

Disclosing Potential Brady Information to the Prosecution

613.1 PURPOSE AND SCOPE

This policy establishes guidelines for identifying and releasing potentially exculpatory, favorable or impeachment information to a prosecuting attorney.

613.1.1 DEFINITIONS

Definitions related to this policy:

Brady information: Information known or possessed by the Orange County Sheriff-Coroner Department that is both favorable and material to the current prosecution or defense of a criminal defendant. In a landmark decision, *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court held that the prosecution has an affirmative duty to disclose to the defendant evidence which is both favorable and material to the guilt and/or punishment of the defendant. Such evidence may either directly impact the issue of guilt or innocence or impeach, i.e., undermine the credibility of a prosecution witness.

Moral turpitude: Acts of dishonesty and untrustworthiness.

Material: Evidence is "material" if there is a reasonable probability that the result of the trial would have been different had the evidence be disclosed.

Sustained Finding: A final determination "by an investigating agency, commission, board, hearing officer or arbitrator, as applicable, following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code, that the actions of the peace officer were found to violate law or department policy." Penal Code § 832.8(b).

613.2 POLICY

The Orange County Sheriff-Coroner Department will conduct fair and impartial criminal investigations and will provide the prosecution with both incriminating and exculpatory evidence, as well as information that may adversely affect the credibility of a witness. In addition to reporting all evidence of guilt, the Orange County Sheriff-Coroner Department will assist the prosecution by complying with its obligation to disclose information that is both favorable and material to the defense. The Department will identify and disclose to the prosecution potentially exculpatory, or impeachment information, as provided in this policy. The determination of what constitutes *Brady* material that must be disclosed to the defendant is a legal determination that must ultimately be made by the prosecutor or the court handling the case.

613.3 DISCLOSURE OF INVESTIGATIVE INFORMATION

Personnel must include in their reports adequate investigative information and reference to all material evidence and facts that are reasonably believed to be either incriminating or exculpatory to any individual in the case. If a member of this Department learns of potentially incriminating or exculpatory information any time after submission of a case, the member must prepare and

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submit a supplemental report documenting such information as soon as practicable. Supplemental reports shall be promptly processed and transmitted to the prosecutor's office.

If information is believed to be protected personnel information, the member shall discuss the matter with a supervisor to determine the appropriate manner in which to proceed.

If a member is unsure whether evidence or facts are material, the member shall address the issue with a supervisor without undue delay. Determining whether evidence or facts are material often requires legal or even judicial review.

Supervisors who are uncertain about whether evidence or facts may be material should address the issue in a written memo to an appropriate prosecutor. Employee personnel information shall not be included in the memo. A copy of the memo should be retained in the Department case file.

613.4 REVIEWING POTENTIAL BRADY ISSUES

(a) Sustained Finding: If, following a personnel investigation, an employee has a sustained finding of untruthfulness, bias, excessive force, or it has been determined the employee engaged in an act of moral turpitude, the Internal Affairs Lieutenant will send the information in a written memorandum to the Constitutional Policing Advisor. The Constitutional Policing Advisor will then convene the three member review panel, which will consist of a representative from Executive Command, the Constitutional Policing Advisor, and a representative from County Counsel.

The written memorandum shall include the name of the employee, the date the information was received, and the nature of the information. The memorandum shall include any relevant source documents that are available that bear on the decision.

(b) Not-Sustained Finding: If, following a personnel investigation, a charge of untruthfulness, bias, excessive force or an act of moral turpitude against the employee was "not sustained", meaning the investigation failed to discover sufficient evidence to clearly prove or disprove misconduct on the part of the employee, the Internal Affairs Captain will send the information in a written memorandum described in subsection (a) to the Constitutional Policing Advisor.

(c) The Internal Affairs Captain will notify the employee at the conclusion of a personnel investigation if there will be notification to the Constitutional Policing Advisor. The employee may elect to have their representative provide relevant case law or legal analysis to the Constitutional Policing Advisor within 20 calendar days.

(d) If a charge of untruthfulness, bias, excessive force, or an act of moral turpitude is pending against the employee and the employee resigns or retires before the personnel investigation is completed or the employee is still active and likely will be called as a witness in a criminal case before the personnel investigation can be completed, the Internal Affairs Captain will send the information in a written memorandum described in subsection (a) to the Constitutional Policing Advisor. If a charge of untruthfulness, bias, excessive force, or an act of moral turpitude pertains to an employee's involvement in a pending criminal case, the Internal Affairs Captain will instead send the information, as soon as the Captain becomes aware of the charge, to

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the Commander of the SAFE Division. The Commander of the SAFE Division shall notify the employee and the Assistant District Attorney in charge of Special Prosecutions at the Orange County District Attorney's Office (hereinafter "Assistant District Attorney") or prosecuting attorney from an agency other than the Orange County District Attorney's Office as provided in section 613.5, subdivision (b).

(e) The three member review panel, defined in 613.4(a), will examine and discuss the information provided by the Internal Affairs Captain. The Constitutional Policing Advisor will provide the panel with case law or legal analysis timely provided by the employee's representative. The panel will determine if there is potential *Brady* information by evaluating facts that objective data supports, and will not consider rumor, speculation, or opinion. If the panel determines there is potential *Brady* information, the Commander of the SAFE Division will notify the employee and the Assistant District Attorney in a confidential letter, that there is potential *Brady* information in the employee's personnel records (personnel records are defined in Cal. Penal Code § 832.8). If the panel determines there is no potential *Brady* information, no further action will be taken.

613.5 NOTIFICATION OF POTENTIAL BRADY INFORMATION

(a) If the three member review panel determines there is potential Brady information relating to an employee of the Orange County Sheriff's-Coroner Department, the Commander of the SAFE Division will simultaneously send a written letter to the employee and a confidential letter to the Assistant District Attorney by certified mail. The letter to the Assistant District Attorney will identify the name of the employee, job position/title, and the date of the earliest such conduct that is potential Brady information. The conduct itself is not to be described in the letter.

(b) If a charge of untruthfulness, bias, excessive force, or act of moral turpitude pertains to an employee's involvement in a pending criminal case, the Commander of the SAFE Division shall simultaneously notify the employee, and the Assistant District Attorney or prosecuting attorney from an agency other than the Orange County District Attorney's Office, by certified mail. The letter will identify the name of the employee, job position/title, and the date of the earliest such conduct that is potential Brady information. The conduct itself is not to be described in the letter.

(c) Subpoenas received from prosecuting agencies other than the Orange County District Attorney's Office will be individually evaluated by the Internal Affairs Captain, or designee. If potential Brady information exists, the Commander of the SAFE Division will send a confidential letter by certified mail to the prosecuting attorney who initiated the subpoena. The letter to the prosecuting attorney will identify the name of the employee, job position/title, and the date of the earliest such conduct that is potential Brady information. The conduct itself is not to be described in the letter.

(d) Copies of the letters to the employee, the Assistant District Attorney, and the prosecuting attorney from an agency other than the Orange County District Attorney's Office (if any), will be

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placed in the personnel investigation file. The employee may choose to add information or any objections to their personnel investigation file after receiving notification from the Department.

(e) If the employee later successfully challenges any departmental decision regarding the misconduct, the Department shall notify the Assistant District Attorney, and the prosecuting attorney from an agency other than the Orange County District Attorney's Office (if any).

613.6 DISCLOSURE OF PERSONNEL INFORMATION

Whenever it is determined that potential *Brady* information is located in the personnel records of a department member who is a material witness in a criminal case, the Assistant District Attorney and the prosecuting attorney from an agency other than the Orange County District Attorney's Office (if any) are to be notified as indicated above. Subsequently, the following procedure shall apply:

Potential *Brady* Information in Sworn members' Personnel Records:

- (a) A *Pitchess* motion is required in order to initiate an in camera review by the court.
- (b) Any member who is the subject of such a motion shall be notified in writing that a motion has been filed.
- (c) The Custodian of Records shall review the motion and determine which portions of the department member's personnel records are relevant to the motion before the Court, and may consult with County Counsel as needed.
- (d) The Custodian of Records shall accompany all relevant records during any in camera inspection and address any issues or questions raised by the court in determining whether any information contained in the records is both material and favorable to the criminal defendant.
- (e) If the court determines that there is relevant *Brady* information contained in the records, only that information ordered released will be copied and released to the party(s) that filed the motion.
 - 1. Prior to the release of any information pursuant to this process, the Custodian of Records shall request a protective order from the court limiting the use of such information to the involved case.

Potential *Brady* information in Professional Staff members' Personnel Records (*Pitchess* Motion Inapplicable):

- (a) A subpoena is required for the personnel information.
- (b) Once the subpoena is received from the prosecutor, County Counsel should be consulted to request that the court conduct an in camera review of the records to determine whether *Brady* material exists and, if so, to request that the court issue a protective order limiting the use of such information to the involved case.

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613.7 CONFIDENTIALITY AND MAINTENANCE OF FILES

All department documents relating to an employee's potential *Brady* information shall be treated as confidential and protected as a confidential personnel record. The potential *Brady* information is to be maintained until the employee has separated from employment and there is no longer a reasonable probability that the employee will be called as a witness in a criminal case.

613.8 DISTRICT ATTORNEY'S AUTHORITY UNDER PENAL CODE SECTION 832.7(A)

Nothing in this policy 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). The District Attorney has a right to review peace officer personnel records when the District Attorney is investigating the peace officer for criminal conduct.

613.9 NO PUNITIVE ACTION

No punitive action, or denial of promotion on grounds other than merit, shall not be undertaken by any public agency against any public safety officer solely because that officer's name has been placed on a *Brady* list, or that the officer's name may otherwise be subject to disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). See Cal. Government Code § 3305.5.

613.10 DISCLOSURE OF RECORDS PURSUANT TO PENAL CODE SECTION 832.7(B)(SB 1421)

Notwithstanding any other section of Policy 613, records subject to disclosure under Penal Code section 832.7(b) will be released, upon request, in accord with Policy 805.