

SENATE BILL REPORT

SHB 1088

As of February 25, 2021

Title: An act relating to potential impeachment disclosures.

Brief Description: Concerning potential impeachment disclosures.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Lovick, Goodman, Fitzgibbon, Johnson, J., Slatter, Wylie, Ramos, Bateman, Berry, Dolan, Tharinger, Simmons, Ryu, Ramel, Shewmake, Leavitt, Senn, Peterson, Gregerson, Valdez, Callan, Chopp, Duerr, Ormsby, Taylor, Lekanoff, Santos, Macri, Frame, Orwall, Berg, Pollet and Harris-Talley).

Brief History: Passed House: 2/10/21, 61-37.

Committee Activity: Law & Justice: 2/25/21.

Brief Summary of Bill

- Requires the Washington Association of Prosecuting Attorneys to update its policy addressing potential impeachment disclosures and develop and maintain online training consistent with the policy.
- Mandates law enforcement agencies to inquire whether an officer is subject to potential impeachment disclosures prior to hiring an officer with previous law enforcement experience, and share potentially exculpatory information with local prosecuting authorities at the time of hire and anytime such conduct is discovered during an officer's employment.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Shani Bauer (786-7468)

Background: Prosecutors have an affirmative duty to disclose exculpatory evidence to the

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defense. This duty arises from constitutional due process requirements, as well as court rules and rules of professional conduct for prosecuting attorneys.

Under the United States Supreme Court case *Brady v. Maryland* and subsequent case law, the prosecution is required to disclose evidence that is both favorable to the accused and material to either guilt or punishment. The duty to disclose applies even if the defense has not requested the information. This obligation extends not only to potentially exculpatory evidence, but also to evidence impeaching the credibility of a government witness. Potential impeachment evidence includes information a reasonable person could view as impairing the witness' credibility or competence. With respect to police officers who are government witnesses, impeachment evidence can include a prior conviction related to dishonesty, misconduct involving dishonesty or abuse of authority, and evidence tending to show a bias or some motive to lie.

Court rules and professional conduct rules also address the duty of prosecutors to disclose exculpatory evidence. Under Criminal Rule 4.7, a prosecutor must disclose to the defense any material or information within the prosecutor's knowledge that tends to negate the defendant's guilt as to the offense charged. The rule also specifically requires disclosure of prior criminal convictions of any government witness. Rule of Professional Conduct 3.8 establishes special responsibilities of prosecutors, and provides an obligation for a prosecutor to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused, or mitigates the offense.

Washington Association of Prosecuting Attorneys Model Policy. In 2013 the Washington Association of Prosecuting Attorneys (WAPA) developed a model policy on potential impeachment disclosures. The model policy provides guidance to prosecuting attorneys on the scope of the duty of disclosure. Under the model policy, the prosecuting attorney is obliged to make determinations regarding whether information is potentially exculpatory and subject to disclosure. The duty to disclose extends to any information that tends to negate the defendant's guilt, including any prior convictions as well as information a reasonable person, knowing all the relevant circumstances, could view as impairing the credibility of an officer that will, or could be called to testify in a criminal proceeding. The model policy also addresses procedures to be followed when making potential impeachment disclosure determinations and maintenance of any list of potential impeachment disclosures.

Washington Association of Sheriffs and Police Chiefs Model Policy. The Washington Association of Sheriffs and Police Chiefs (WASPC) also adopted a model policy that addresses potential impeachment disclosure information that may be in the possession of law enforcement agencies. Under WASPC's model policy, law enforcement agencies must investigate all complaints against their officers. An agency must review all internal investigation files to determine if there is potential impeachment information on any officers who may be called as witnesses. The agency must disclose any potential impeachment information discovered to the prosecutor, and must notify the prosecuting attorney any time the agency becomes aware of new potential impeachment information.

Summary of Bill: Potential Impeach Disclosure Policy. WAPA must update its best practices policy addressing potential impeachment disclosures. The policy must address the types of conduct that should be recognized as potentially exculpatory, how information about officer conduct should be maintained and shared, and under what circumstances potential impeachment information about an officer should be removed. When updating its policy, WAPA must consult with the Washington State Association of Municipal Attorneys, WASPC, Washington Council of Police and Sheriffs, the Fraternal Order of Police, and the Washington State Patrol Troopers Association.

No later than June 30, 2022, WAPA must develop and maintain online training for potential impeachment disclosures consistent with the best practices policy.

Mandatory Reporting. Within ten days of discovery, a law enforcement agency must report to the prosecuting attorney of any jurisdiction in which a peace officer may testify any act by the officer that may be potentially exculpatory to a criminal defendant, and any misconduct in which the officer has engaged that may affect the officer's credibility.

Prior to hiring any peace officer with previous law enforcement experience, the law enforcement agency must inquire whether the officer has ever been subject to potential impeachment disclosure and verify any information with the prosecuting authorities in the jurisdictions of the officer's previous employment. Within ten days of hire, a hiring agency must forward any information regarding prior potential impeachment disclosure to the prosecuting authority of any jurisdiction in which the officer may testify as a witness.

Appropriation: The bill contains a section or sections to limit implementation to the availability of amounts appropriated for that specific purpose.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Truth and transparency matter. Truth is the bedrock of our legal system. Policing is ineffective without truth. This bill will solidify these principles and make sure our system is a system we want.

This bill will improve transparency and accountability and we appreciate the requirement to update the policy with current case law and provide training opportunities. University officers should be held to the same standards as other peace officers and we agree with their inclusion.

Law enforcement is always concerned when unproven allegations can have an impact on employment. We appreciate the opportunity to interject some due process into those

determinations. It is important to maintain current law stating that an employer cannot take action solely because of the person's name on a Brady list.

OTHER: We are in strong support of the policy, but would like some minor changes. Rather than WAPA creating a model policy, we believe each prosecutor's office should be required to create their own policy and review and update the policy regularly.

We would like to see a certain number of minimum standards that could be recommended to the Legislature for adoption in statute. There should be some consistency across the counties in the state.

Once an officer's name is on a Brady list, there is never a reason to remove that officer's name from the list. The issue is one of disclosure. Once the information is disclosed, defense council can make a determination whether that information is relevant or not. We want to hold law enforcement to a higher standard. When a law enforcement officer behaves badly, we must ensure accountability.

Persons Testifying: PRO: Sanjay Walvekar, Washington Association of Sheriffs & Police Chiefs; Edgar Espino, Washington Student Association; Jeff DeVere, Washington Council of Police and Sheriffs.

OTHER: Russell Brown, Washington Association of Prosecuting Attorneys; Michael Transue, Washington Fraternal Order of Police; Emily Gause, Washington Defenders Association and the Washington Association of Criminal Defense Attorneys.

Persons Signed In To Testify But Not Testifying: No one.