The IACP Law Enforcement Policy Center creates four types of documents: Model Policies, Considerations Documents, Concepts & Issues Papers, and Need to Know one-page summaries. Typically, for each topic, either a Model Policy or a Considerations Document is created, supplemented with a Concepts & Issues Paper. This file contains the following documents:

- **Considerations Document**: Offered as an alternative to the bright-line directives found in a Model Policy. Instead of providing exact policy language, the Considerations Document outlines items that agencies should address and provides options that agencies should examine when developing their own policies on the topic.

- **Concepts & Issues Paper**: Designed to provide context and background information to support a Model Policy or Considerations Document for a deeper understanding of the topic.
Duty to Disclose Exculpatory Evidence

I. PURPOSE

This document is intended to provide agencies with items for consideration when developing their policies regarding fulfilling the reporting and testimonial requirements related to the disclosure of exculpatory evidence.

II. POLICY

Agencies should develop a policy statement to concisely explain to agency personnel and the public the agency’s policy on disclosure of exculpatory evidence.¹

Sample: It is the policy of this law enforcement agency to follow disclosure requirements consistent with the law, to include identifying and providing to the prosecution, upon their request if applicable by local laws, any exculpatory material that would have a reasonable probability of altering the results in a trial, any material that could reasonably mitigate the sentencing of a defendant, and any material relevant to the credibility of government witnesses, including, but not limited to, law enforcement officers.

Sample: It is the policy of this agency that the chief executive officer or their designee shall review employees’ files to determine if any employee has a disciplinary history that would impact their credibility as a witness. This information shall be made available to the prosecutor as soon as possible following the initiation of any criminal case in state or federal court.

III. DEFINITIONS

Duty to disclose: The affirmative duty of law enforcement to notify the prosecutor of any exculpatory material. Agencies should consult with their legal advisor to determine if there are any additional applicable notification requirements.

Exculpatory evidence: Evidence that is favorable to the accused; is material to the guilt, innocence, or punishment of the accused; and/or may impact the credibility of a government witness, including a law enforcement officer or other agency employee. Impeachment material is included in the disclosure requirements.

¹ Refer to state laws for further guidance as to whether this is an affirmative duty to disclose exculpatory evidence to prosecution.
IV. PROCEDURES

A. General Provisions of Disclosure

When developing policies and procedures related to disclosure requirements, agencies should consider:

1. When potential exculpatory material should be provided to the prosecutor and other parties as required by law.

2. The person(s) responsible for reviewing existing employee files to determine if they contain potentially exculpatory material.

3. What materials are potential exculpatory material. These may include but are not limited to:
   a. Information that would directly negate the defendant’s guilt concerning any count in an indictment.
   b. Information that would cast doubt on the admissibility of evidence that the government plans to offer that could be subject to a motion to suppress or exclude.
   c. Any criminal record or criminal case pending against any witness whom the prosecution anticipates calling.
   d. The failure of any proposed witness to make a positive identification of a defendant.
   e. Information that casts doubt on the credibility or accuracy of a witness or evidence.
   f. An inconsistent statement made orally or in writing by any proposed witness.
   g. Statements made orally or in writing by any person that are inconsistent with any statement of a proposed government witness regarding the alleged criminal conduct of the defendant.
   h. Information regarding any mental or physical impairment of any governmental witness that would cast doubt on their ability to testify accurately and truthfully at trial.
   i. Information that tends to diminish the degree of the defendant’s culpability or the defendant’s offense level under state or federal sentencing guidelines.
   j. An official finding of misconduct that reflects on the witness’s truthfulness, bias, or moral turpitude.
   k. Evidence that a proposed witness has a personal bias against a protected class.
   l. An officer’s excessive use of force, untruthfulness, dishonesty, bias, or records related to serious misconduct by officers that is related to the investigation, in conjunction with their service as a law enforcement officer.

4. Whether employee personnel files that are related to matters stated above should be provided or available to the prosecution as part of a disclosure, as is consistent with the law.

5. Procedures for notifying the employee who is subject to the disclosure that potential impeachment information has been disclosed to the prosecutor, what information was disclosed, and any judicial rulings and related pleadings.

B. Duty to Report

Agencies should consider providing guidance regarding the importance of adhering to agency policies and rules, and the possible consequences of rule breaches specifically related to honesty and veracity. Agencies should consider developing guidelines related to:

1. Agencies may provide the relevant prosecuting authority with potential exculpatory evidence regardless of whether the prosecutor makes a request for such evidence.
2. How much information the agency will provide to the prosecutor. In some jurisdictions, agencies may require that the complete file and all related documentation are provided to the prosecutor and that written acknowledgment of receipt is obtained.

3. The impact of violations of policy involving integrity, honesty, credibility, veracity, and related matters and whether these items may be subject to disclosure requirements.

4. Requirements regarding notification by individual employees of any elements of their employment as a law enforcement officer, information contained in investigative reports, or evidence connected with a criminal indictment or trial that they reasonably believe may be subject to disclosure, to include who should be notified.

5. The role of supervisory officers in identifying any potential exculpatory material connected with any criminal proceeding for which they have oversight.

6. Whether employees may also be subject to disciplinary action up to and including termination of employment for violations that may be subject to disclosure requirements. This may be directly tied to an employee’s inability to perform required job functions as a result of the exculpatory material.

C. Training

Agencies should develop initial and ongoing training to all employees regarding exculpatory material disclosure requirements and their potential impact on employment.

D. Records Retention

Agency executives should consult with their legal counsel regarding any requirements for retention of any records related to potential exculpatory evidence. When determining records retention policies, agencies should consider confidentiality requirements and open records law implications.
Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory board to ensure that this document incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives, and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes. Law enforcement administrators should be cautioned that each law enforcement agency operates in a unique environment of court rulings, state laws, local ordinances, regulations, judicial and administrative decisions, and collective bargaining agreements that must be considered and should therefore consult their legal advisor before implementing any policy.
Duty to Disclose Exculpatory Evidence

I. INTRODUCTION

A. Purpose of Document

This paper is designed to accompany the Considerations Document on Duty to Disclose Exculpatory Evidence published by the IACP Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide a greater understanding of the recommendations and guidance provided in the Considerations Document. This material may be of value to law enforcement executives in their efforts to develop their own policies that meet the requirements and circumstances of their communities and their law enforcement agencies.

B. Background

Honesty and credibility are essential traits of a law enforcement employee. This credibility can also determine whether they may face testimonial impeachment during court proceedings or even be subject to termination of employment.

Court decisions regarding the responsibility to disclose exculpatory evidence have existed for many years. However, many agencies are faced with at least two obstacles in efforts to fulfill disclosure requirements. First, legal precedent does not provide bright-line rule on the types of information that must be revealed, resulting in a broad disparity in policy and practice on this issue. Second, many agencies have difficulty establishing protocols on compiling exculpatory materials from data and records that may be spread throughout an agency.

C. Definitions

Exculpatory evidence is evidence that is favorable to the accused; is material to the guilt, innocence, or punishment of the accused; and/or may impact the credibility of a government witness, including a law enforcement officer or other agency employee. Impeachment material is included in the disclosure requirements. In other words, the term exculpatory is generally understood to refer to any kind of information that would cast doubt on the guilt of the defendant. In its simplest form, this would include any evidence pointing directly to the innocence of the

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1 In this United States, this overview is principally from interpretation of federal case law requirements. Additional guidance should be sought at the local level for understanding of any state law requirements.
Duty to Disclose Exculpatory Evidence

Material evidence is defined as information that, had it been disclosed to the defense, would have a “reasonable probability of providing a different result in the trial or sentencing” in the case. Exculpatory evidence is “material” if there is a reasonable probability that disclosing it will change the outcome of a criminal proceeding. Further, a “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the trial or sentencing of a criminal case. Exculpatory disclosure requirements relate not only to the finding of the case but to the sentencing phase as well.

II. PROCEDURES

A. Legal Duty of Law Enforcement

Legally, law enforcement agencies are required to inform the prosecution of any evidence known to them that could be exculpatory in nature. This places a heavy burden on employees and their agencies due to the risk that a criminal conviction will be dismissed or reversed if law enforcement is found in violation of disclosing all relevant evidence. There is also the risk of civil liability associated with a failure to disclose, as well as the difficulty in determining what must be disclosed.

Many jurisdictions have their own court decisions, statutes, and discovery rules governing disclosure that may impose burdens upon a local law enforcement agency in excess of the federal legal requirements. In places where there has been no such codification, and in those locations that have statutory requirements that require interpretation, preceding case law must be depended upon for guidance. Agencies should consult with their legal advisors to determine the applicable laws in their jurisdictions and how these relate to the agency’s duty to disclose.

B. Affirmative Duty to Report

Law enforcement has an affirmative duty to report information that may impact the determination of a court or jury as to a defendant’s guilt or sentencing. An agency should take positive steps or demonstrable measures to uncover and reveal potentially exculpatory material. Failure to take such steps or suppression of any evidence or information that is favorable to the accused is a violation of due process. The burden is not on the defense to request such material; it is the responsibility of involved law enforcement agencies to provide such material to the prosecutor as soon as reasonably possible so that they can determine whether it falls within exculpatory disclosure requirements. This requirement is in effect from the point of indictment through trial and sentencing.

C. Impeachment Evidence and Witness Credibility

Exculpatory disclosure requirements extend beyond matters that relate directly to the issue of guilt or innocence. The prosecution is required to disclose to the defense any information relevant to the credibility of the government’s witnesses. Additionally, any information that could serve to impeach the credibility of a prosecution witness,

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2 For the United States, see Brady v. Maryland, 373 U.S. 83.
3 See U.S. Const. amend. XIV.
5 For example, in the United States, California disclosure requirements have been organized by the state legislator. See, e.g., California Evidence Code §§1043–1047.
6 In the United States, as with any other federal constitutional issue, state constitutions, cases, statutes, and so on, may not diminish the federal constitutional requirements but may increase them.
including that of a law enforcement employee, must be disclosed. As a result, law enforcement must disclose to the prosecutor any information that may cast doubt on the credibility of employees participating in the case. Such information may be used by the defense to impeach the testimony of any employee whose participation in the case is relevant to the prosecution.

There are, however, even broader implications. Once information damaging to an employee’s credibility has been revealed, it is likely that it will be used by other defendants in other cases involving that same employee. In some jurisdictions, defense attorneys have established and continue to update formal and/or informal databases regarding law enforcement employee credibility. These databases can be accessed by other defense attorneys for use in impeaching those same employees in subsequent cases. The lack of standardization as well as the informality of these lists may lead to unfairness in the identification of employees who lack credibility.

These overall disclosure requirements give rise to three major questions:
• What information must be disclosed?
• How does the agency determine whether such information exists?
• Once possible impeachment information has been disclosed, to what extent will this adversely affect the subject employee’s ability to perform their duties in the future? Could it impede their usefulness to the agency?

D. What Information About an Employee Must Be Disclosed?

Because of the diversity of circumstances surrounding any given case, the determination of what affects an employee’s credibility in a specific case can be difficult to determine. The following are examples of information that is potential exculpatory material and should be disclosed:

Crimes committed. Not every crime affects credibility. However, crimes committed by an employee that are the subject of an internal investigation that involves disciplinary action up to and including termination of employment, or even prosecution, are generally included as material. Reference must be made to the most recent legal findings, with emphasis on the cases and evidentiary rules of the agency’s jurisdiction, to determine what is considered to affect credibility in that jurisdiction.

Incidents involving untruthfulness. There is a broad range of conduct that may be considered material. Lying under oath, whether subject to a perjury conviction or not, and filing a false report are examples of material conduct. Lying even about small matters raises questions about the employee’s credibility and may be used by the defense in certain circumstances. The issue of covering up or failing to report serious violations of others within the agency can also reflect on an employee’s integrity.

Incidents involving dishonesty. Acts not considered sufficiently significant to be treated as crimes but that bring an employee’s honesty and/or integrity into question may be within the disclosure rule. However, there is significant variety of acts, large and small, that may be regarded as dishonest. Further, the dividing line between “crimes,” “untruthfulness,” and “dishonesty” may be indistinct, creating a further problem for an agency trying to determine what does or does not fall within the disclosure requirement. Whatever an agency determines to be relevant may be less important than an employee’s understanding that truthfulness and honesty in all matters is essential if they are to avoid the potential career problems that can result from disclosures.

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8 For the United States, see Giglio v. United States, 405 U.S. 150 (1972) prosecution’s promise of leniency to witness was not disclosed to the defense.
9 Reference to the jurisdiction’s rules of evidence, though not determinative, may be instructive. For example, the common law, still in effect in many states in the United States, permits the impeachment of any witness in any case, civil or criminal, by a showing that the witness has committed a felony or a misdemeanor involving moral turpitude. The Federal Rules of Evidence, for example, Rules 608, 609, and 610, also give some indication of what is permissible for impeachment in a trial in federal court.
Use of excessive force and other employee misconduct. Instances of what is broadly termed “employee misconduct” not falling directly into one of the previous categories may require disclosure. For example, any history of use of excessive force by an employee may be disclosable.

Matters indicating bias. Matters revealing bias on the part of a witness are almost universally regarded as proper subjects for impeachment. Where the bias is related to some aspect of the current case, disclosure may be necessary, but bias reflected in past deeds can also have serious consequences.

Statements made by a defendant or defense witness that may affect employee credibility. Disclosable information includes statements or actions by the employee, but also statements made by a defendant or other person that, if true, could affect employee credibility. This may include statements made by a defendant or defense witness that (1) contradict statements made by a law enforcement officer or other material prosecution witness; (2) indicate that a material law enforcement employee or witness used excessive force; or (3) allege that a law enforcement employee made statements exhibiting racial, religious, or other bias.10 Such statements, although not made by an agency employee, nevertheless may be material to employee credibility and must be considered when the agency is determining what is to be disclosed.

Whether a matter is disclosable may also depend upon the degree to which the matter has been substantiated. Substantiated allegations falling into any of the aforementioned categories are almost certainly subject to disclosure. Allegations that cannot be substantiated, are not credible, or have resulted in an individual’s exoneration are generally not considered to be potential impeachment information. However, even these may be subject to the disclosure requirement under certain circumstances if they go to the truthfulness of the employee.

Totally unsubstantiated rumors about an employee and matters not involving law enforcement business might not fall under the disclosure requirement. However, it is often difficult to state with certainty that any particular matter is exempt from disclosure.

One of the most troubling questions about the disclosure rules is the issue of whether or not matters that are unrelated to the employee’s official duties are subject to disclosure. Incidents of untruthfulness related to law enforcement duties may be within disclosure requirements, but incidents of untruthfulness that arise solely in the context of an employee’s private life might not be subject to the same requirements. For example, if an employee is having an extramarital affair and lies about it, must this be disclosed?11

Additional examples of materials that are potentially exculpatory material and may require disclosing include but are not limited to the following:

- Information that would directly negate the defendant’s guilt concerning any count in an indictment.
- Information that would cast doubt on the admissibility of evidence that the government plans to offer that could be subject to a motion to suppress or exclude.
- Any criminal record or criminal case pending against any witness whom the prosecution anticipates calling.
- The failure of any proposed witness to make a positive identification of a defendant.
- Information that casts doubt on the credibility or accuracy of a witness or evidence.
- An inconsistent statement made orally or in writing by any proposed witness.
- Statements made orally or in writing by any person that are inconsistent with any statement of a proposed government witness regarding the alleged criminal conduct of the defendant.
- Information regarding any mental or physical impairment of any governmental witness that would cast doubt on their ability to testify accurately and truthfully at trial.

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10 Los Angeles County District Attorney’s Office, Special Directive 02–07, Possible Brady Material in the Possession of Law Enforcement.
11 Perjury committed in a civil trial, for example, a divorce action, would presumably need to be disclosed; lesser instances of untruthfulness fall into a grayer area.
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- Information that tends to diminish the degree of the defendant’s culpability or the defendant’s offense level under state or federal sentencing guidelines.
- An official finding of misconduct that reflects on the witness’s truthfulness, bias, or moral turpitude.
- Evidence that a proposed witness has a personal bias against a protected class.

E. Disclosure Requirements

Failure to disclose all the required information can lead to serious adverse consequences for the agency. These include but are not limited to dismissal or reversal of a criminal case, civil liability, and even deterioration in the relationship between the agency and local prosecutors.

However, disclosure of material that is not required can be damaging to a case or to an employee’s future. Some agencies and prosecutors’ offices have adopted an “open file” policy under which everything in agency records is made available to the defense to address the complexity of the disclosure requirements and the risks associated with not fully disclosing all necessary information. In this case, agencies should provide complete files of the investigation and all related documentation and should receive a written acknowledgement of the receipt of these items. However, agencies should instead develop policies that satisfy disclosure requirements but do not involve revelations that would unnecessarily harm the criminal prosecution, the agency, or individual employee. Assistance of local legal counsel is essential if a proper balance is to be achieved.

Since the prosecution and the law enforcement agency have an affirmative duty to discover disclosable matters, agencies must determine whether such information exists. Particularly in a large agency, it may be difficult for managers to be aware of the array of actions and information that fall, or may fall, within the disclosure requirements.

Agencies should establish a policy that assigns responsibility for the internal reporting of conduct that may eventually need to be disclosed. The details of how such responsibility is assigned and fulfilled will vary from agency to agency.

One approach requires that any agency employee who is aware of any potential exculpatory material must report it to their supervisor or other appropriate person or unit within the agency. The policy may then impose upon supervisors the responsibility for forwarding any such information received from employees to the appropriate office or executive. A unit within the agency may be established or, if one is already in existence, may be charged with the duty of maintaining records of matters that have the potential of falling within the disclosure rules in an easily retrievable format.

Agency executives should consult with their legal counsel regarding any requirements for retention of any records related to potential exculpatory evidence. When determining records retention policies, agencies should consider confidentiality requirements and open records law implications.

To implement the disclosure policy, agencies must take steps to determine where relevant information may be located in the agency’s records. Agencies should begin by conducting an audit of the various potential repositories of such information within the agency. In an increasingly technological age, disclosable information may find its way into many places other than traditional police reports, investigators’ notes, and personnel files. For example, computer records; communications center recordings; mobile data terminals and transmissions; and recordings by body-worn or in-car cameras, may all be sources where potential exculpatory evidence may be found. Agencies should be aware that

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12 In the United States, see Fed. R. Crim. P. 16 and 17 for extensive coverage of the disclosure requirements applicable to the prosecution in a criminal trial in federal court.
13 The file may include the defendant’s statements, witness’s statements, investigating officer’s notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind may be made available to the defendant including but not limited to preliminary test or screening results and bench notes.
14 It should be noted that material contained in such records may be accessible to defense lawyers even if not disclosed by the department.
the existence of records such as social media posts that contain potential exculpatory evidence may be discoverable to
the public.

F. Employee Credibility and Agency Response

If potential impeachment information has been disclosed, agencies should have procedures in place to inform the
employee who is the subject of the disclosure. This employee should be aware of what information was disclosed as
well as any judicial rulings and related pleadings. Moreover, if a matter affecting an employee’s credibility has been
identified, the question often becomes to what extent will this adversely affect that employee’s ability to perform their
duties in the future and, in turn, the employee’s usefulness to the agency?

In the context of the present investigation, the employee (a) is unlikely to be called by the prosecution as a witness
in the case or (b) if called, may be subjected to impeachment by the defense.15

Of ongoing significance to both the employee and the agency is the question of whether, after exculpatory
evidence disclosure, the employee can ever be an effective witness in any case. As noted earlier, the establishment of
computer databases, lists, or other repositories of information by defense attorneys will likely make the same
information available to defense attorneys in all subsequent trials, regardless of whether this information was obtained
informally or in an unstandardized way. Agencies may wish to consult with their prosecutor or other legal advisor to
determine if such lists exist in their jurisdiction and if they can access them. Even if the employee’s untruthfulness,
dishonesty, or integrity has not been subject to disclosure in a criminal case, the existence of defense databases makes
it possible that these matters will be raised in some later case.

An agency must also determine if it wishes to retain an employee who has been shown to be untruthful, dishonest,
or otherwise subject to doubts about their integrity since such behavior is generally considered unacceptable,
regardless of whether this has been the subject of an exculpatory evidence inquiry. Moreover, some jurisdictions do
not include untruthfulness as a certification standard. Individuals whose employment is terminated for untruthfulness
might not lose their law enforcement certification and may be hired by other agencies who are unaware of the grounds
for their termination. Prior to hiring an officer, agencies should conduct an in-depth investigation to ensure that the
officer does not have any previous employment violations that would prevent them from testifying in court. Agencies
may elect to take no action in these circumstances. Agencies may also consider continuing to employ these employees
in an enforcement capacity but ensuring that they do not take enforcement actions without another employee witness,
an electronic record, or other verification of the actions taken. For example, employees may be prohibited from taking
enforcement action without the presence of a partner, or without having a functioning body-worn camera. However,
agencies considering this approach should recognize that it does not entirely resolve agency liability and should seek
legal advice before implementing this response.

Another response is the permanent transfer of the employee to solely administrative duties. However, there are
only a certain number of administrative positions available in any agency and budget considerations may make it
impossible to expand the availability of such positions beyond a certain point. If an employee maintains their pay
grade in such a transfer, the matter of pay equity between sworn and non-sworn personnel who are subject to
distinctly different work demands and risks can be an issue. Agencies that select this approach may choose to freeze
the affected individual’s pay and chances for promotion.

Termination is an option in cases where the disclosure rule has been invoked as well as situations where, even in
the absence of a disclosure issue, incidents of dishonesty or untruthfulness by an employee have come to the attention
of the agency. However, in general, termination due to untruthfulness not related to official duties may be considered
inadequate to justify termination by the courts.16 Where the untruthful statement or other misconduct relates directly to

15 Even if not called as a prosecution witness, any officer affiliated with the case may find that they will be subject at the trial to a public attack by the defense on the
grounds that the officer’s actions in the case were tainted by dishonesty, bias, and so on, thus, strengthening the defense’s case for acquittal.
16 In the United States, for example, see Harder v. Village of Forest Park, 05-C-5800, Lexis 36892 (N.D. Ill. 2008) key factor is the subject matter of the falsehood and
how it relates to an officer’s duties to the public.
law enforcement duties, the act of termination generally garners greater support from the courts. This is especially true where the untruthfulness has occurred under oath or in connection with an official investigation. If an agency has a policy of termination for violations that may be subject to disclosure requirements, this policy should be clearly communicated and explained to employees. Agencies may elect to terminate for such violations because they render the employee unable to perform required job functions, such as testifying in court, as a result of the exculpatory material. However, agencies should be aware of any union requirements or bargaining agreements in their jurisdiction before terminating an employee for potential loss of credibility in court.

As with any type of employee misconduct, other forms of discipline may be invoked, such as suspension and/or demotion. However, these measures do not resolve the basic problem posed by exculpatory disclosures—that the employee’s value to the agency and to the public as a law enforcement employee may be permanently damaged once the employee’s conduct becomes known to defense attorneys.

**G. Training**

Agencies should develop initial and ongoing training to all employees regarding exculpatory material disclosure requirements and their potential impact on employment. Employees should receive clear guidance regarding the impact that violations of policy involving integrity, honesty, credibility, veracity, and related matters. They should be familiar with which items are subject to disclosure requirements and the requirements regarding notification by individual employees. These requirements may include notifying a supervisor or other designated personnel of any elements of their employment as a law enforcement employee, information contained in investigative reports, or evidence connected with a criminal indictment or trial that they reasonably believe may be subject to disclosure.

Supervisory employees should have a clear understanding of their role in identifying potential exculpatory material connected with any criminal proceeding for which they have oversight. The agency policy on disciplinary action up to and including termination for violations that may be subject to disclosure requirements should be clearly communicated to employees.

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APPENDIX A: SUPREME COURT CASES

A. Supreme Court of Canada

R. v. Stinchcombe ([1991] 3 S.C.R. 326). The Supreme Court of Canada ruled that “the Crown has a legal duty to disclose all relevant information to the defence… Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory.” In other words, any information which is not clearly irrelevant must be disclosed, a responsibility that is held both by the crown and law enforcement.

B. Supreme Court of the United States

Napue v. Illinois, 360 U.S. 264 (1959). The Court determined that a prosecution witness had testified falsely regarding his receipt of consideration in exchange for his testimony. The Court held that the government’s use of the false testimony violated the defendant’s right of due process.

Brady v. Maryland, 373 U.S. 83, 87 (1963). The Court held that the prosecution in a criminal trial has a duty to disclose to the defense, upon request, material information that is exculpatory of the defendant. The Court declared in Brady that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment “irrespective of the good faith or bad faith of the prosecution.”

Giglio v. United States, 405 U.S. 150 (1972). The Court determined that a prosecution’s failure to fulfill their duty to present all material evidence to a jury constitutes a violation of due process and requires a new trial.

United States v. Agurs, 427 U.S. 97 (1976). The Court held that the Brady disclosure is required even if the defense has not specifically requested it.18

Kyles v. Whitley, 514 U.S. 419, 437 (1995). The Court further held that the prosecution has an affirmative duty to learn of, and disclose, any favorable evidence known to “others acting on the government’s behalf in the case, including the police.” Further, the disclosure rule includes not only evidence directly related to the crime involved, but also to information that would affect the credibility of a prosecution witness in the case.19 Thus, the prosecution is required not only to disclose what is already known to prosecutors, but also to learn of any such information that is known to law enforcement, including matters related to witness credibility—even that of police officers—and make that information available to the defense. Under Brady, there is no distinction between evidence that could serve to impeach a government witness and evidence that could be material to the guilt or punishment of a defendant.

Brogan v. United States, 118 S. Ct. 805 (1998). The Court ruled that the Fifth Amendment allows a person being questioned by law enforcement officials to remain silent but does not grant the right to explicitly lie or falsely deny wrongdoing. In other words, a false statement that denies wrongdoing—sometimes referred to as an “exculpatory no”—is not an exception to criminal liability; to use the word “no” to falsely deny wrong-doing is to “knowingly and willfully” make a “false, fictitious, or fraudulent” statement or representation (18 U.S. C. § 1001 (1988 ed.).

LaChance v. Erickson, 522 U.S. 262 (1998). The Court determined that federal agencies can sanction an employee for making false statements regarding alleged employment-related misconduct. Employees have the right to remain silent when questioned about alleged conduct, but they do not have the right to make false statements/willfully lie about charged conduct, and employee lies can be considered in this instance when imposing penalties.

18 Notwithstanding the affirmative duty of the prosecution to disclose material and exculpatory matters to the defense, in many instances the disclosure process will be initiated by the defense through a specific request to the prosecutor’s office for disclosure.

APPENDIX B: UNITED STATES DISCLOSURE REQUIREMENTS

The Federal Rules of Criminal Procedure, Rules 16 and 17, contain extensive coverage of the disclosure requirements applicable to the prosecution in a criminal trial in federal court. The disclosure issue normally arises for local prosecutors and law enforcement in state criminal trials not subject to the federal rules. However, agencies should note the requirements of these federal rules since they give some indication of what the federal courts, and, by extension, perhaps a state court, may consider subject to disclosure.
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