of information obtained from SFPD personnel files pursuant to *in camera* hearings. Instead, motions shall be made under *Brady* and Evidence Code sections 1043 and 1045(e) in each future case in which the officer is a material witness.

### **III. REVIEW OF HISTORICAL INFORMATION BY THE TRIAL INTEGRITY UNIT**

The SFPD has potential *Brady* material in its personnel files concerning officers and employees that relates to conduct that has occurred in the past and thus may impact closed criminal cases.

In order for the District Attorney's Office to satisfy any *Brady* obligation that may apply in closed criminal cases, the SFPD will provide the employee's name, star number if applicable, date of separation if not a current employee, and the following information. For conduct that has resulted in criminal arrest or conviction, the SFPD will provide the District Attorney with the relevant dates and description of the criminal conduct. For other types of misconduct, the SFPD will provide the District Attorney with the relevant dates.

The SFPD is aware that the District Attorney's Office will then take appropriate legal action to ensure that notice is given to all affected parties, including, but not limited to, filing a motion with the Court, giving written notice to a defendant's counsel of record, or giving written notice to the defense bar.

This historical review is being done by the San Francisco District Attorney's Office's Trial Integrity Unit (TIU). Should assistant district attorneys have questions concerning a closed criminal case, they should contact the managing attorney of the TIU or the Chief of their Division.



#### **IV. NON-SFPD PROCEDURES**

Assistant district attorneys preparing cases for any hearing shall consult the external list maintained on the shared computer drive against any witnesses they propose to subpoena; should any such proposed witnesses who are on the list be employed as law enforcement or civilian employees of a non-SFPD law enforcement agency, the assistant district attorney will access the list of legal contact information attached hereto (and updated regularly on the shared drive, 'S') and will immediately send a letter to the designated contact person for that agency asking that agency if the proposed witness has any *Brady* information for which a motion need be made to the Court. If that agency responds in the positive for any witness(es), the assistant district attorney shall notify the defense attorney in his/her upcoming trial/hearing, and make a *Brady/1043* motion to the Court.

#### **V. INVESTIGATIONS NOT COVERED BY THIS PROCEDURE**

##### **A. District Attorney's Authority Under Penal Code Section 832.7(a)**

Nothing in this Procedure for Disclosure shall apply to or in any way limit the District Attorney's authority pursuant to the exception set forth in Penal Code Section 832.7(a).

##### **B. Cases Covered by the SFDA Internal Policy**

The District Attorney's Office sometimes learns of potential law enforcement employee misconduct outside of the procedure described in Section II, above, or outside of an *in camera* review procedure. For example, evidence of untruthfulness may come to light during a criminal trial, or from credible reports of other law enforcement employees based on sources other than personnel records. The procedure in such cases is described in a separate memorandum ("Internal Policy").