

SENATE BILL REPORT

SHB 1088

As Passed Senate - Amended, March 9, 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, 3/04/21 [DPA].

Floor Activity: Passed Senate - Amended: 3/9/21, 46-3.

Brief Summary of Bill (As Amended by Senate)

- Requires each county prosecutor develop and adopt a written protocol addressing potential impeachment disclosures no later than July 1, 2022.
- 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.
- Provides immunity from civil liability to public officials, employees, and agencies for sharing impeachment disclosure information in good faith.

SENATE COMMITTEE ON LAW & JUSTICE

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; McCune, Assistant Ranking Member; Darneille, Holy, Kuderer and Salomon.

Staff: Shani Bauer (786-7468)

Background: Prosecutors have an affirmative duty to disclose exculpatory evidence to the 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 Amended Bill: Potential Impeach Disclosure Policy. Each county prosecutor must develop and adopt a written protocol addressing potential impeachment disclosures. The protocol must provide guidance for 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. The protocol must be developed in consultation with agencies representing law enforcement officer and local departments that will be impacted by the protocol

No later than June 30, 2022, the Criminal Justice Training Commission must develop and maintain online training for potential impeachment disclosures . Protocols shall be in place no later than July 1, 2022, and must be reviewed every two years to determine whether modifications are needed.

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. A prosecuting authority must respond to a law enforcement agency within ten days of a request for verification. 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.

A public official, employee, or agency is immune from civil liability for sharing impeachment information about a peace officer with the peace officer's employer, potential employer, or prosecuting authority unless the official, employee, or agency acted with gross negligence or in bad faith.

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 on Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* 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.