



LEGAL DEFENSE TRUST TRAINING BULLETIN

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STILL MORE ON *BRADY* AND POLICE PERSONNEL RECORDS

Attorney General Says Citizen Complaint Investigations Can Be Destroyed After Five Year Retention Period Despite Brady

This will be our third *Brady* bulletin. It concerns a recent California Attorney General's Opinion, No. 99-1111, May 2, 2000. It poses the question: In light of *Brady* and its progeny, may an agency destroy citizen complaint investigations after five (5) years, notwithstanding that such files may constitute "*Brady* material"?

The short answer is: Yes, so long as the destruction is a function of administrative routine or "housecleaning", and not carried out pursuant to an improper purpose, or in bad faith.

This Opinion was requested by Ventura County District Attorney Michael D. Bradbury.

First, let's review the legal landscape regarding *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963) dealt with a prosecutor's duty to turn over information or evidence to a criminal defendant that is both favorable to the accused and material to the case. Information that would impeach the credibility of a prosecution witness may well be both "favorable" and "material." Subsequent federal decisions expanded the *Brady* obligation to include not only information in the hands of the prosecution, but also in the possession of the police, since they are part of the "prosecution team".

Police administrators have become increasingly alert to the issues created by this development, because an officer-witness' personnel records containing evidence of previous deception, false statements, perjury,

false reports, or acts of moral turpitude may render that officer an unfit witness, and therefore, an unfit officer. This is because one of the most effective ways of impeaching the credibility of any testifying witness, is to show that the witness has a poor character for truth, honesty and veracity. The obvious way to demonstrate this blemished character is by showing specific instances of conduct that are inconsistent with truth, honesty, and veracity, or that are inimical to proper performance of the public trust (theft, embezzlement, fraud and other notorious criminal behavior).

Naturally, a prosecutor will not be thrilled to proceed with a case, if he knows that his primary police witness may well be impeached in this way. The officer-witness is said to be, therefore, no longer a viable witness in court. Since a big part of any officer's job involves making arrests, writing reports and testifying, a police chief will be disinclined to retain an officer who cannot do these things effectively. Hence, the officer is unfit, and may be subject to discharge. This is why we have been on a year-long campaign to emphasize the absolute necessity of maintaining the highest standards of integrity and honesty in all that we do: indeed, one slip-up that leads to a sustained charge of dishonesty can cost you your job.¹

¹See, for example, "Truth or Consequences? The Path to career Destruction." Michael P. Stone, P.C., Training Bulletin, Vol. 2, Issue No. 6, July, 1999.

For years now, *Penal Code* §832.5 has required that agencies retain citizen complaint investigation files for five (5) years--referred to as a *mandatory retention period*. On the other hand, local policy permitting, and with the resolution of the city council or board of supervisors together with the written authorization of the city or county attorney, agencies can shred such files that are at least five years old.

The present Opinion focuses on the tension between a criminal defendant's due process right to access to *Brady* material, and the file destruction provisions of the *Penal Code* (§832.5) and the *Government Code*. Put differently, if the Constitution's due process clause guarantees a defendant access to *Brady* material, is not a statute which permits routine destruction of that "evidence" potentially invalid? Well, no, says this Opinion. The distinction to be applied here is: does the agency have any substantial reason to suspect that the particular file to be destroyed contains favorable or exculpatory material with respect to a pending case? If so, destruction may amount to bad faith and constitute the corresponding due process violation under *Brady*. If not, destruction of the file otherwise in good faith is not a due process violation, even if it might arguably contain *Brady* material relevant to a subsequent criminal case. This determination is made by the trial court. The burden is on the defendant to show the requisite "bad faith".

In our earlier *Brady* training bulletin, we commented that agencies may want to give consideration to whether it is prudent to retain such files for more than five (5) years, in addition to being careful about charging and sustaining "integrity allegations", since a single sustained charge of this character can end a career. This Opinion supports the first part of that recommendation (retention beyond five years).

The second part of the earlier recommendation is now developed further: agencies should consider applying a more exacting standard of proof when integrity or dishonesty issues are charged--"**clear and convincing proof**." A preponderance of evidence is all that is necessary to sustain administrative misconduct charges generally. We suggest however, both for the good of the agency, the member, and ultimately the

public, that agencies require something more than the "weight of the evidence" (or, 51% of the evidence) to sustain this category of offense. For example, not every contradicted denial of an act, nor difference between a member's account and that of other witnesses, means the member is lying. We suggest that only clear and convincing proof ought to trigger integrity or dishonesty charges, since the effect, *even of alleging them*, can constitute irreparable harm to the member's career. The difference between willful deception or other dishonesty and inaccuracy or other inadvertent false statement must be clearly apparent, in order to justify the allegation, given the disastrous consequences.

We look forward to bringing you more on this subject as it develops.

Stay safe!

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