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December 31, 2019

FIRE SERVICE ADVISORY

New Criminal Discovery Laws and the Fire Service

Dear Fire Service Colleague:

On April 12, 2019 the Governor signed into law Chapter 59 of the Laws of 2019. That Chapter was part of an "omnibus budget bill" and contained many changes to state law, in addition to addressing budget matters, including a substantial revision of the laws pertaining to the "discovery" laws in criminal proceedings.

You may have seen media reports as the new law is about to be implemented on January 1, 2020. The new law, Article 245 of the Criminal Procedure Law, provides new provisions related to the disclosure of materials in criminal cases by the prosecution to the defense, including "automatic" disclosure, often within short time frames.

Normally the Fire Service is rarely affected by criminal proceedings; most frequently our involvement with a criminal case is as EMS providers or fire chiefs as first arrivals on an emergency scene. Our review of the new law and procedures suggests that such minimal involvement by the Fire Service in criminal proceedings will likely remain the same.

However, in recent weeks several inaccurate and in some instances, inflammatory, accounts have circulated in social and mainstream media which claim that these new laws will cause enormous intrusions into the private matters of our members as well as incurring outrageous legal fees for protecting us from these intrusions.

That simply is not true.

First, we have attached a copy of the actual law for your own review, Criminal Procedure Law 245.20, which sets out the provisions for the new "automatic discovery" under the law. We want you to see it directly for yourselves.

Next, we want to draw your attention to a couple of its provisions, to the limited extent they *might* affect you and your agency.

The first paragraph of this section is vitally important to a thoughtful understanding of this law:

> *"The prosecution shall 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****, including but not limited to…"* [Emphasis supplied]

That last phrase is crucial and bears repeating: "*in the possession, custody or control of the prosecution* ***or persons under the prosecution's direction or control***."

Members of the Fire Service are not a part of law enforcement or a district attorney's office: the Fire Service is a separate branch of public service, and is no more a part of a prosecutor's case or under the direction or control of a prosecutor than a member of the Department of Public Works or any other municipal agency.

That is a vital distinction that this new law makes: only if someone, including those in the Fire Service, were acting "*under the prosecution's direction or control*" then and only then do those provisions that follow in Criminal Procedure Law 245. 20 sections 1 (a) through (u) apply, which seem to be the subject matter of the uninformed and wrong commentaries being circulated.

For the sake of argument only, the only remotely applicable provisions of CPL 245.20 which might apply IF a member of the Fire Service were "*under the prosecution's direction or control*" would be sections 1 (c), (j) and (p).

Let's look at those sections.

Section 1(c)[1] has to do with "the names and adequate contact information" for all persons other than law enforcement personnel whom the prosecution knows to have "evidence or information relevant" to the offense charged or defense to such charge, including someone the prosecution may call as a witness.

So, if a Fire Service agency member, while "*under the prosecution's direction or control*" ends up having evidence or relevant information to the charges or defenses to the charges, the prosecution must provide that member's name and contact information to the defense.

But what constitutes "adequate contact information"?

First, it DOES NOT INCLUDE PHYSICAL ADDRESSES! That can only be done by court order after a showing of "good cause." So, it is simply not true that your agency personnel must disclose their residence address to people charged with a crime.

Read section 1 (c) closely.

We would expect any contact to be made through the agency, at the agency's address.

Next, section 1 (j) may have some relevancy, again only if someone in the Fire Service was (here comes that crucial phrase again!) "*under the prosecution's direction or control*" and performed a physical examination which was *"made by or at the request of a public servant engaged in law enforcement activity*" or "*by a person whom the prosecutor intends to call as a witness*."

But that applies only to the production of reports, documents and records.

Third, CPL 245.10 section 1 (p) might have some possible applicability for Fire Service personnel acting, again only "*under the prosecution's direction or control*" and who would be called as a witness. In that instance, a "complete record of judgements of conviction" for the potential witness must be produced … by the prosecution. So, if your agency has someone with a criminal conviction, that record must be disclosed by the prosecution (not by the member or the agency) to the defense.

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[1] CPL 245.20 (1)(c): "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, including a designation by the prosecutor as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a motion and good cause shown the court may direct the disclosure of a physical address. Information under this subdivision relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.70 of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown." [Emphasis supplied]

The suggestion that all of your personnel are going to be subject to invasive background checks because of this law is simply wrong.

Finally, we want to offer some guidance, in the event that your agency and your personnel becomes involved as a witness to a criminal proceeding.

Generally speaking, and unless your personnel are in the unlikely position of being "*under the prosecution's direction or control*" your personnel are going to be subpoenaed to appear, whether before a grand jury, a pre-trial hearing or at trial itself. But that process will generally be controlled by the local District Attorney's office in coordination with your agency, *just as it is done currently*.

The claims of intrusiveness are simply not borne-out by a solid reading of the statute itself.

Of course, you can always seek the input of your local District Attorney's Office. Please be respectful of their time: a forum at a County Chiefs' meeting would be a good way to inform many Fire Service leaders at the same time, with the same message. But we suspect that this issue is so significantly below the radar of your District Attorney because your agency is NOT an agent of law enforcement or the prosecution and the provisions of this law have so little applicability to the Fire Service.

And please keep in mind that your agency's insurance policy should contain a provision or rider that includes "miscellaneous" legal proceedings coverages and would offset any costs incurred seeking legal counsel in the unlikely event that this statute is invoked with your agency.

I apologize for the unusual length of this Advisory. However, given the incredible amount of mis-information, uninformed rumor and sheer speculation currently being circulated, we believe that this is an instance where "more" is better.

Best wishes for a safe 2020!

Very truly yours,

Mark C. Butler, Esq.

MCB:dfs
Attachment: Criminal Procedure Law 245.20 (Effective January 1, 2020)

NOTICE: This document is intended for general information purposes to inform members of the Fire Service in New York state of recent legislative changes affecting the Fire Service. This does not create an attorney-client relationship and you should seek competent legal counsel to assist you and your agency.

New York Criminal Procedure Law § 245.20

Effective January 1, 2020

§ 245.20. Automatic discovery.

1. Initial discovery for the defendant. The prosecution shall 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, including but not limited to:

(a) 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.

(b) All transcripts of the testimony of a person who has testified before a grand jury, including but not limited to the defendant or a co-defendant. If in the exercise of reasonable diligence, and due to the limited availability of transcription resources, a transcript is unavailable for disclosure within the time period specified in subdivision one of section 245.10 of this article, such time period may be stayed by up to an additional thirty calendar days without need for a motion pursuant to subdivision two of section 245.70 of this article; except that such disclosure shall be made as soon as practicable and not later than thirty calendar days before the first scheduled trial date, unless an order is obtained pursuant to section 245.70 of this article. When the court is required to review grand jury transcripts, the prosecution shall disclose such transcripts to the court expeditiously upon receipt by the prosecutor, notwithstanding the otherwise-applicable time periods for disclosure in this article.

(c) 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, including a designation by the prosecutor as to which of those persons may be called as witnesses. Nothing in this paragraph shall require the disclosure of physical addresses; provided, however, upon a motion and good cause shown the court may direct the disclosure of a physical address. Information under this subdivision relating to a confidential informant may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.70 of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

(d) 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. Information under this subdivision relating to undercover personnel may be withheld, and redacted from discovery materials, without need for a motion pursuant to section 245.70 of this article; but the prosecution shall notify the defendant in writing that such information has not been disclosed, unless the court rules otherwise for good cause shown.

(e) 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.

(f) 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, or if no report is prepared, a written statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. This paragraph does not alter or in any way affect the procedures, obligations or rights set forth in section 250.10 of this title. If in the exercise of reasonable diligence this information is unavailable for disclosure within the time period specified in subdivision one of section 245.10 of this article, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article; except that the prosecution shall notify the defendant in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than sixty calendar days before the first scheduled trial date, unless an order is obtained pursuant to section 245.70 of this article. When the prosecution's expert witness is being called in response to disclosure of an expert witness by the defendant, the court shall alter a scheduled trial date, if necessary, to allow the prosecution thirty calendar days to make the disclosure and the defendant thirty calendar days to prepare and respond to the new materials.

(g) All tapes or other electronic recordings, including all electronic recordings of 911 telephone calls made or received in connection with the alleged criminal incident, and a designation by the prosecutor as to which of the recordings under this paragraph the prosecution intends to introduce at trial or a pre-trial hearing. If the discoverable materials under this paragraph exceed ten hours in total length, the prosecution may disclose only the recordings that it intends to introduce at trial or a pre-trial hearing, along with a list of the source and approximate quantity of other recordings and their general subject matter if known, and the defendant shall have the right upon request to obtain recordings not previously disclosed. The prosecution shall disclose the requested materials as soon as practicable and not less than fifteen calendar days after the defendant's request, unless an order is obtained pursuant to section 245.70 of this article.

(h) 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.

(i) All photographs, photocopies and reproductions made by or at the direction of law enforcement personnel of any property prior to its release pursuant to section 450.10 of the penal law.

(j) All reports, documents, records, data, calculations or writings, including but not limited to preliminary tests and screening results and bench notes and analyses performed or stored electronically, concerning physical or mental examinations, or scientific tests or experiments or comparisons, relating to the criminal action or proceeding which were made by or at the request or direction of 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 the prosecution intends to introduce at trial or a pre-trial hearing. Information under this paragraph also includes, but is not limited to, laboratory information management system records relating to such materials, any preliminary or final findings of nonconformance with accreditation, industry or governmental standards or laboratory protocols, and any conflicting analyses or results by laboratory personnel regardless of the laboratory's final analysis or results. If the prosecution submitted one or more items for testing to, or received results from, a forensic science laboratory or similar entity not under the prosecution's direction or control, the court on motion of a party shall issue subpoenas or orders to such laboratory or entity to cause materials under this paragraph to be made available for disclosure.

(k) 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. Information under this subdivision shall be disclosed whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information. The prosecutor shall disclose the information expeditiously upon its receipt and shall not delay disclosure if it is obtained earlier than the time period for disclosure in subdivision one of section 245.10 of this article.

(l) A summary of all promises, rewards and inducements made to, or in favor of, persons who may be called as witnesses, as well as requests for consideration by persons who may be called as witnesses and copies of all documents relevant to a promise, reward or inducement.

(m) A list of all tangible objects obtained from, or allegedly possessed by, the defendant or a co-defendant. The list shall include a designation by the prosecutor as to which objects were physically or constructively possessed by the defendant and were recovered during a search or seizure by a public servant or an agent thereof, and which tangible objects were recovered by a public servant or an agent thereof after allegedly being abandoned by the defendant. If the prosecution intends to prove the defendant's possession of any tangible objects by means of a statutory presumption of possession, it shall designate such intention as to each such object. If reasonably practicable, the prosecution shall also designate the location from which each tangible object was recovered. There is also a right to inspect, copy, photograph and test the listed tangible objects.

(n) Whether a search warrant has been executed and all documents relating thereto, including but not limited to the warrant, the warrant application, supporting affidavits, a police inventory of all property seized under the warrant, and a transcript of all testimony or other oral communications offered in support of the warrant application.

(o) All tangible property that relates to the subject matter of the case, along with a designation of which items the prosecution intends to introduce in its case-in-chief at trial or a pre-trial hearing. If in the exercise of reasonable diligence the prosecutor has not formed an intention within the time period specified in subdivision one of section 245.10 of this article that an item under this subdivision will be introduced at trial or a pre-trial hearing, the prosecution shall notify the defendant in writing, and the time period in which to designate items as exhibits shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.60 of this article.

(p) A complete record of judgments of conviction for all defendants and all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision, other than those witnesses who are experts.

(q) When it is known to the prosecution, the existence of any pending criminal action against all persons designated as potential prosecution witnesses pursuant to paragraph (c) of this subdivision.

(r) The approximate date, time and place of the offense or offenses charged and of the defendant's seizure and arrest.

(s) In any prosecution alleging a violation of the vehicle and traffic law, where the defendant is charged by indictment, superior court information, prosecutor's information, information, or simplified information, all records of calibration, certification, inspection, repair or maintenance of machines and instruments utilized to perform any scientific tests and experiments, including but not limited to any test of a person's breath, blood, urine or saliva, for the period of six months prior and six months after such test was conducted, including the records of gas chromatography related

to the certification of all reference standards and the certification certificate, if any, held by the operator of the machine or instrument. The time period required by subdivision one of section 245.10 of this article shall not apply to the disclosure of records created six months after a test was conducted, but such disclosure shall be made as soon as practicable and in any event, the earlier of fifteen days following receipt, or fifteen days before the first scheduled trial date.

(t) In any prosecution alleging a violation of section 156.05 or 156.10 of the penal law, the time, place and manner such violation occurred.

(u)

(i) A copy of all electronically created or stored information seized or obtained by or on behalf of law enforcement from: (A) the defendant as described in subparagraph (ii) of this paragraph; or (B) a source other than the defendant which relates to the subject matter of the case.

(ii) If the electronically created or stored information originates from a device, account, or other electronically stored source that the prosecution believes the defendant owned, maintained, or had lawful access to and is within the possession, custody or control of the prosecution or persons under the prosecution's direction or control, the prosecution shall provide a complete copy of the electronically created or stored information from the device or account or other source.

(iii) If possession of such electronically created or stored information would be a crime under New York state or federal law, the prosecution shall make those portions of the electronically created or stored information that are not criminal to possess available as specified under this paragraph and shall afford counsel for the defendant access to inspect contraband portions at a supervised location that provides regular and reasonable hours for such access, such as a prosecutor's office, police station, or court.

(iv) This paragraph shall not be construed to alter or in any way affect the right to be free from unreasonable searches and seizures or such other rights a suspect or defendant may derive from the state constitution or the United States constitution. If in the exercise of reasonable diligence the information under this paragraph is not available for disclosure within the time period required by subdivision one of section 245.10 of this article, that period shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article, except that the prosecution shall notify the defendant in writing that such information has not been disclosed, and such disclosure shall be made as soon as practicable and not later than forty-five calendar days before the first scheduled trial date, unless an order is obtained pursuant to section 245.70 of this article.

2. Duties of the prosecution. The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section 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; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution. The prosecution shall also identify any laboratory having contact with evidence related to the prosecution of a charge. This subdivision 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, under paragraph (c) or (e) of subdivision one of this section.

3. Supplemental discovery for the defendant. The prosecution shall disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court

information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of (a) impeaching the credibility of the defendant, or (b) as substantive proof of any material issue in the case. In addition the prosecution shall designate whether it intends to use each listed act for impeachment and/or as substantive proof.

4. Reciprocal discovery for the prosecution. (a) The defendant shall, subject to constitutional limitations, disclose to the prosecution, and permit the prosecution to discover, inspect, copy or photograph, any material and relevant evidence within the defendant's or counsel for the defendant's possession or control that is discoverable under paragraphs (f), (g), (h), (j), (l) and (o) of subdivision one of this section, which the defendant intends to introduce at trial or a pre-trial hearing, and 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.

(b) Disclosure of 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.

(c) If in the exercise of reasonable diligence the reciprocally discoverable information under paragraph (f) or (o) of subdivision one of this section is unavailable for disclosure within the time period specified in subdivision two of section 245.10 of this article, such time period shall be stayed without need for a motion pursuant to subdivision two of section 245.70 of this article; but the disclosure shall be made as soon as practicable and subject to the continuing duty to disclose in section 245.60 of this article.

5. Stay of automatic discovery; remedies and sanctions. Section 245.10 and subdivisions one, two, three and four of this section shall have the force and effect of a court order, and failure to provide discovery pursuant to such section or subdivision may result in application of any remedies or sanctions permitted for non-compliance with a court order under section 245.80 of this article. However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, such party may move for a protective order pursuant to section 245.70 of this article and production of the item shall be stayed pending a ruling by the court. The opposing party shall be notified in writing that information has not been disclosed under a particular section. When some parts of material or information are discoverable but in the judgment of a party good cause exists for declining to disclose other parts, the discoverable parts shall be disclosed and the disclosing party shall give notice in writing that non-discoverable parts have been withheld.

6. Redactions permitted. Either party may redact social security numbers and tax numbers from disclosures under this article.

7. Presumption of openness. There shall be a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article.