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## **OLR Bill Analysis**

### **SB 653**

#### ***AN ACT CONCERNING OPEN FILE DISCLOSURE IN CRIMINAL CASES.***

#### **SUMMARY**

This bill broadens the type of information that prosecutors must provide to defendants in a criminal proceeding upon request. It requires a prosecutor, upon receiving a written request from such a defendant, to disclose in writing the existence of, provide photocopies of, and allow the defendant to inspect, copy, photograph, and have reasonable tests made on certain items within the control of the prosecutor, the state, a state agency, or a state contractor. The bill eliminates a requirement for a court order for such disclosures. Under the bill, the prosecutor must make the disclosure promptly, but no later than 45 days after the defendant files the request unless the court extends the time for good cause shown.

Currently, a prosecutor, within 30 days of a defendant entering a not guilty plea in a criminal case, must automatically disclose any exculpatory information or material (i.e., evidence tending to establish a defendant's innocence) that he or she may have regarding the defendant. Under the bill, the prosecutor must only disclose the exculpatory information, including the results of a DNA analysis, at the defendant's request and in the timeframe described above for other disclosures under the bill.

The bill requires the prosecutor to disclose certain additional information to the defendant's attorney at least 35 days before the criminal trial starts. In cases where a defendant is charged with a class A, B, or C felony, the bill (1) requires both the defendant and prosecutor to acknowledge any disclosures under the bill and (2) establishes a time frame for doing so.

The bill also requires the prosecution and defense in a criminal trial, upon a request from the opposing party, to disclose their witness list in advance of the trial.

The bill permits any party to object to any disclosure requirement under the bill. The court must evaluate the objection and make a determination about it in the manner provided in the Connecticut Practice Book.

Several of the bill's other provisions also incorporate practice book requirements applicable to discovery and pretrial motions, including provisions related to protective orders and disclosure limitations (see BACKGROUND).

The bill also makes minor, technical, and conforming changes.

EFFECTIVE DATE: January 1, 2020

#### **REQUIRED DISCLOSURES**

The bill broadens the type of information that a prosecutor must provide to a defendant in a criminal proceeding upon request and eliminates the requirement for the defendant to get a court order for that access. Currently, the prosecutor, upon the defendant's request and a court order following a showing that the items sought may be material to preparing the defense and that the request is reasonable, must provide access to the following materials:

1. written or recorded statements, admissions, or confessions by the defendant;
2. books, papers, documents or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process;
3. copies of records of any physical or mental examinations of the defendant; and
4. records or copies of records of the defendant's prior convictions.

The materials must be in state possession, custody, or control and their existence must be known to the prosecutor or defendant in order to be subject to disclosure.

Under the bill, the additional information and materials to which the prosecutor must promptly provide access to the defendant without a court order include:

1. relevant police or uniform arrest reports, including all recorded written or oral witness statements;
2. relevant books, papers, documents, photographs, or other tangible materials;
3. relevant recorded written and oral statements, admissions, or confessions by the defendant;
4. relevant records or copies of records of a prior conviction for the defendant or any witness; and
5. any warrant executed for the defendant's arrest for the offense charged, and any search and seizure warrants issued in connection with the investigation of the offense charged.

The information must be disclosed promptly or no later than 45 days after the request is filed unless the court grants an extension for good cause shown.

The bill also requires prompt disclosure of disculpatory information to the defendant upon his or her request. Under current law, the prosecutor must make such disclosures automatically. It also eliminates a provision that allows the prosecutor to request an ex parte, in camera (i.e., private) hearing with a judge other than the one who is presiding over the criminal case to determine whether any material or information is exculpatory.

***Additional Disclosures***

The bill also requires the prosecutor to obtain and disclose to the defendant's attorney certain additional information within the control

of the prosecutor, the state, a state agency, or a state contractor. The defendant and his or her counsel do not need to make a request for the prosecutor to make these disclosures. They must be made as soon as possible but no later than 35 days before the start of the criminal trial unless the court adjusts the period upon the defendant's or prosecutor's motion and for good cause shown. This additional information includes:

1. expert reports or statements made in connection with the case, including results of physical or mental examinations, scientific tests, experiments, or comparisons;
2. tapes and transcripts of any electronic surveillance of conversations involving the defendant, any codefendant, or witness in the case;
3. a summary of any unwritten or unrecorded admissions or confessions made by the defendant or any codefendant; and
4. copies of relevant records of any physical or mental examinations of the defendant.

Upon the defendant's request, the prosecutor must provide any information or material subject to disclosure under the bill in the same electronic format and file type, if any, in which the state maintains the information or material. If before or during the trial the prosecutor discovers additional information or materials that must be automatically disclosed to the defendant under the bill, the prosecutor must immediately disclose them.

***Acknowledgment of Disclosures to the Court***

Under the bill, in a case where a defendant is charged with a class A, B, or C felony, the defendant and prosecutor must acknowledge in writing or otherwise on the record in open court, the disclosure of all information or material the prosecutor provided the defendant as required under the bill. They must make this acknowledgment before (1) the defendant accepts a guilty or nolo contendere plea; (2) the court requires a defendant to accept or reject a plea agreement, the rejection

of which would cause the case to go to trial; or (3) trial.

The bill permits either party to object to any of the bill's disclosure requirements and requires the court to evaluate and make a determination about the objection in the manner provided in the practice book.

***List of Disclosures***

The bill requires the prosecutor to provide the defendant an itemized list of information or material disclosed under the bill. The list must be in the order the prosecutor disclosed the information or materials. The defendant must acknowledge receipt of any such list on the record.

**WITNESS LIST DISCLOSURES AND TESTIMONY**

Currently, after a witness for the prosecution in a criminal case has testified in direct examination, the court must order the prosecutor, upon the defendant's motion, to deliver directly to the defendant any oral or written statements from the witness in the prosecutor's possession if the statement relates to the testimony. The court must strike the witness's testimony from the record if the prosecutor fails to comply with a court order to provide witness statements to the defendant.

The bill instead allows the defendant, his or her attorney, or the prosecutor to request that the opposing party disclose the name and address of any person he or she may use as a witness to present evidence at trial. Such requests must be made at least 30 days before jury selection is scheduled to begin, or if it is a trial without a jury at least 30 days before the presentation of evidence is scheduled to begin. The party receiving the request generally must disclose the requested information no later than 10 days after receiving the request and subject to the relevant practice book provisions. On a party's motion and notice to the other parties, the court may order one or more of the other parties to disclose the requested information at an earlier date. Under existing law and the bill, information about victims of sexual assault, family violence, voyeurism, or child endangerment can be

withheld (see CGS §§ 54-86d & -86e).

The bill permits the court to strike witness testimony from the record if the defendant, his or her attorney, or the prosecutor fails to comply with these requirements. As under current law, after the court strikes the witness testimony from the record, the trial proceeds unless the court in its discretion declares a mistrial after determining that the interest of justice so requires.

### **POLICE OFFICER DISCLOSURES**

The bill broadens the circumstances in which a peace officer must disclose information to the prosecutor in charge of a criminal investigation. Currently, an officer must disclose in writing any exculpatory information or material that he or she has regarding a criminal investigation to the prosecutor in charge of it. The bill instead requires officers to make such disclosures about an investigation to the prosecutor in charge of any criminal case for which the officer knows or should know the investigation is relevant. (It is unclear how an officer “should know” that an investigation is relevant.)

The bill additionally requires the prosecutor to represent to the defendant and court at least 35 days before the trial starts that he or she has (1) asked each officer in the case whether the officer has made the prosecutor aware of all such information or material and (2) disclosed all such information or material to the defendant.

### **DISCLOSURE LIMITATIONS**

Under the bill, the disclosures a prosecutor or defendant make may be limited in the manner provided in the practice book provisions related to information not subject to disclosure (e.g., internal documents related to the prosecution or defense or legal research).

#### ***Protective Order***

The bill also permits either party to move for a protective order, in accordance with the related practice book provisions, to prevent the disclosure of certain information or material.

Under the bill, the court may issue an order in the manner and form

provided in the practice book in response to a (1) protective order request or (2) motion from a party alleging the other party's failure to comply with the bill's disclosure requirements.

***Tests or Experiments on Materials***

Additionally, the bill requires a party in a criminal case to give reasonable notice and an opportunity to be present to any other party to the case or person known or believed to have an interest in the case, if (1) the party intends to perform a scientific test or experiment on any material subject to disclosure under the bill and (2) the test or experiment may preclude or impair future tests or procedures.

The court may order otherwise for good cause. The party or other person may have an expert observe or participate in the test or experiment.

**BACKGROUND**

***Connecticut Practice Book***

Chapters 40 and 41 establish rules for discovery, depositions, and pretrial motions. Among other things, the chapters specify the information that is subject to disclosure and impose deadlines for disclosing it; impose a continuing obligation on parties to disclose information subject to discovery; and establish a procedure through which a court can order information to be withheld.

**COMMITTEE ACTION**

Judiciary Committee

Joint Favorable

Yea 25    Nay 15    (04/09/2019)