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July 7, 2021

The Honorable Robert W. Ferguson
Attorney General
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Copy sent via email to judy.gaul@atg.wa.gov

Re: **Request for a Formal Attorney General Opinion Interpreting SHB 1088 (Laws 2021, Ch. 322).**

Dear Attorney General Ferguson:

This is a request for you to issue an Attorney General Opinion on the following question:

> Where a prosecutor knows of information about a law enforcement officer that constitutes potential impeachment evidence, under what circumstances may the officer's information or name be removed from any list of potential impeachment disclosures?

This question arises because the 2021 Legislature passed, and the Governor signed, SHB 1088 (Laws 2021, Ch. 322). That statute requires that "Each county prosecutor shall develop and adopt a written protocol addressing potential impeachment disclosures pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent case law."

Specific to my question, the statute requires that (emphasis added):

> The protocol must provide guidance for: (i) The types of conduct that should be recognized as potentially exculpatory or as creating potential impeachment material; (ii) how information about an officer or officer conduct should be shared and maintained; and **(iii) under what circumstances an officer's information or name may be removed from any list of potential impeachment disclosures**.

By way of background, I trust you are well aware of the origin of a prosecutor's obligation to disclose potentially exculpatory information. *Brady v. Maryland* established that criminal defendants have a constitutional due process right to disclosure of such information. A prosecutor's failure to disclose potential impeachment evidence may result in reversals of convictions, civil liability and attorney discipline. Subsequent case law, court rules, and the

Rules of Professional Conduct all impose strict obligations upon prosecutors. *See, e.g.* CrR 4.7; RPC 3.8.

Because of the high risk involved, prosecutors err on the side of disclosure. Even minor violations of agency policies, no matter how detached from the quality and credibility of the officer's investigation, become permanent "*Brady* notices" for the subject officers. Removing an officer from a "*Brady* list"[1] is fraught with additional risk, precisely because the officer's information had once been determined to be potentially exculpatory or grounds for impeachment.

Some prosecutors have hypothesized that, after a period of time, potential impeachment evidence concerning an officer becomes so attenuated that it may no longer be considered as potentially exculpatory or impeachment evidence that is favorable to the accused, and therefore need not be disclosed. However, there is little guidance from judicial opinions on that theory.

In a 2016 unpublished opinion[2] from Division II of the Court of Appeals, the State responded to an alleged *Brady* violation by asserting the misconduct of the officer at issue was too remote in time to be admissible at trial, and therefore disclosure was unnecessary. The court disagreed and observed: "We are not ultimately concerned with the concrete admissibility of withheld evidence; instead, we are concerned with the materiality of the withheld evidence and the effect of any potentially resulting prejudice." *State v. Griffin*, No. 42012-1-II, slip op. at 23 (Division 2, September 7, 2016) (citing United States v. Price, 566 F.3d 900, 911-12 (9th Cir. 2009)).

Griffin only tells us that the officer's 10-year-old misconduct incident[3] had to be disclosed by the State. It does not approach the question posed by Sec. 1 (1)(a)(iii) of SHB 1088, which is under what circumstances may the officer and his or her potential impeachment information be released from the disclosure obligation.

This is a question of statewide importance and the WAPA[4] membership is supportive of my request for a formal AGO. Each of Washington's 39 prosecutors is mandated to adopt a policy that complies with SHB 1088 by July 1, 2022. The policy must address the removal issue.

WAPA membership is interested in both the criteria that may be considered legal grounds for removal of an officer from a "*Brady* list," as well as the procedural steps that should be taken, such that removal would not jeopardize the due process rights of future criminal defendants.

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[1] The term "*Brady* list" has become a colloquial shorthand term to encompass a broader universe of information and officer than those identified in *Brady v. Maryland*. Prosecutors in Washington more precisely use the term "Potential Impeachment Disclosure" or PID list.
[2] The opinion may be cited as non-binding authority. GR 14.1.
[3] The misconduct by Officer Wilken was egregious, arguably making the case less relevant and useful for determining under what circumstances an officer's information may be removed from a "*Brady* list."
[4] Washington Association of Prosecuting Attorneys.

We look forward to your guidance on this matter.

Sincerely,

Gregory M. Banks
Prosecuting Attorney

Cc: Russ Brown, Washington Association of Prosecuting Attorneys, Executive Director
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