MEMORANDUM

TO: All County Attorneys
All Law Enforcement Agencies

FROM: Peter W. Heed, Attorney General

RE: Identification and Disclosure of *Laurie* Materials

DATE: February 20, 2004

INTRODUCTION

In 1995, the New Hampshire Supreme Court issued *State v. Laurie*, 139 N.H. 325 (1995); an opinion which significantly changed the landscape with respect to the constitutionally-mandated disclosure of evidence favorable to a criminal defendant. In prior decisions, the Court had held that when a convicted defendant made a claim that the prosecutor failed to disclose material evidence favorable to the defense, the conviction would stand unless the defendant proved that he or she was prejudiced by the non-disclosure. Under the *Laurie* decision, the burden of proof was shifted to the State. Now, if a defendant makes a threshold showing that the State withheld material favorable evidence, the conviction must be overturned unless the State proves, beyond a reasonable doubt, that the non-disclosure was harmless.

The *Laurie* Court reversed the defendant's murder conviction after finding that the State failed to disclose material evidence about a police officer who participated in the investigation and testified at trial. The non-disclosed information was contained in the officer's confidential personnel file, and could have been used to impeach his credibility.

The impact of the *Laurie* decision has been significant. Police personnel files are now frequently the target of defense discovery requests. Out of an abundance of caution, prosecutors may tend towards disclosure of any information that could possibly be perceived as *Laurie*-type material, often without analyzing whether disclosure is, in fact, required. The police officer's interest in maintaining the confidentiality of personnel information is often disregarded in the

disclosure decision. On the other hand, because police personnel files and internal investigative files are confidential by statute, prosecutors must rely on a police officer or police department to inform them if *Laurie* material exists in a particular officer's file. Due to the lack of case law on the issue of what constitutes *Laurie* material, police departments are free to develop their own definitions, which may or may not comport with the law.

In an effort to assist police and prosecutors, and to develop a standardized method for identifying and dealing with potential *Laurie* material, I am issuing this memorandum, which addresses issues relating to information contained in confidential police personnel files and internal investigations files.

Identification of Potential *Laurie* Materials

Unfortunately, the term "*Laurie* material" is not subject to easy definition. Whether a court would view any particular piece of information as *Laurie* material would depend, to some extent, on the nature of the information in question, the officer's role in the investigation and trial, the nature of the case, and the recency of the information. However, as a general proposition, information that falls within any of the following categories should be considered potential *Laurie* material:

- any sustained instance where an officer deliberately lied during a court case, administrative hearing, other official proceeding, in a police report, or in an internal investigation;
- any sustained instance when an officer falsified records or evidence;
- any sustained instance that an officer committed a theft or fraud;
- any sustained instance that an officer engaged in an egregious dereliction of duty (for example, an officer using his/her position as a police officer to gain a private advantage such as sexual favors or monetary gain; an officer misrepresenting that he/she was engaged in official duties on a particular date/time; or any other similar conduct that implicates an officer's character for truthfulness);
- any sustained complaint of excessive use of force;[1]
- any instance of mental instability that caused the police department to take some affirmative action to suspend the officer for evaluation or treatment, except for a referral for counseling after being involved in a traumatic incident, or for some other reason, for which no disciplinary action was taken.

Material that falls within any of these categories must be retained in the officer's personnel file so that it is available for *in camera* review by a court and possible disclosure to a defendant in a criminal case. However, a report or other document that concerns an incident over ten years old is presumptively non-disclosable and may be removed from the file, provided that the officer has not been the subject of any subsequent disciplinary action.

Police departments are encouraged to develop a policy for identifying *Laurie* materials. A

[1] Incidents of excessive use of force generally do not reflect on an officer's credibility, and thus, in the context of most criminal cases, would not be considered *Laurie* material. However, in the context of a case in which a defendant raises a claim of aggressive conduct by the officer, such incidents would constitute *Laurie* material, requiring disclosure.

proposed policy is attached.

A Prosecutor's Duty to Search for *Laurie* Material

A prosecutor has a constitutional obligation to disclose to a criminal defendant evidence favorable to that defendant. Brady v. Maryland, 373 U.S. 83 (1963); State v. *Laurie*, 139 N.H. 325 (1995); Prof. R. Cond. 3.8(d). Favorable evidence includes evidence that is exculpatory and information that could be used to impeach the testimony of a prosecution witness. Giglio v. U.S., 405 U.S. 150 (1972). Disclosure is not contingent upon the information being admissible at trial. If the information would be material to the preparation or presentation of the defendant's case, it must be turned over. The 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. 419, 437 (1995). Thus, a prosecutor has a duty to seek out *Laurie* material in the hands of any involved police agency.

Because police department internal investigations files and personnel files are confidential by statute, a prosecutor cannot conduct a search of those files for *Laurie* material. Rather, the prosecutor must rely on the police department to identify such materials and provide notification of their existence. Some prosecutorial agencies direct a specific *Laurie* inquiry to the police departments for each law enforcement witness in a particular case. However, that may result in a police department being required to respond to the same inquiry regarding a particular officer from multiple prosecutors. On the other hand, for many prosecutors, particularly in the district courts, the process of making specific requests in each case is impractical. Prosecutors must rely, instead, on individual police officers to reveal the existence of *Laurie* materials in their files.

To ensure that all prosecutors are able to meet their constitutional obligations, I am requesting each county attorney to work with the law enforcement agencies within his/her jurisdiction to develop a process whereby the county attorney will be given written notice by a law enforcement agency whenever one of that agency's officers has been found to have engaged in conduct that would fall within one of the categories listed above.[2] Thereafter, notification to the county attorney should occur whenever a determination is made that an officer has engaged in conduct that constitutes *Laurie* material, regardless of whether the officer has already been the subject of an earlier notification. If an officer who has been the subject of such notification leaves the agency for another law enforcement position, the agency should inform the county attorney of the officer's departure and new employer.

There are a number of law enforcement agencies whose officers have statewide jurisdiction, such as the State Police, Marine Patrol, Fish and Game, and Liquor Commission. Because those officers are far more likely to appear as a witness in multiple counties, notification should be made to each of the ten county attorneys, and to the chief of the criminal justice bureau at the attorney general's office.

The written notification should include only the officer's name, department, date of birth,

[2] At the same time, notice should be given to the agency's prosecutor/court liaison officer.

and date of incident that gave rise to the *Laurie* determination. It should not include any information regarding the underlying disciplinary matter, as that information is confidential by statute.[3]

The county attorney will be responsible for compiling a comprehensive list of officers within his/her county who are subject to possible *Laurie* disclosure. The list should be updated as needed to reflect the name of any officer not already on the list who has been the subject of a *Laurie* disciplinary matter. Local prosecutors should be provided a copy of the list, or at least that portion of the list containing information from police departments within their jurisdiction. If only partial lists are provided, local prosecutors should be instructed to check with the county attorney for a *Laurie* notification on any officer with whom they are dealing as a potential witness, if that officer either has statewide jurisdiction or is from outside the prosecutor's prosecutorial region. The county attorney shall make the list, or relevant portions thereof, available to prosecutorial agencies in other counties upon request. The list should otherwise be kept confidential.

Since the concept of *Laurie* materials is rather vague, it is likely that law enforcement agencies will have questions about whether a particular incident would constitute potential *Laurie* materials. The county attorneys should make themselves available to consult with police departments and assist in making that determination. However, because the disciplinary materials are confidential by statute, the consultation should be done on a hypothetical basis, without disclosing the officer's name or any other identifying facts.

This process should ensure that prosecutors have the necessary information to deal with the issue of Brady material in the event that a particular officer is a witness in one of their trials. However, the establishment of this process does not completely relieve a prosecutor of the obligation to seek out potential *Laurie* materials. If a prosecutor has a basis to believe that an officer/witness may have been subject to discipline for conduct that would constitute impeachment information, but the police department has not provided notification of that fact, the prosecutor should direct a specific inquiry to the chief of that department.

Disclosure of *Laurie* materials

That a police department has designated documents in an officer's personnel file as

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[3] I am aware that, with respect to officers who are subject to *Laurie* disclosure, some police departments follow a practice of providing the prosecutor a brief summary of the underlying disciplinary incident, on which the officer has signed off. That summary is provided to defense counsel in cases in which the officer will be a witness, and defense counsel can decide whether to pursue the issue further. Often, the summary is sufficient for defense purposes and no further discovery is requested.

In developing this protocol, it is not my intent to discourage these types of practices. The notification process set out in this memo will ensure that that there is a certain minimum level of information available to all prosecutors, which will enable them to fulfill their *Brady/Laurie* obligations. The county attorneys and local law enforcement agencies are free to adapt that process to better reflect local practice, or to adopt additional procedures to further advance that objective.

If the underlying incident involves excessive use of force, which would only be considered Laurie material in the context of certain types of cases, the officer may wish to have that fact noted on the notification form. The inclusion of that information would enable a prosecutor to decide whether a request for *in camera* review of the personnel file is necessary, based on the facts of a particular case.

potential *Laurie* material does not mean that those documents must necessarily be disclosed to a criminal defendant. Rather, it simply informs a prosecutor of the existence of such materials. If a prosecutor intends to call the officer as a witness, the prosecutor should file a motion under seal, advising the court of the material's existence and requesting the court to order the submission of the file for *in camera* review, to determine whether disclosure of any portion of the file is required. The prosecutor should consider requesting, as additional relief, that if the court rules that the file is not subject to disclosure, it issue a further ruling that the file is non-disclosable in any future prosecution. The motion should include a request for a comprehensive protective order to protect against further disclosure of information. The request for a protective order should state that all matters relating to the motion - including the motion, related pleadings, court orders, and similar documents concerning the admissibility of any of the information at issue - be sealed until the court issues an express order to the contrary.

The prosecutor should inform the police officer/witness that such a motion is going to be filed and advise the officer that the prosecutor does not represent the officer's personal interests in the matter; and if the officer desires an advocate to represent his/her interests, the officer should retain private counsel.

If, after conducting an *in camera* review, the court determines that no portion of the file need be disclosed to the defendant, a prosecutor may generally rely on that ruling to support non-disclosure in future cases. The prosecutor should notify the county attorney of the court's decision, so that the county attorney's list can be updated to reflect that ruling. If the court rules that the file need not be disclosed in any future prosecution, the prosecutor should forward a copy of the order to the county attorney. The county attorney, in turn, should remove the officer's name from the list and forward a copy of the court's order to the officer and his or her department. However, nothing herein prevents a prosecutor from seeking *in camera* review of an officer's file in the context of a subsequent case, if the prosecutor deems such a review appropriate in light of the specific facts or the unique role of the officer in the case.

If a court orders disclosure of an officer's file, or portions thereof, copies will be furnished to both parties. Provided that the officer has not accrued additional *Laurie* material in the meantime, in any subsequent case the prosecutor can make an independent assessment of whether disclosure is required, without court involvement. In making that determination, a prosecutor should consider such factors as:

- the nature of the officer's conduct that is the basis of the *Laurie* report (An incident of lying, which involved calling in sick when the officer simply wanted a day off, is less probative of that officer's veracity than an incident of lying that involved providing false information in a police report)
- how recently the incident occurred (The probative value of information diminishes with the passage of time. Any incident more than 10 years in the past should be presumed immaterial, unless it involved particularly egregious conduct that is highly probative on the issue of truthfulness. See N.H. R. Ev. 609)
- the importance of the officer's role in the investigation and/or the officer's testimony at trial
- whether the incident was an isolated one (If there are multiple incidents, the prosecutor

must consider the combined impact of those incidents. An incident that would appear relatively minor if viewed in isolation may take on increased importance if it is one of a series of events)

If the *Laurie* documents being evaluated were provided to the prosecutor under a protective order and there is a determination made that disclosure is required, the prosecutor should file a motion seeking court authorization to release the materials, with an accompanying request for a protective order.

It is not uncommon to be faced with a situation where material is arguably *Laurie* material, but in the context of the particular case its probative value is minimal. The prosecutor has three options: (1) file a request for in-camera review of the materials by the court, providing the court with an explanation of why there would be some debate as to whether disclosure is required; (2) disclose the materials and file a pre-trial motion seeking to bar their use at trial (this should only be done where the material has previously been ordered to be disclosed by a court); or (3) withhold the materials. In the latter event, the prosecutor should document the materials in his/her possession and the reason for non-disclosure.

Even if a court orders disclosure of certain materials in a personnel file, that does not necessarily mean that they can be used at trial. Judges typically review documents in-camera prior to trial, when they have little or no knowledge of the facts of the case. Since it is difficult to evaluate the materiality of information in a vacuum, a judge may order disclosure of marginally probative documents, simply to ensure that a defendant's constitutional rights are protected. However, there is nothing to prevent a prosecutor from seeking to limit or bar altogether any reference to the material on the grounds that its probative value is minimal. This can be accomplished by way of a motion in limine or an oral trial motion.

Sample Policy for Police Departments

While the above-discussed guidelines are largely directed to prosecutors, there is also a need for police departments to implement standard procedures for the identification and retention of potential *Laurie* materials in police officer personnel files. To address that need, I am attaching a sample policy for consideration by police departments.

CONCLUSION

I believe that these guidelines and sample policy strike a fair balance between the need to protect the confidentiality of an officer's police personnel file and the prosecutorial obligation to disclose material favorable evidence to a criminal defendant. While it is not possible to establish definitive standards to deal with all questions surrounding *Laurie* materials, I hope that they will be of assistance in addressing these very important issues.