

	The University of North Carolina Greensboro Police Department	
	General Order 3-1.9	Brady/Giglio/Whitley Information

Purpose and Scope

This policy establishes guidelines for identifying and releasing potentially exculpatory or impeachment information (so-called “Brady information” - information known or possessed by the University of North Carolina at Greensboro Police Department that is both favorable and material to the current prosecution or defense of a criminal defendant) to the District Attorney’s office or the United States Attorney’s Office (hereinafter referred to as) prosecution.

Policy

The UNCG Police 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 UNCG Police 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 information, as provided in this policy.

A. Disclosure of Investigative Information

Officers must include in their investigative 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 an officer learns of potentially incriminating or exculpatory information any time after the submission of a case, the officer or the handling investigator must prepare and 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 privileged or confidential (e.g., informant or attorney-client information, attorney work product), the officer should discuss the matter with a supervisor and/or prosecution to determine the appropriate manner to proceed.

Evidence or facts are considered material if there is a reasonable probability that they would affect the outcome of a criminal proceeding or trial. Determining whether evidence or facts are material often requires legal or even judicial review. If an officer is unsure, the officer should address the issue with a supervisor and the District Attorney.

Supervisors who are uncertain about whether evidence or facts are material should address the issue in a written memo to an appropriate prosecution. A copy of the memo should be retained in the department case file.

B. Brady Process

The Chief of Police shall select a member of the Department to coordinate requests for Brady or Giglio information. This person shall be directly responsible to the Assistant Chief or the authorized designee.

The coordinator's responsibilities include but are not limited to:

- Working with the appropriate prosecutors' offices and the General Counsel's office to establish systems and processes to determine what constitutes Brady or Giglio information and the method for notification and disclosure.
- Maintaining a current list of members who have Giglio information in their files or backgrounds.
 - Updating this list whenever potential Brady information concerning any department member becomes known to the Department or is placed into a personnel or internal affairs file.

D. Disclosure of Requested Information

If Brady information is located, the following procedure shall apply:

- In the event that a motion has not already been filed by the criminal defendant or other parties, the prosecuting attorney and department member whose file is related to the motion shall be notified of the potential presence of Brady information.
- The prosecution or General Counsel should be requested to file a motion in order to initiate an in-camera review by the court.
 - If no motion is filed, the Custodian of Records should work with the appropriate counsel to determine whether the records should be disclosed to the prosecution.

- The Custodian of Records shall accompany all relevant personnel files during any in-camera inspection and address any issues or questions raised by the court in determining whether any information contained in the files is both material and favorable to the criminal defendant.
- If the court determines that there is relevant Brady information contained in the files, only that information ordered released will be copied and released to the parties filing the motion.
 - Prior to the release of any information pursuant to this process, a protective order should be requested from the court limiting the use of such information to the involved case and requiring the return of all copies upon completion of the case.
- If a court has determined that relevant Brady or Giglio information is contained in a member's file in any case, the prosecutor should be notified of that fact in all future cases involving that member.

E. Investigating Brady Issues

If the Department receives information from any source that a member may have issues of credibility or dishonesty, or has been engaged in an act of moral turpitude or criminal conduct, the information shall be investigated and processed in accordance with the Complaint Investigation and Administrative Review Process.

F. Subpoena Processing

The individual processing subpoenas (or the supervisor of the subpoenaed member) shall check the subpoenaed member's name against the current list of those who are known to have Brady information in their files or background and shall alert the coordinator if a person on the list is subpoenaed.

G. Training

Department personnel should receive periodic training on the requirements of this policy.

-----Additional Reference Information-----

Background and Purpose

Incidents involving allegations of officer misconduct are of heightened public interest, and a lack of transparency and uniformity of procedure in past incidents, both locally and nationally, has impaired public trust. These investigations are complex, with profound civil liability for municipalities, career employment and criminal law consequences for the officers involved, and multiple potential conflicts of interest. It is therefore critical that the Department pledges to ensure that a thorough, fair, and impartial inquiry into the facts and circumstances of the alleged misconduct be obtained in every case to ensure maximum public confidence in both law enforcement and our local system of justice.

In addition, prosecutors have a constitutional obligation to disclose to a defendant, in a criminal case, evidence favorable to that defendant. While the source of this obligation is the United States Constitution, the prosecutor's duty to disclose this information is defined and explained in two seminal United States Supreme Court decisions: Brady and Giglio [hereinafter "Brady/Giglio"]. This information specifically includes conduct that affects the credibility of the involved officer and would constitute impeachment material should the officer testify in a criminal case.

This disclosure obligation is not limited to materials in the hands of the prosecuting agency. It extends to information "known to the others acting on the government's behalf in the case, **including the police.**" *Kyles v. Whitley*, 514 U.S. at 437. Prosecutors are required to make a "**reasonably diligent inquiry**" into the existence of Brady/Giglio material that may be in possession of law enforcement.

Brady/Giglio Material Defined

The District Attorney is obligated to disclose to the defense in criminal cases any **favorable evidence** that is **material** to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

"Favorable evidence" includes evidence that is exculpatory (Brady) as well as information that could be used to impeach the testimony of a prosecution witness (Giglio).

Materiality does not require a demonstration that the undisclosed evidence would have resulted in the defendant's acquittal. Rather, evidence is "material" when the undisclosed evidence would "undermine confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. at 434.

Standard of Proof Triggering Disclosure

The standard of proof for disclosure of information shall be the "**substantial information**" standard.

"**Substantial information**" is defined as credible information that might reasonably be deemed to have undermined confidence in a later conviction in which the law enforcement employee is a witness, and is not based on mere rumor, unverifiable hearsay, or a simple and irresolvable conflict in testimony about an event.

The District Attorney considers substantial information to be a somewhat lower evidentiary showing than what would ordinarily sustain a probable cause showing in a criminal prosecution.

The following types of incidents involving an officer or civilian employee of a law enforcement agency will **always** trigger disclosure requirements:

1. Substantial information that the officer employed deadly or excessive force as defined by the law enforcement agency's Use of Force policy, regardless of whether the use of such deadly force resulted in injury or death to any person.
2. Substantial information that an officer or employee committed a felony or non-traffic misdemeanor criminal offense or was charged with such an offense while employed with the agency;
3. A sustained administrative finding of misconduct that comes within the definition of Brady/Giglio material set forth in this policy, regardless of any discipline imposed; and
4. Any administrative discipline imposed against a law enforcement employee that may have a bearing on credibility.

As to all other matters, the head of the law enforcement agency is responsible for determining whether the agency is in possession of substantial information triggering the disclosure requirements set out above to the District Attorney.

Procedure in Cases of Potential Criminal Misconduct

After preliminary inquiry, if substantial information listed in Section III, subsections 1 or 2 above is found to exist, the law enforcement agency will not initiate a full internal investigation. If the District Attorney authorizes criminal charges no further action is required.

If the District Attorney declines criminal charges, the law enforcement agency shall then conduct a full internal review subject to the procedures described in this document and make any required disclosures upon completion.

Procedure in Cases of Potential Non-Criminal Misconduct

Upon receipt of substantial information listed in Section III, subsections 3 or 4 above, or any other substantial information as defined in Section III, the parties agree to the following procedure:

1. Disclosure Requirement

When there is no substantial information to believe that a criminal offense was committed, but other substantial information about an officer or civilian employee exists as defined in Section III above, and that officer or civilian employee is a potential witness in a prospective or pending criminal case in Guilford County, that agency shall inform the District Attorney's Office of the matter.

2. Timing of Disclosure

The agency will disclose the matter to the District Attorney's Office within a reasonable time of this determination, but in no case may the officer or civilian employee testify in a criminal case after such determination until the information is disclosed to the DA and a determination is made pursuant to the terms of this MOU.

3. Manner of Disclosure

The head of the law enforcement agency, or their attorney or designee, shall prepare a summary memorandum of the facts and findings constituting the substantial information. This document shall be only a summary and will not include any documents or items from the employee's personnel file. This summary memorandum will be turned over to the defense if disclosure is deemed to be required. The defense will be instructed to follow the statutory procedure for requesting personnel records if they require additional information for the criminal case.

The summary memorandum shall be delivered directly to the confidential attention of the District Attorney or designee without unnecessary delay.

Annual Certification

The head of the law enforcement agency, or designee, shall issue a certification to the District Attorney by letter or e-mail that the agency is current and in compliance. This certification shall occur annually during the first quarter of each calendar year.

District Attorney's Office

Once in receipt of the summary memorandum, the District Attorney or designee shall, within a reasonable time, review the memorandum and contact the law enforcement agency if additional information is needed to determine whether disclosure is required. Under no circumstances will the District Attorney be provided material from the employee's personnel file. If additional information from the file is required, the District Attorney may read or view such information, but the personnel file shall remain in the exclusive custody of the law enforcement agency and/or its attorney.

Once in possession of sufficient information to make a determination, the District Attorney shall make one of the following findings:

1. No further action is required based upon a conclusion that no Brady/Giglio material exists.
2. Disclosure must be provided in cases in which the law enforcement employee is a witness, but the District Attorney is willing to proceed with the cases and call that person to testify. The District Attorney or designee will communicate with the officer or civilian employee and prepare to address any such matters when the person testifies at trial.
3. Disclosure is required and, because of the nature of the information, the District Attorney will not call that officer or civilian employee as a witness in any pending or prospective criminal proceedings.

The District Attorney or designee shall send written notification of this finding to the head of the employing law enforcement agency and the agency's attorney within a reasonable time of making the determination. If the District Attorney determines that disclosure is required, they shall also send a copy of the notification to the appropriate North Carolina Training and Standards agency.

If disclosure to the defendant in a criminal case is required, the District Attorney or designee will deliver a copy of the summary memorandum to the defendants and attorneys and will do so within a reasonable time regardless of the procedural status of the case. However, if the disclosure is made at a time when the case is set for trial, the District Attorney will not proceed to trial until the defense has had sufficient opportunity to receive the summary memorandum and take any necessary and appropriate action on behalf of the defendant in that case. If the defense requests additional information from the DA, they will be instructed to follow the statutory procedure governing access to personnel records.