

**Comments from the Maryland Office of the Public Defender for Baltimore City
Exculpatory Evidence Disclosure Requirements Draft Policy 1809
August 2019**

The revised draft of proposed Policy 1809 includes several changes from the original draft, many that strengthen its principles and reinforce the importance of complying with disclosure requirements to meet constitutional standards. The comments below are directed toward the revisions that we believe require further clarification or revision.

Recommendation 1: Require exculpatory evidence to be memorialized in a police report.

Revisions to the policy clarify that members are not required to affirmatively investigate for exculpatory and impeachment evidence. While implicitly recognizing that potential exculpatory evidence often arises unexpectedly during the course of an investigation, it provides no guidance on how to make sure that what is uncovered is sufficiently memorialized. Without any required documentation, exculpatory evidence is not always communicated to the prosecutor. For one, a member may wrongfully interpret such evidence as irrelevant, since it does not support their theory. Moreover, information learned, but not documented, by members who may not be called as witnesses at trial, who leave the Department, or who are otherwise unavailable during the prosecutor's development of the case are at high risk for never being disclosed. In various places, the revised proposed policy rightfully requires that information be provided in writing. It should make explicitly clear that such documentation is required for all exculpatory evidence.

Suggested action: In Required Actions, Members add the following provision as ¶ 1.4:

Best practice requires documenting in writing potentially exculpatory evidence. To avoid lapses in communication, members shall document in a police report potentially exculpatory evidence, such as a negative photo array or a misidentification.

Recommendation 2: Make clear that members need to update their IAPro summary prior to every case in which they are investigators or anticipated witnesses.

The revised proposed policy details the process by which IAPro information must be gathered and shared overall, but Required Actions for Members, ¶2, suggests that members may only need to update the information that they share with prosecutors once per year. The policy should make clearer that members still need to update their IAPro summary for every time they meet with the prosecutor to prepare for a case, regardless of the frequency with which they do so.

Suggested action: Revise the first sentence of Required Actions, Members ¶ 2.1.2 as follows:

In every case in which they are testifying, members ~~should~~ **must update** and review their histories with prosecutors before testifying.

Recommendation 3: Make clear that the IAPro Summaries and Form 430 may be disclosed in discovery.

The Department and the State's Attorney work closely together on developing a prosecution and compiling the evidence that will be relied upon and/or needs to be shared with the court and the defense. The BPD's policies are informative for both entities and will be relied upon as a document that helps guide how disclosure occurs. Therefore, it is important to provide context and clarity. While the policies generally create a practice that should result in information being provided to the prosecutor for possible disclosure when required under the law, it also emphasizes the confidentiality of information that, while protected from public viewing, often must be disclosed to the court and defense. While not requiring a shift in the practices laid out, the policy should make clear that defense counsel can request information about expunged personnel matters and that prosecutors may need to share any and all of the materials provided under their constitutional obligations.

Suggested actions:

Amend the first note after Required Actions, Public Integrity Bureau ¶ 1.1 as follows:

Because IAPro was not implemented until 2010, and because of historical practices and different interpretations of what matters are expungable, there may be some disciplinary matters that are not captured in IAPro. Accordingly, BPD members and prosecutors cannot exclusively rely on IAPro for the purpose of this policy. To the extent BPD members or prosecutors or members have questions or concerns about the completeness of the Potential Impeachment Evidence being provided regarding BPD members, they should contact the Brady/Giglio Liaison. **Inquiries from defense counsel regarding expunged and older matters may also be directed to the Brady/Giglio Liaison with the results provided to the prosecutor for sharing with defense counsel.**

Add to Required Actions, Public Integrity Bureau ¶ 2 and ¶ 6.3 the following:

The State's Attorney may disclose the IAPro Summary and any other documents to defense counsel through the discovery process, where appropriate to comply with their constitutional obligations.

Remove the second paragraph of Form 430, or revise it as follows:

Portions of this document and any attached memorandum that reference disciplinary matters, and any disciplinary files, including IAPro summaries, are CONFIDENTIAL, as they are personnel records protected under Md. Code Ann., General Provisions, § 4-311. **This form and any related materials are not shielded from disclosure as part of the prosecutor's discovery obligations.**