CRIMINAL JUSTICE REFORM

AND THE IMPACT UPON EMERGENCY SERVICE ENTITIES

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On January 1, 2020, New York State's sweeping criminal justice reforms take effect. Fire Departments and Emergency Medical Service agencies are panicking over what they believe will be invasions into their own personal privacy. How much of that fear is well founded? This article examines the revisions to the Criminal Procedure Law's discovery rules and discusses the new law's potential impact upon emergency service agencies.

Article 245 of New York State's Criminal Procedure Law ("CPL") is entirely new and replaces former Article 240 in its entirety. Both the new and former articles address laws on discovery and disclosure of evidence. It is this new Article 245 that is causing so much unnecessary anxiety among emergency service workers.

The discovery process and the obligations imposed upon prosecutors in this state have been significantly expanded in order to prevent unfair surprises upon criminal defendants and to ensure that all evidence, whether it be helpful (exculpatory) or hurtful to a defendant are revealed. These new laws are intended to ensure that criminal defendants receive a fair trial and have access to "almost" all of the same information as does the criminal prosecutor. The goal is certainly laudable, though it is certain that District Attorneys' offices will become overwhelmed.

Let us review each pertinent section of Article 245. The reader should note that most of the obligations are upon the prosecutor and law enforcement and not upon potential witnesses. The initial discovery obligations consist of approximately twenty-one categories of information that the prosecutor must disclose. This article discusses only those which even remotely could impact those in the fire and EMS services.

Requirement

Section 245.10(1)(a) requires that:

> The prosecution shall perform its initial discovery obligations under subdivision one of section 245.20 of this article as soon as practicable but not later than fifteen calendar days after the defendant's arraignment on an indictment, superior court information, prosecutor's information, information, simplified information, misdemeanor complaint or felony complaint.

(emphasis added).

The prosecution generally has fifteen (15) days after the defendant's indictment to disclose to the defendant, and permit the defendant to "discover, inspect, copy, photograph and test, all items and

information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control". (CPL § 245.20[1]).

The Impact

Sections 245.10 and 245.20(1) do not impose any obligations upon the witnesses or third parties (other than law enforcement personnel such as arson investigators) to inform the prosecutors that they have any of the above materials. Firefighters and EMTs are generally not acting under the prosecution's control and have no such disclosure obligations.

Of course, if the prosecutor or law enforcement requests such materials from a fire department or EMS agency, such materials should never be destroyed and their existence should be acknowledged. As will be discussed later, the fire department/EMS agency may require a subpoena before it can be obligated or permitted to release any materials.

Requirement

Section 245.20(1)(a) requires the prosecutor to disclose:

> All written or recorded statements, and the substance of all oral statements, made by the defendant or a co-defendant to a public servant engaged in law enforcement activity or to a person then acting under his or her direction or in cooperation with him or her.

The Impact

This is not a new requirement. This same requirement existed under the now repealed CPL § 240.20(1)(a).

Generally speaking, firefighters and EMS workers are not "engaged in law enforcement activity" and are not acting under the supervision of law enforcement. The exception, of course, would be arson investigators. It is possible that this section could include EMTs who perform blood draws pursuant to police order under the Public Health Law. The written statements in these limited instances would include their investigative reports, findings and conclusions and any statements of the defendants made to persons acting under police control.

While obtaining copies of written statements given by a defendant is not burdensome, this section does require the witness to an oral statement from the defendant to provide the substance of the oral statement made by the defendant. The best practice in this instance is for the recipient of any oral statement made by a "potential" defendant to immediately write down this statement as accurately as possible so that memory is not the only reference.

The most daunting words of this section require a person acting "in cooperation with" a law enforcement personnel to disclose any statement made a defendant. This is a broad and unlimited statement on its face. For example, would an EMT who cooperates with a police officer during an EMS call for a heroin overdose, be deemed to be working "in cooperation with" the police officer? Assume the cooperation would simply be honoring a request to roll a victim onto his back so that the police officer could search the pockets of the victim.

We opine that the word "cooperation" is probably tailored more towards cooperating in the criminal investigation and is not so broad to include the above scenario, but time and case law will answer this question.

New Requirement

Section 245.20(1)(c) requires the prosecutor to disclose:

> The names and adequate contact information for all persons other than law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto…

The Impact

This specific requirement is new and did not exist under Article 240. This paragraph does not require the disclosure of the physical address of a witness, but a court may direct the disclosure of a physical address of the above individual. However, with regard to an emergency service work, it is most likely that "adequate contact information" would simply include a contract person at the fire department or ambulance service who can get in touch with the witness and produce the witness when necessary. There is nothing inherently invasive in this requirement.

It is also vital to note that prosecutors are not required to "ascertain the existence of witnesses not known to the police or another law enforcement agency" (CPL § 245.20[2]) although the prosecutor is deemed to know what the police know as to evidence and potential witnesses. Nothing in this new Article 245 requires the police to learn the names of all potential witnesses.

New Requirement

Section 245.20(1)(d) requires the prosecutor to disclose:

> The name and work affiliation of all law enforcement personnel whom the prosecutor knows to have evidence or information relevant to any offense charged or to any potential defense thereto, including a designation by the prosecutor as to which of those persons may be called as witnesses.

The Impact

This specific requirement is new and did not exist under Article 240. This section most likely applies to arson investigators who could be deemed to be law enforcement personnel. However, this is not an overly daunting requirement and does not provide any confidential information as to the investigators as the information provided is simply the names and employers. This would not apply to the ordinary firefighter or EMT who is not otherwise a police officer (eg: Nassau County).

New Requirement

Section 245.20(1)(e) requires the prosecutor to disclose:

> All statements, written or recorded or summarized in any writing or recording, made by persons who have evidence or information relevant to any offense charged or to any potential defense thereto, including all police reports, notes of police and

> other investigators, and law enforcement agency reports. This provision also includes statements, written or recorded or summarized in any writing or recording, by persons to be called as witnesses at pre-trial hearings.

The Impact

This specific requirement is new and did not exist under Article 240. This provision imposes a small burden upon anyone who is in possession of any written or recorded statement made by anyone with information relevant to the alleged crime. This could include PCRs, fire reports, investigator notes and any other similar report. This also would include any statements caught on any type of recording device, such as a dash camera, helmet camera, drone footage or personal phone, made by anyone observing a relevant event.

We note that although the prosecutor has the obligation to disclose this information, there is no obligation imposed on the witness or owner of the recorded statements to inform anyone that this material exists. Nor are there any penalties upon an individual who possesses the information for failure to disclose. Note that police have always had the ability to investigate, review and seize evidence such as these statements, subject to a valid warrant or subpoena.

New Requirement

Section 245.20(1)(f) requires the prosecutor to disclose:

> Expert opinion evidence, including the name, business address, current curriculum vitae, a list of publications, and all proficiency tests and results administered or taken within the past ten years of each expert witness whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, and all reports prepared by the expert that pertain to the case…

The Impact

This somewhat new provision most likely would apply to arson investigators. Arson investigators are considered expert witnesses. This burden is minimal as very little information is required to be turned over. The prior law, section 240.20(1)(c) did require disclosure of reports and scientific testing relating to the criminal actions but did not require disclosure of the credentials and history of the expert.

New Requirement

Section 245.20(1)(g) requires the prosecutor to disclose:

> All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged criminal incident…

The Impact

This is not an overly new requirement as prior section 240.20(1)(g) required the prosecutor to turn over "tapes or other electronic recordings which the prosecutor intends to introduce at trial". The main difference with the prior legislation is that this material must be turned over regardless of

whether the prosecutor believes it to be relevant or whether the prosecutor intends to use it at trial. The relevance of the materials does not dictate the obligation to disclose it.

This material would include 911 recordings of all channels, dash cameras in vehicles, body and helmet cameras, drone footage, firehouse video cameras, personal phone recordings and pictures.

Again, the obligation here is not on the fire department or EMS agency to turn the information over but only upon the prosecutor to turn it over once the prosecutor's office is aware of the material. We note also that this same information would be subject to disclosure under the Freedom of Information Act unless some type of exclusion applied under such law.

Requirement

Section 245.20(1)(h) requires the prosecutor to disclose:

> All photographs and drawings made or completed by a public servant engaged in law enforcement activity, or which were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing, or which relate to the subject matter of the case…

The Impact

These are not new requirements as former section 240.2(1)(d) contained provisions very similar to these requirements. This continues to require the photographs and drawings made by a person whom the prosecutor intends to call as a witness to be disclosed.

Requirement

Section 245.20(1)(k) requires the prosecutor to disclose any evidence which could exonerate the defendant, including:

> All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment.

The Impact

Arguably this may not be a completely new requirement as former section 240.20(1)(h) imposed the obligation upon the prosecutor to disclose exculpatory evidence required to be disclosed under the federal and state constitutions. This section requires that "all evidence and information" that "tends to" be exculpatory be turned over by the prosecutor to the defendant. This still does not impose an obligation upon the original possessor of the information to disclose the same to the prosecutor.

Requirement

Pursuant to CPL § 245.20(1)(m), the prosecutor must disclose "a list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant."

The Impact

This new requirement generally does not impact fire and EMS workers, other than perhaps arson investigators who may seize evidence from the scene. Firefighter and EMS workers normally would identify potential evidence and immediately notify the police of its existence. Every firefighter and EMS worker should know that they should never disturb a potential crime scene by removing potential evidence from the scene.

Requirement

Pursuant to CPL § 245.20(1)(p), the prosecutor must disclose "A complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses" (other than those witnesses who are experts).

The Impact

This is not a completely new requirement as former CPL § 240.45 required the prosecutor to disclose "a record of judgment of conviction of a witness the people intend to call at trial" but only if the record of convictions was known to the prosecutor. The prosecutor now is required to run a criminal background check on all persons "designated as potential prosecution witnesses".

Therefore, should the prosecutor, in the first fifteen days or thereafter formulate a list of potential witnesses which includes firefighters or EMTs, the prosecutor must run some type of criminal background check on such individuals. This information would be disclosed to the defendant and presumably be used to impeach the creditability of a witness. However, as most firefighters and EMTs should not have a criminal history and it is infrequent that the testimony of a firefighter or EMT is needed, the expansion of this former law should not be an unreasonable burden.

Be clear that this does not require performing background checks upon every person on a fire, rescue or medical scene. Nor is there any requirement that the potential witness has to actively participate in the background check as it appears that the background check can be performed generally on name only. The statute imposes no obligation upon the witness to provide any information. There is no penalty imposed upon a witness that fails to provide information necessary to complete a criminal background check or to cooperate in the criminal background check. A Division of Criminal Justice (DCJS) full background check requires fingerprinting. The statute does not provide any subpoena authority to compel a witness to produce their information or fingerprints.

It is important to note, however, an omission from the prior law. Prior CPL § 240.45(1) provided that it "shall not be construed to require the prosecutor to fingerprint a witness or otherwise cause the division of criminal justice services or other law enforcement agency or court to issue a report concerning a witness".. No similar language appears in this new Article 245. The omission of

this statutory language certainly will raise a number of challenges from defendants as to what type of criminal background check was conducted, but this is not an issue for the fire or EMS personnel.

Duties of the prosecution

Pursuant to CPL § 245.20(2), the prosecutor is under the obligation to "make a diligent, good faith effort to ascertain the existence of material or information discoverable" above "and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control". Note also that this statute "shall not require the prosecutor to ascertain the existence of witnesses not known to the police or another law enforcement agency, or the written or recorded statements thereof".

This statute does not impose any obligation or undue hardships upon firefighters, EMTs or other witnesses to reach out to the prosecutor or law enforcement, though we are not suggesting that such persons impede the investigation by refusing to participate or hide any relevant information.

Duties of the defendant

Pursuant to CPL § 245.20(4), the defendant also must disclose the names, addresses, birth dates, and all statements, written or recorded or summarized in any writing or recording, of those persons other than the defendant whom the defendant intends to call as witnesses at trial or a pre-trial hearing. This is not substantially new and would not burden a firefighter or EMT or their agency.

The new statute now requires the defendant to disclose:

> the name, address, birth date, and all statements, written or recorded or summarized in any writing or recording, of a person whom the defendant intends to call as a witness for the sole purpose of impeaching a prosecution witness is not required until after the prosecution witness has testified at trial.

This would involve the disclosure of the names of an incredibly small set of individuals, being only those who are called to impeach the character of the prosecution's witnesses.

Nor does this section require a witness such as a firefighter or EMT to disclose their address or come forward to the defendant. This does not present a burden to the firefighter or EMT.

Redaction permitted

Pursuant to CPL § 245.20(6), either side is permitted to redact the social security numbers of witnesses from any information disclosed.

Court order to preserve evidence

Pursuant to CPL § 245.30(1), a court may now order that "any individual, agency or other entity in possession, custody or control of items which relate to the subject matter of the case or are otherwise relevant" are required to preserve such items for a given period of time. Such an order would result in the requirement for any fire department, EMS agency or member thereof to preserve in its original form, any item such as a photograph, message, video, recording or any other item covered above.

Persons who are ordered to preserve the information must comply or face serious penalties.

Discretionary discovery by order of the court.

Pursuant to CPL § 245.23(3), a court has the discretion to require any agency or individual to produce any material information or potential evidence to the defendant. This request is made to the court and the individual or agency in possession of such material or information must receive notice of the request. If such an order is granted the material or information must be disclosed to the defendant. The court may refuse to issue the order or may vacate the order upon showing that producing the material or information would cause an undue hardship on the possessor of such material or information.

Duties to disclose

CPL § 245.60 makes clear that the duties to make disclosures are upon the prosecutor and the defendant but not witnesses.

Protection orders

The drafters of Article 245 considered that a defendant may attempt to intimidate or cause the intimidation of witnesses after their names are disclosed. To alleviate this concern, CPL § 245.70(1) provides that a court may order that "discovery or inspection of any kind of material or information [such as the names of witnesses] be denied, restricted, conditioned or deferred, or make such other order as is appropriate."

The court may order that certain information related to witnesses be given only to the counsel for the defendant and that the attorney's employees not be permitted to provide this information to the actual defendant or anyone else. The violation of this protective order by the defense attorney or his employee is a crime in and of itself.

Right of defense attorney to subpoena witnesses

Although not new, the attorney for the defendant has the authority to subpoena the attendance of witnesses as if the court has itself issued the subpoena. CPL § 610.20. However, the subpoena does not require the witnesses to give testimony that would otherwise be protected.

Note that the defense attorney cannot issue a subpoena to a government entity such as a fire district, village or city without a court order. Thus, all fire departments other than possibly "independent" fire departments may only be issued a court ordered subpoena.

Questions raised to our law firm

We have received a number of questions and have seen a number of statements made by non-attorneys regarding this new criminal justice reforms. We will attempt to address them here and to continue to expand the list as they are received.

It is again very important to clarify that nothing in this law changes the protections, if any, offered to any type of document, recording, statement or other potentially evidentiary material.

Question: Is an EMS agency or fire department required to turn over Pre-Hospital Care Reports or notes involving medical conditions under this new law?

Answer: There is no change in the law or new requirements imposed under this law. Case law requires that a judge sign any order for the production of medical records, other than the defendant's request for his own medical records, including PCRs, before they be released. See, *People v. Brito,* 26 Misc.3d 1097. A judge must also sign an order permitting the testimony of any medical provider regarding a defendant's medical conditions or treatment. Of course, a medical examiner has the authority to issue a subpoena for testimony and other reports. N.Y.S. County Law § 674.

Question: Must copies of "run sheets" showing the names of responders be turned over? Must notes or other reports (other than medical related reports) be turned over?

Answer: Any information which is demanded pursuant to a proper subpoena must be turned over to the defendant or the prosecutor, unless otherwise protected by law. Run sheets of fire departments and the names of first responders on fire department run sheets are subject to Freedom of Information requests and are not generally protected regardless of this new statute. Article 245 does not require the fire department to notify the police or the prosecutor of the existence of the run sheet.

Question: May a police agency confiscate a camera or phone for the purpose of securing evidence?

Answer: Nothing in this new Article 245 affects the rights of witnesses who possess potentially relevant evidence. This article does not require or protect the disclosure of evidence while in the possession of a witness and only addresses the evidence once it is possessed by a police agency, a prosecutor or the defendant. Therefore, the answer to this question is outside the scope of this new Article 245.

We do note, however, that Article 245, as discussed above, does require that any subpoena attempting to secure evidence from a government agency must be on notice to the government agency. The government agency may move for a protective order from the court.

The Fourth Amendment of the United States Constitution protects individuals from unreasonable search and seizure of their property, even if the seizure is only temporary. In order for police to secure a camera or other personal item from a witness, it is almost guaranteed that a Court issued warrant would be required. Police generally have no authority to seize personal possessions without a search warrant.

Question: Is the fire department or EMS agency required to turn over the home addresses of the responders?

Answer: No. This Article 245 does not require the disclosure of the physical address of a witness, althought a court may direct the disclosure of a physical address of the responder/witness. However, it is most likely that "adequate contact information" would simply include a contract person at the fire department or ambulance service who can get in touch with the witness and produce the witness when necessary. There is nothing inherently invasive in this requirement.

Question: Is the fire department or EMS agency required to turn over personal information such as the birth date or phone number of a responder?

Answer: Absolutely not. Nothing in this Article 245 imposes any such requirement.

Question: Is a firefighter or EMT required to provide personal information which allows the prosecutor to perform a criminal background check?

Answer: No. The full answer to this question is recited above. News stories have circulated which claim the contrary but there is no basis in the law to support these allegations.

The Pinsky Law Group, PLLC represents hundreds of fire departments and EMS agencies throughout New York State. The law firm maintains a website at www.pinskylaw.com. Bradley M. Pinsky served as past Chief of the Manlius Fire Department and has been in the emergency services since 1988. David Garwood has over 30 years in the fire service. Mr. Pinsky lectures throughout North America and has authored two books and hundreds of articles on managing fire departments and EMS agencies. The law firm hosts the popular "Fire & EMS Law and Management Conference" in March/April of every year.