

SOUTH PORTLAND POLICE DEPARTMENT

STANDARD OPERATING PROCEDURES

Subject:	Brady / Giglio Duty to Disclose	Policy #	1-5-A
Effective Date:	March 14, 2018	Review:	Annually
Distribution:	All Personnel	# of pages:	3

I. PURPOSE:

To establish procedures to ensure that the South Portland Police Department to fulfill the government's constitutional duty to affirmatively disclose specific information that may be viewed as adverse to the credibility of its officers or employees who may be recurring material witnesses in prosecutions.

II. POLICY:

It is the policy of the South Portland Police Department to identify and provide to prosecutors any exculpatory evidence or information, including information relevant to the credibility of recurring witnesses, including police officers and other employees, as required by *Brady v. Maryland* (1963), *Giglio v. United States* (1972), and their progeny.

III. BACKGROUND:

The *Brady* Rule (*Brady v. Maryland*) requires prosecutors to disclose to the defense any materially exculpatory evidence in the government's possession. This duty to disclose is applicable even if there has been no request by the accused, and encompasses material exculpatory evidence, including impeachment evidence. Evidence is considered material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." Prosecutors are required to err on the side of disclosure in order to ensure compliance with these rules, as violations can occur whether the State willfully or inadvertently suppressed the evidence. Suppression of material exculpatory evidence 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.

IV. DEFINITIONS:

- A. **Brady material:** exculpatory or impeachment information that is material to the guilt or innocence or punishment of a defendant. This includes any finding of misconduct that reflects on an officer-witness's truthfulness; any finding of misconduct that indicates that the officer-witness may be biased; or previous conduct or action in which the officer witness's honesty or integrity was compromised; any credible allegation of misconduct, subject of a pending investigation, that reflects on the truthfulness or possible bias of the officer-witness; and any past criminal charge or pending criminal charge brought against the officer-witness who will testify in a case before the court or who was involved in the investigation of the case.
- B. **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. Exculpatory evidence must be disclosed even if there has been no request made by the accused.
- C. **Giglio Information:** refers to evidence that, if true, would tend to adversely affect the credibility of a law enforcement officer. This specifically includes any sustained finding that establishes a record of untruthfulness, bias, and / or commission of crimes, as well as information that reflects an impaired ability of an officer to perceive or recall the truth of a matter. It does not include allegations, rumors, or other inconclusive information.
- D. **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 truthfulness or

untruthfulness. Evidence that might be used to impeach a witness is exculpatory evidence and must be disclosed to the defense by the prosecutor. Admissibility of impeachment evidence is determined on a case by case basis by the courts. Therefore, even evidence that is likely to be inadmissible can still be considered *Brady* information and thus must be submitted to the prosecutor.

- E. **Impeachment Material:** for purposes of this policy, impeachment material involving an employee is a sustained complaint regarding an employee's excessive use of force, untruthfulness, dishonesty, or trustworthiness; or a credible allegation of excessive use of force, untruthfulness, dishonesty, or untrustworthiness until the allegation is disproved or not sustained.
- F. **Lie:** untruthfulness; any intentionally deceptive message communicated verbally or in writing, or intentionally withholding facts (lying by omission).
- G. **Untruthfulness:** deception, false reports, fabrications, intentional inaccuracies, or lying.

V. PROCEDURES:

A. Employee's Duty to Disclose:

1. Each employee who may be expected to act as a witness in Court shall complete a "*Giglio* Declaration Form" and submit the form to the Office of Professional Standards. Failure to do so will result in disciplinary action, up to and including termination.
 - a. Individual officers have a continuing obligation to report to the Chief of Police any relevant circumstances, including any impeachment evidence or material that would change the status of the *Giglio* Declaration. Each employee shall immediately notify the Chief of Police of any change in the status of the responses on file and submit an updated form.
 - b. If an employee is unsure if something in his or her personal life could be used for impeachment purposes, the employee should consult the prosecutor prior to trial to determine if the information needs to be disclosed to the court. The employee is required to promptly disclose the information to the Chief of Police if the prosecutor or the court decides that it qualifies as *Brady* material.
2. In the performance of their duties, police officers may engage in deceptive conduct that is essential to public safety; examples include lying to a suspect or conducting undercover operations. These are deceptive investigatory practices that are acceptable and may be used when they are lawful and intended to elicit evidence. Their use shall be disclosed in the officer's report.
3. In order to meet the prosecution's affirmative obligation to disclose exculpatory or impeachment evidence, all personnel are required to include in their reports their knowledge of any exculpatory evidence. This includes, but is not limited to, inconsistent or contradictory statements or accounts of the same incident, substantiated alibi information, or misidentification of a suspect.
 - a. If an employee learns of potentially exculpatory evidence after the case has been submitted, the employee shall complete a supplemental report and forward it to the Court Officer (or the assigned detective), who will forward it to the appropriate prosecutor, as soon as possible. This responsibility extends from arraignment and through the trial and sentencing process.
 - b. Supervisors are responsible for providing due diligence in identifying potential *Brady* material connected with any criminal proceeding of which they are aware and for ensuring that the material is brought to the attention of the Court Officer, assigned officer, detective, or prosecutor in a timely manner. This responsibility extends from arraignment through the trial and sentencing process.

B. Department's Duty to Report:

1. The Office of Professional Standards shall maintain a confidential file containing the completed *Giglio* Declaration Forms of all personnel.

2. The Office of Professional Standards will also identify the applicable internal investigations that meet the definition of *Brady* material and / or *Giglio* information, specifically including any impeachment evidence or material. Credible allegations of such conduct, *until disproved or not sustained*, must also be disclosed to the prosecutor's office. Allegations that cannot be substantiated, are not credible, or have resulted in an individual's exoneration are not considered *Brady* material or *Giglio* Information.
3. The department shall exercise due diligence to meet the ongoing obligation to provide the prosecution with material of possible *Brady* or *Giglio* relevance.
 - a. The Chief of Police will complete and forward a "Law Enforcement Agency *Giglio* Inquiry" form to the Cumberland County District Attorney's Office, providing a consolidated overview of the officer responses and relevant department information.
 - b. The Chief of Police or designee will release *Brady* or *Giglio* material regarding a recurrent government witness employee in response to a specific inquiry from a prosecutor.
 - c. If the department is aware of information relevant to a particular case, the department will proactively disclose that information to the prosecutor's office.
 - d. The final written disciplinary decisions regarding a sustained complaint for excessive use of force, untruthfulness, dishonesty, or trustworthiness will be released to the prosecutor's office as soon as it becomes a public record. In-lieu-of actions or agreements, such as resignation, demotion, retirement, or separation from service of a recurring government witness employee in lieu of other disciplinary action, may be *Brady* information if it is relevant to the case at hand.
4. Prior to reporting any potential *Giglio* information to a prosecutor, the Chief of Police shall notify the respective employee and provide that employee with an opportunity to further address the information. If the potential *Giglio* information identifies another person who may have privacy rights to the information, the Chief of Police will also notify that person.
5. If an employee's information is released to the prosecutor, the Chief of Police will ask the prosecutor to request a protective order from the court limiting the use of the information, by the prosecution or the defense, to the specific case for which the information was requested. Once the Chief of Police has presented the prosecutor's office with potential *Giglio* information, it becomes the duty of the prosecutor to determine whether the information is subject to further disclosure.
6. Any prosecutorial or judicial decisions regarding whether or not certain material or information provided as potential *Brady* material or *Giglio* information is, in fact, so or not, will be noted in the file containing the employee's *Giglio* Declaration form. Such rulings may come during prosecutorial review or in camera inspection seeking a ruling of admissibility.
7. The Chief of Police may confer with the appropriate prosecutor and other legal counsel to determine if an employee's potential *Giglio* information is so serious that it renders that employee unable to offer effective or credible testimony in a court of law or other venue. It is recognized that there is a gradient of severity of potential *Giglio* issues, ranging from a minor misstatement of fact, to a lie, untruthfulness, intentional misrepresentation of fact, and / or knowingly providing false testimony while under investigation or oath. Given that this is an essential job function, employees whose testimony can be impeached in this manner are subject to disciplinary action, up to and including termination.

By Order Of:

Timothy B. Sheehan
Chief of Police