BRADY/GIGLIO DISCLOSURES

PREAMBLE:

Two United States Supreme Court Cases are referenced in this policy. The first case, Brady v. Maryland, determined that prosecutors must disclose Exculpatory Evidence to the defense or violate a defendant's due process rights if such evidence is withheld. The second case, Giglio v. United States, extended such disclosures to include Impeachment Evidence against government witnesses, including against law enforcement employees. Several additional cases added to the requirements of these cases. Collectively, these cases are referred to as "Brady/Giglio cases;" the disclosure requirements related to these cases are referred to as "Brady/Giglio Disclosures;" and the employees impacted by the parameters of these cases are referred to as "Brady/Giglio Employees." This policy was created to establish procedures for the Omaha Police Department to use in order to legally comply with the disclosure requirements mandated by the Brady/Giglio cases. This policy was generated in conjunction with the Omaha City Prosecutor and the Douglas County Attorney.

POLICY:

It is the policy of the Omaha Police Department (OPD) provide Exculpatory Evidence to relevant Prosecuting Offices, as required by the Brady/Giglio cases and to comply with Nebraska State Statutes related to Brady/Giglio processes.

DEFINITIONS:

Advisory Committee: The Advisory Committee shall be comprised of two prosecutors appointed by the County Attorney and two prosecutors appointed by the City Attorney. The Advisory Committee shall review recommendations made by County Attorneys, City Attorneys, and Special Prosecutors within the county.

Brady/Giglio Employee: An OPD employee who Prosecuting Offices determine meets the standards of requiring a Brady/Giglio Disclosure as established in this policy and in accordance with NRS §29-4901 – 29-4908.

Exculpatory Evidence: Evidence that tends to negate the defendant's responsibility for the charged crime and is material to the guilt, innocence, or punishment of the accused. This includes evidence that may negatively impact the credibility of a government witness, including a law enforcement officer or employee.

Impeachment Evidence: Evidence that demonstrates a witness is biased or prejudiced against a party, has some other motive to fabricate testimony, has a poor reputation for truthfulness, or has past specific incidents that are probative of the witness's untruthfulness. Prior inconsistent statements are considered Impeachment Evidence.

Prosecuting Offices: The Omaha City Prosecutor's Office, the Douglas County Attorney's Office, and a Special Prosecutor collectively. This term may also include other prosecuting offices such as the U.S. Attorney.

PROCEDURE:

I. Exculpatory Evidence Disclosures

A. OPD officers have a duty to conduct fair and impartial criminal investigations. Officers shall document all Exculpatory Evidence, whether discovered pre- or post-conviction, and shall provide such evidence to the relevant Prosecuting Office.

B. When an officer becomes aware of Exculpatory Evidence that is reasonably believed to be material to a criminal case, the officer shall document the Exculpatory Evidence on a

Supplemental Report and bring it to the attention of the relevant Prosecuting Office in a timely manner.

C. When an officer is uncertain whether information is Exculpatory Evidence, the officer shall consult with the relevant Prosecuting Office for guidance.

II. Brady/Giglio Employees

A. Identification and Required Disclosures.

1. Each internal investigation, citizen's complaint, or line investigation involving OPD employees who may be subjected to testifying in court shall be reviewed by the OPD Professional Oversight and Tactical Operations Bureau (POTOB) to determine its applicability to the standard established by Brady/Giglio cases.

2. The POTOB shall present applicable cases to Prosecuting Offices when required. The following findings shall require immediate notification to the Prosecuting Offices:

a. Any finding of misconduct that reflects upon the truthfulness or possible bias of an employee.

(1) Bias may include harassment, bias-based profiling, etc.

(2) A substantiated finding that reflects upon an officer's honesty or truthfulness. This may include, but is not limited to, falsifying a report, perjury, lying during an internal affairs investigation, etc.

(3) Policy allegation findings may include "Failure to Cooperate with Other Employees" or "Failure to Make a Required Report or Making Improper, Incomplete, or False Reports" as found in the OPD "Rules of Conduct."

b. Any past or pending criminal charge brought against the employee within the last ten years or since the employee's date of hire, whichever is earlier in accordance with NRS §27-609.

c. Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation.

d. Any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence - including witness testimony - that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence.

e. Information that may be used to suggest the OPD employee is biased for or against a defendant.

3. The analysis to determine whether an employee is subject to Brady/Giglio disclosure may consider any action that has occurred in the employee's life/career, however the POTOB will only disclose information it receives in its official capacity.

B. Reporting.

1. Following identification of an instance which may be subject to Brady/Giglio disclosure, the POTOB will provide a summary of the circumstances, investigation, and/or findings to each of the Prosecuting Offices and City Legal.

a. The initial summary will not identify the specific employee by name or other identifying information.

b. The initial summary will outline the facts of the case for the prosecuting attorney's review, but shall not include any discipline or disciplinary recommendation.

c. The initial summary will request an evaluation of whether that Prosecuting Office determines that the employee meets the definition of a Brady/Giglio Employee.

2. Investigations completed at the request of any office other than the City Prosecutor or Douglas County Attorney which identifies an officer who may be considered a Brady/Giglio Employee shall use the same initial summary and evaluation request detailed above.

3. Each initial summary provided to the Prosecuting Office will include instructions for the prosecuting attorney to obtain involved employee information if they determine the employee is considered to be a Brady/Giglio Employee.

4. All summaries provided by the OPD to Prosecuting Offices will be maintained permanently in the employee's Internal Affairs file to document the disclosure. Additional correspondence with the Prosecuting Office will also be maintained permanently in the employee's Internal Affairs file.

C. Determination.

1. Prosecuting Offices must have an established process for reviewing and making determinations for prospective Brady-Giglio Disclosures as well as to ensure the rights of the employees. In the event that a Prosecuting Office determines an employee is a Brady/Giglio Employee, the following shall apply:

a. Officers have a right to counsel at every stage of the determination process.

b. Written notice will be provided to the impacted officer including the rationale for the proposed determination.

c. Officers will be provided a reasonable opportunity to respond to the proposed determination, as well as provided the opportunity to contest it.

d. If the impacted officer desires to contest the proposed determination, the Prosecuting Office shall request the Advisory Committee make a recommendation.

(1) The Prosecuting Office shall provide the Advisory Committee with the materials that support or corroborate naming the officer in such prospective disclosure and any exculpatory materials provided by the officer.

(2) The Advisory Committee may request further information from the officer or Prosecuting Office, including oral testimony from the officer, and may conduct an informal hearing.

(3) Evidence presented to the Advisory Committee shall remain confidential unless otherwise provided by law.

(4) The Advisory Committee shall make a recommendation to the Prosecuting Office as to whether or not a prospective disclosure is required under Brady/Giglio case law and shall provide written notice of its recommendation to the Prosecuting Office.

(5) The Prosecuting Office is not bound by the recommendation of the Advisory Committee.

e. Written notice of the Prosecuting Office's final decision will be provided to the impacted officer.

2. Per NRS §29-4907, officers shall not be discharged, disciplined, threatened with discharge or discipline, or subjected to revocation or suspension of their law enforcement officer certification for exercising any of the rights provided for in state law for prospective Brady-Giglio officers.

3. In the event that a Prosecuting Office determines an employee is a Brady/Giglio Employee, the following shall apply:

a. All Prosecuting Offices shall be notified of the determination.

b. The employee's Captain (if any) and Deputy Chief shall be notified of the determination.

(1) The Chain of Command notification shall occur immediately upon POTOB's receipt of the determination from a Prosecuting Office.

(2) The Chain of Command notification shall be re-sent at every subsequent shift change.

(3) Captains and Deputy Chiefs who assume new commands shall immediately request a list of all Brady/Giglio Employees under their command.

4. Per NRS §29-4905, officers who are aggrieved by a Prosecuting Office's decision to name them as a Brady-Giglio Employee may file a petition to seek a review in Douglas County District Court. This petition must be filed within ten (10) days of the Prosecuting Office's final determination.

5. All determinations provided to the OPD by Prosecuting Offices shall be maintained permanently in the officer's Internal Affairs file.

6. At the discretion of the Chief of Police, employees identified by a Prosecuting Office as Brady/Giglio Employees may be reassigned or have their current or future work assignments modified or restricted.

D. Confidentiality.

1. The POTOB shall make certain all reports provided to and received from Prosecuting Offices remain confidential.

2. Due to open court rules, OPD cannot maintain the confidentiality of a Brady/Giglio Employee when the disclosure occurs in a court setting. OPD is not responsible for Prosecuting Offices' disclosure of an employee's Brady/Giglio status.

REFERENCES:

I. Laws

A. Court cases.

1. Brady v. Maryland, 373 U.S. 83 (US 1963).

2. Giglio v. United States, 405 U.S. 150, 153 (1972).

B. Nebraska Revised Statutes (NRS): §27-609, §29-4901 - 29-4908

II. Previous OPD Orders

A. Previous General Orders: #70-17, 8-23, and 56-26.

III. Accreditation Standards

A. CALEA Accreditation Standards: 42.1.6.

IV. Other References

A. United States Department of Justice *U.S. Attorneys' Manual*, Title 9, Section 9-5.100 was used in the drafting of this policy.

V. Other

A. PPM Monthly Updates: #4-2018.