

# Discovery in Criminal Cases

## Table of Contents

Section 1: Statement of Purpose .....	2
Section 2: Voluntary Discovery.....	2
Section 3: Discovery by Order of the Court .....	2
Section 4: Mandatory Disclosure by the State.....	3
Section 5: Disclosure by the State – Certain Information Not Subject to Disclosure .....	6
Section 6: Continuing Duty to Disclose.....	6
Section 7: Regulation of Discovery – Protective Orders .....	6
Section 8: Regulation of Discovery – Time, Place, and Manner of Production and Inspection ...	7
Section 9: Regulation of Discovery – Charges and Exemptions for Reproduction of Discovery in All Cases .....	7
Section 10: Regulation of Discovery – Advice to Refrain from Discussing Case .....	7
Section 11: Regulation of Discovery – Certificate of Compliance.....	8
Section 12: Regulation of Discovery – Failure to Comply.....	8

## **Discovery in Criminal Cases**

### **Section 1: Statement of Purpose**

The purpose of this law is to ensure the fairness and finality of criminal trials and guilty pleas by requiring that the accused in every criminal prosecution shall receive, promptly after arraignment, on a timely basis thereafter, and prior to any plea agreement, all information within the possession of the prosecutors, law enforcement agencies and other investigatory agencies involved in case investigation and prosecution. Full, timely and complete disclosure of all unprivileged material in the State's file is mandated by this law, and the statutory language should be construed with this purpose in mind.

### **Section 2: Voluntary Discovery**

(a) A defendant seeking discovery under this statute must, before filing any motion before a judge, request in writing that the State comply voluntarily with the discovery request. A written request is not required if the State agrees in writing to voluntarily comply with the provisions of this statute.

(b) To the extent that discovery authorized in this statute is voluntarily made in response to a request or written agreement, the discovery is deemed to have been made under an order of the court for the purposes of this statute.

### **Section 3: Discovery by Order of the Court**

(a) Upon receiving a negative or unsatisfactory response to the request or agreement to comply with the provisions of this statute pursuant to Section 2, or upon the passage of seven days following service of the request without response, the defendant may file a motion for discovery under the provisions of this statute concerning any matter as to which voluntary discovery was not made pursuant to request or agreement.

(b) Unless a later date is set by the court or stipulated by the parties, a motion for discovery shall be made no later than 30 days before trial.

(c) Notwithstanding the provisions of subparagraph (b), the court must entertain and decide on its merits, at any time before the end of the trial, a discovery motion based upon grounds of which the defendant could not, with due diligence, have been previously aware, or which, for other good cause, could not reasonably have been raised within the period specified in subparagraph (b) Any other discovery motion made after the thirty day period may be

summarily denied, but the court, in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits.

(d) The court in its discretion may, upon motion, require disclosure to the defense of relevant material and information not covered by the statute, upon a showing by the defense that the request is reasonable.

(e) Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by this statute, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may, upon notice, order any person to make it available to the defendant.

(f) Upon motion of the defendant, the court for good cause must require the prosecutor to assist the defendant in seeking access to specified matters relating to the case that are within the possession or control of an official or employee of any governmental agency, but not within the prosecutor's control.

(g) The court shall have the authority to issue subpoenas or orders necessary to ensure that information determined to be discoverable under subsection (3)(f) is provided to the defense in accordance with the time, place, and manner provisions specified in Section 10, if the prosecutor's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court.

(h) Nothing in this section shall limit the statutory and constitutional right of the accused to compulsory process to obtain witnesses and evidence, nor shall anything in this section limit any other rights possessed by the accused to request or obtain information in possession of the government.

#### **Section 4: Mandatory Disclosure by the State**

(a) Whether disclosure occurs through voluntary compliance or upon motion of the defendant as described in Section 3, the court shall issue an order providing as follows:

(1) The prosecutor's office must provide to the defendant a copy of the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation and prosecution of the crimes alleged to have been committed by the defendant.

(A) Unless otherwise specified in this statute, the term "prosecutor's office" refers to the office of the attorney or attorneys responsible for prosecuting the crimes alleged to have been committed by the defendant.

(B) The term “law enforcement agency” includes any public or private entity granted the authority to investigate crimes and arrest suspected criminal offenders under the laws and regulations of this State or local jurisdictions within this State.

(C) The term "investigatory agency" includes any public or private entity that obtains or analyzes information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation or prosecution of the crimes alleged to have been committed by the defendant.

(D) Unless otherwise specified in this statute, the term “witness” includes persons reasonably believed to have information regarding the offenses alleged to have been committed by the defendant, whether or not the prosecution anticipates calling those witnesses to testify at trial;

(E) The term "file" includes all information or matter obtained during the investigation of the offenses alleged to have been committed by the defendant, including but not limited to the following:

(i) statements of the defendant, codefendants, and witnesses;

(ii) results of tests and examinations and all related data, calculations, writings, and communications of any kind including, but not limited to, preliminary test or screening results and bench notes;

(iii) notes and original and supplemental reports prepared by a law enforcement or investigatory agency in connection with the offenses alleged to have been committed by the defendant or the prosecution of the defendant, photographs and recordings, data gathered from or collected by electronic devices, cellphone data, GPS data and any other electronic data gained through wiretapping or otherwise, and electronically stored information;

(iv) a written list of the names, addresses, birthdates, and phone numbers of any persons whom the prosecutor reasonably believes to have information regarding the offenses alleged to have been committed by the defendant, including a designation by the prosecutor as to which of those persons may be called to testify;

(v) disclosure of the relationship, if any, of any witnesses to the prosecutor's office; the substance of any discussions between the prosecutor's office and any witness related to the initiation or resolution of criminal charges against the witness, or against another person on the witness' behalf; and all promises, rewards or inducements made to persons providing information to law enforcement agencies, investigatory agencies, or the prosecutors' offices in connection with the crimes alleged to have been committed by the defendant;

(vi) the prior cooperation history, including as an informant or pursuant to an agreement in a prior criminal case, regardless of jurisdiction, of any person the prosecutor intends to present at trial;

(vii) all transcripts of grand jury testimony and all exhibits or other tangible evidence presented to the grand jury in connection with the case;

(viii) any record of prior criminal convictions of the accused, any codefendant or any person the prosecuting attorney intends to call as a witness in the case;

(ix) a summary of and all information, data, documents, evidence or objects concerning any voice, photograph, or in-person identification procedures, circumstances and results, and all statements made in the presence of or by an identifying witness regarding the issue of identity or the identification procedures;

(x) a summary of and all information, data, documents, evidence or objects concerning the procedures and circumstances relating to the acquisition of any statements from the accused, any codefendant(s), and eyewitnesses to the alleged offenses; and

(xi) a summary of and all information, data, documents, evidence or objects that may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed.

(F) Oral statements by witnesses shall be in written or recorded form. Recordation can occur by any reasonable means, including electronic recording, handwritten notes, verbatim transcript or other written report, provided that any notes or other original sources upon which the report relies are preserved and released to the defense pursuant to this statute. Oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatory agency shall not be required to be in written or recorded form if:

(i) the oral statement is made during the prosecutor's preparation of the witness to testify at a trial or hearing; and

(ii) the oral statement is identical in substance to the content of any prior statement made by the witness.

(G) The prosecutor's office must provide the defendant with the opportunity, under appropriate safeguards, to inspect, examine, photograph, and test any physical evidence or sample contained therein.

(H) The prosecutor's office must provide all electronically stored information in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(2) The prosecutor's office shall provide reasonable notice to the defendant of any witnesses and exhibits that the State expects to present at trial. Each expert witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court, but in no event less than 30 days before trial absent a showing of good cause.

(b) On a timely basis, law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files related to the investigation of the offenses allegedly committed by the defendant or the prosecution of the defendant for

compliance with this section. Investigatory agencies that obtain information and materials listed in subsection (a) of this section shall ensure that such information and materials are fully disclosed to the prosecutor's office on a timely basis for disclosure to the defendant.

### **Section 5: Disclosure by the State – Certain Information Not Subject to Disclosure**

(a) The State is generally not required to disclose written materials drafted by the prosecuting attorney or the prosecuting attorney's legal staff for their own use at trial, including witness examinations, voir dire questions, opening statements, and closing arguments. Disclosure is also generally not required of legal research or of records, correspondence, reports, memoranda, or trial preparation interview notes prepared by the prosecuting attorney or by members of the prosecuting attorney's legal staff to the extent they contain the opinions, theories, strategies, or conclusions of the prosecuting attorney or the prosecuting attorney's legal staff.

(b) The State is not required to provide any personal identifying information of a witness beyond that witness's name, address, date of birth, and phone number, unless the court determines upon motion of the defendant that such additional information is necessary to accurately identify and locate the witness.

(c) Nothing in this section prohibits the State from making voluntary disclosures in the interest of justice nor prohibits a court from finding that the protections of this section have been waived.

(d) This section shall not limit the State's duty to provide favorable information to the defendant pursuant to Section 4(a)(1)(e)(xi), nor shall it limit the production of any other information necessary to comply with federal or State constitutional disclosure requirements.

### **Section 6: Continuing Duty to Disclose**

The discovery duties imposed by this Act apply prior to, during, and after trial. The prosecutor's office must promptly disclose any additional information that is identified as discoverable under this Act after initial discovery is provided to the defendant.

### **Section 7: Regulation of Discovery – Protective Orders**

(a) Upon written motion of a party demonstrating a particularized, compelling need, which may include, but is not limited to a finding that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment, the court may at any time order that discovery or inspection be denied, restricted, or deferred, or may make other appropriate orders.

(b) The prosecutor may submit ex parte for a protective order only upon substitute disclosure of the substance of the information to the defendant, and if the court's scrupulous review of the

reliability of the submitted information establishes a compelling need to maintain the secrecy of certain evidence and no alternative means of meeting that need other than *ex parte* submission. Upon such findings, the court must carefully limit any sealing order only to materials genuinely implicating the compelling need.

(c) Any material submitted *ex parte* under subsection (b) must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

### **Section 8: Regulation of discovery – Time, Place, and Manner of Production and Inspection**

An order of the court granting relief under this statute must specify the time, place, and manner of making the discovery and inspection permitted and may prescribe appropriate terms and conditions. Unless otherwise provided, disclosures by the State shall occur without delay after arraignment and prior to the entry of any guilty plea by the defendant or, if such information is not then known, immediately upon its existence becoming known, without regard to whether the defendant is proceeding to trial or has entered a guilty plea.

### **Section 9: Regulation of Discovery – Charges and Exemptions for Reproduction of Discovery in All Cases**

A reasonable charge may be made to cover the actual costs of reproduction, but no charges may be assessed to a defendant who is: (1) represented by the public defender or court-appointed counsel; (2) determined by the court to be financially unable to obtain counsel; or (3) determined by the court to be unable to cover the actual costs of reproduction. No charges may be made for producing in paper form information that is available to the State in electronic form unless the defendant has waived its right to receive the information in electronic form.

### **Section 10: Regulation of Discovery – Advice to Refrain from Discussing Case**

Except as is otherwise provided as to matters not subject to disclosure and protective orders, neither counsel for the parties nor other prosecution or defense personnel shall advise persons (except the accused) having material or information regarding the offenses allegedly committed by the defendant or the prosecution of the defendant to refrain from discussing the case with opposing counsel or showing opposing counsel any such material or information, nor shall they otherwise impede opposing counsel's investigation of the case.

## **Section 11: Regulation of Discovery – Certificate of Compliance**

(a) When the State has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The prosecutor shall certify under penalty of perjury that, to the best of its knowledge and after reasonable inquiry, the State has disclosed and made available all items subject to discovery and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(b) When, pursuant to Section 5, the State withholds information, the prosecuting attorney's Certificate of Compliance must:

(i) expressly note that withholding; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed in a manner that, without revealing information itself protected by Section 5, will enable the defendant to assess the claim.

## **Section 12: Regulation of Discovery – Failure to Comply**

(a) If at any time during the course of the proceedings the court determines that the State has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may:

(1) Order the State to permit the discovery or inspection;

(2) Grant a continuance or recess;

(3) Prohibit the State from introducing information not disclosed into evidence;

(4) Declare a mistrial;

(5) Dismiss the charge, with or without prejudice;

(6) Order the reimbursement of costs incurred by the defendant, or

(7) Enter other appropriate orders.

(b) Prior to finding any of the foregoing sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article, including a prosecutor's good-faith effort to comply with this Article.

(c) If the court imposes any of the foregoing sanctions, it must make specific findings justifying the imposed sanction or sanctions.



(d) In all cases of an alleged violation of Section 4(b) of this Act, prosecutors and their staffs shall be presumed to have acted in good faith if they have made a reasonably diligent inquiry of those law enforcement and investigatory agencies and disclosed the responsive materials.