

# Potential Impeachment Information

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## **Policy Statement**

The Whatcom Prosecuting Attorney's Office and other prosecutorial authorities are obligated by case law, court rules and rules of professional responsibilities for public prosecutors to disclose potentially exculpatory information to a charged defendant. This includes information relating to [potential impeachment information](#) regarding recurring witnesses such as law enforcement employees whose regular duties include testifying in criminal cases. The disclosure obligation exists irrespective as to whether this information is requested by the defense.

A prosecutor's obligation includes "a duty to learn of any exculpatory information"<sup>1</sup> including potential impeachment information known to law enforcement. The Whatcom County Prosecuting Attorney's Office has adopted revised standards for disclosure developed by the Washington Association of Prosecuting Attorneys that reflect evolving case law and standards for disclosure. The Sheriff's Office has an affirmative obligation to report to the Prosecuting Attorney's Office any information in its possession that relates to a prosecutor's obligation to disclose potential impeachment information.

The purpose of this policy is to clarify Sheriff's Office responsibilities for disclosure of potentially exculpatory impeachment information to the Prosecuting Attorney's Office. This policy is based on advice received from the Whatcom County Prosecuting Attorney's Office, the Washington Association of Sheriffs and Police Chief's model policy regarding "Potential Impeachment Disclosure" (November 2013), and the Washington Association of Prosecuting Attorney's model policy for "Disclosure of Potential Impeachment Evidence for Recurring Investigative or Professional Witnesses" (June 2013).

## **Persons Affected**

All Sheriff's Office employees and volunteers.

## **Definitions**

**Employee Witness** – For purposes of this policy, this means an employee for whom it is reasonable to believe will or may be called to testify. This includes volunteers serving with the Sheriff's Office.

**Potential impeachment information** – Encompasses information that a prosecutor is required to disclose by the Rule of Criminal Procedure, Rules of Professional Conduct and the Constitution, and includes any information that tends to negate the defendant's guilt. This information extends to any prior convictions as well as any information that a reasonable person, knowing all relevant circumstances, could view as impairing the credibility of a law enforcement [employee witness](#) that will or could be called to testify in a particular matter. Potential impeachment information also includes any confirmed performance errors committed by employee witnesses called to testify as experts where such errors could compromise the expert witness' opinions.

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<sup>1</sup> Kyles v. Whitely, 514 U.S. 419 (1995)

## **Disclosure**

### **Responsibility**

It is the responsibility of the Prosecuting Attorney's Office to determine if evidence is material and whether it must be disclosed to the court and/or defense. Such evidence must have a specific and plausible connection to the case and demonstrate more than minor inaccuracies. If the Prosecuting Attorney's Office is unsure whether or not information meets disclosure requirements, it may submit the information to the court for an in-camera inspection.

It is the responsibility of the Sheriff to ensure that information in the possession of the Office that could reasonably be subject to disclosure requirements is reported in a timely manner to the Prosecuting Attorney.

### **Standard**

The potential impeachment disclosure standard depends on what a reasonable person could believe. It does not necessarily reflect the belief of the Prosecuting Attorney or the Sheriff. Consequently, disclosure may be required in cases where the Prosecuting Attorney's Office and/or the Sheriff's Office findings indicate that no misconduct occurred.

The Sheriff's Office will not take adverse administrative action solely on the basis of the Prosecuting Attorney's determination that information must be disclosed. Adverse administrative action against an employee shall require adherence to existing standards for sustaining misconduct and administering discipline.

With regard to allegations disclosed to the Prosecuting Attorney under this section, the Sheriff shall lawfully seek to protect the confidentiality of such information and the privacy interests and reputations of employee-witnesses. Further, because of the nature of said information (i.e., no sustained findings of misconduct), the privacy interest of the employee would outweigh any legitimate public interest and as such, would not be subject to disclosure through a public disclosure request without redaction of any personally identifiable information.

### **Admissibility**

Admissibility of impeachment evidence is determined by the courts on a case by case basis. Therefore, evidence that is likely to be inadmissible may still need to be disclosed by the Prosecuting Attorney's Office as potential impeachment information.

## **Notification**

### **Prosecuting Attorney's Office**

The Sheriff or his or her designee shall make notification in writing to the Prosecuting Attorney or his or her designee within 10 days of discovery of any **potential impeachment information** in his or her possession and/or allegations he or she receives relating to truthfulness, bias or other behavior that may be exculpatory to criminal defendants including confirmed competency issues relating to employees who may be called to testify as expert witnesses where such errors could compromise the expert witness' opinions.

- The Sheriff or his or her designee shall notify the Prosecuting Attorney of the existence of any pending criminal or administrative investigation relating to truthfulness, bias or other behavior that may be exculpatory to criminal defendants including competency issues relating to **employee witnesses** who may be called to testify as expert witnesses where such errors could compromise the expert witness' opinions.
- The Sheriff or his or her designee shall notify the Prosecuting Attorney as soon as practical if at any point in an investigation, an allegation of misconduct relating to dishonesty or falsehood is confirmed or acknowledged.
- The Sheriff or his or her designee shall notify the Prosecuting Attorney of sustained findings relating to an employee's dishonesty or untruthfulness.

### **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration**

Generally, the Prosecuting Attorney's Office is not required to disclose completed investigations into allegations with findings of *exonerated* or which are so lacking in credibility that a full investigation is not authorized or initiated. As such, this information will not normally be released to the Prosecuting Attorney's Office.

In cases where evidentiary standards under Civil Service Rules and collective bargaining agreements for sustaining investigations of misconduct differ from the quantum of evidence triggering the Prosecuting Attorney's Office obligation to disclose potential impeachment information, the Sheriff or his or her designee will confer with the Prosecuting Attorney's Office.

### **Subject Employees**

If the Sheriff determines he or she has an obligation to report potential impeachment disclosure information to the Prosecuting Attorney or other prosecutorial agency, he or she shall make all reasonable efforts to notify the affected employee witness who is the subject of the potential impeachment disclosure information at least 72 hours (three business days) prior to the actual release. Such notice shall not be required if it has the potential to jeopardize a criminal investigation.

## **Requests from External Prosecutor's Offices**

At times the Sheriff's Office receives requests from prosecutors other than the Whatcom County Prosecuting Attorney's Office for potential impeachment information. Requests of this nature shall be referred to the Whatcom County Prosecuting Attorney.

## **Record Keeping**

The Sheriff's Office's Office of Professional Standards will track and maintain a record of all potential impeachment information provided to the Prosecuting Attorney or other prosecutorial agencies. Such record shall not be an actual copy of the provided information, but rather a log or spreadsheet that tracks information such as dates, document numbers, and names of subject employees; a brief description of the information provided; and the results of any related decisions or proceedings, if known (as indicated in (a) – (c) below).

The Sheriff's Office will request that the Prosecuting Attorney provide the following, which will be included with the original source of information (e.g., personnel and/or Admin Inquiry file):

- (a) Whether the employee provided an affidavit or testimony in a criminal proceeding, or whether a decision was made not to use the employee as a witness or affiant because of potential impeachment issues;
- (b) Whether the information was disclosed to a court or to the defense and, if so, whether the court ruled that the information was admissible for use as impeachment information; and,
- (c) A copy of any related pleadings, and any judicial rulings, findings or comments relating to the use of the potential impeachment information.