



Senate

General Assembly

January Session, 2019

File No. 831

Senate Bill No. 653

Senate, April 29, 2019

The Committee on Judiciary reported through SEN. WINFIELD of the 10th Dist., Chairperson of the Committee on the part of the Senate, that the bill ought to pass.

AN ACT CONCERNING OPEN FILE DISCLOSURE IN CRIMINAL CASES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. Section 54-86a of the general statutes is repealed and the
2 following is substituted in lieu thereof (*Effective January 1, 2020*):

3 [(a) Upon motion of a defendant at any time after the filing of the
4 indictment or information, and upon a showing that the items sought
5 may be material to the preparation of his defense and that the request
6 is reasonable, the court shall order the attorney for the state to permit
7 the defendant to inspect and copy or photograph any relevant (1)
8 written or recorded statements, admissions or confessions made by the
9 defendant; (2) books, papers, documents or tangible objects obtained
10 from or belonging to the defendant or obtained from others by seizure
11 or process; (3) copies of records of any physical or mental
12 examinations of the defendant; and (4) records of prior convictions of
13 the defendant, or copies thereof, within the possession, custody or
14 control of the state, the existence of which is known to the attorney for

15 the state or to the defendant.

16 (b) An order of the court granting relief under subsection (a) of this
17 section shall specify the time, place and manner of making the
18 discovery and inspection permitted and may prescribe such terms and
19 conditions as are just.

20 (c) A motion under subsection (a) of this section may be made only
21 in a criminal case and shall include all relief sought under subsection
22 (a) of this section. A subsequent motion may be made only upon a
23 showing of cause why such motion would be in the interest of justice.]

24 [(d)] (a) Prior to the arraignment of any arrested person before the
25 court to determine the existence of probable cause to believe such
26 person committed the offense charged or to determine the conditions
27 of such person's release pursuant to section 54-64a, the [attorney for
28 the state] prosecutorial official shall provide the arrested person or his
29 or her counsel with a copy of any affidavit or report submitted to the
30 court for the purpose of making such determination; except that the
31 court may, upon motion of the [attorney for the state] prosecutorial
32 official and for good cause shown, limit the disclosure of any such
33 affidavit or report, or portion thereof.

34 (b) Upon written request by a defendant filed in accordance with
35 section 41-5 of the Connecticut Practice Book, as amended from time to
36 time, and without requiring any order of the court, the prosecutorial
37 official, subject to section 40-40 et seq. of the Connecticut Practice Book,
38 as amended from time to time, shall promptly, but no later than forty-
39 five days from the filing of such request, unless such time is extended
40 by the court for good cause shown, disclose in writing the existence of,
41 provide photocopies of, and allow the defendant in accordance with
42 section 40-7 of the Connecticut Practice Book, as amended from time to
43 time, to inspect, copy, photograph and have reasonable tests made on
44 any of the following items that are within the possession, custody or
45 control of the prosecutorial official, the state or any agent of the state,
46 including a person under contract with the state: (1) Relevant police or
47 uniform arrest reports, including all recorded statements, whether oral

48 or written, of all witnesses; (2) relevant books, papers, documents,
49 photographs or other tangible materials; (3) relevant recorded
50 statements, whether oral or written, admissions or confessions made
51 by the defendant; (4) relevant records or copies of such records of any
52 prior conviction of the defendant or any witness; (5) any warrant
53 executed for the arrest of the defendant for the offense charged, and
54 any search and seizure warrants issued in connection with the
55 investigation of the offense charged; and (6) exculpatory information
56 and material with respect to the defendant. Upon request from a
57 defendant, the prosecutorial official shall provide such information
58 and material in the same electronic format and file type, if any, in
59 which the state maintains such information and material.

60 (c) As soon as practicable, but not later than thirty-five days before
61 the start of a trial in a criminal case, except that the court may, upon
62 motion of the defendant or prosecutorial official and for good cause
63 shown, adjust such period of time, the prosecutorial official shall
64 obtain and disclose to the attorney for the defendant the following
65 information and material not required to be disclosed under
66 subsection (b) of this section and that is within the possession, custody
67 or control of the prosecutorial official, the state or any agent of the
68 state, including a person under contract with the state: (1) Reports or
69 statements of experts made in connection with the particular case,
70 including results of physical or mental examinations and of scientific
71 tests, experiments or comparisons; (2) tapes and transcripts of any
72 electronic surveillance of conversations involving the defendant, any
73 codefendant or witness in the case; (3) a summary of any unwritten or
74 unrecorded admissions or confessions made by the defendant, or any
75 codefendant; and (4) copies of relevant records of any physical or
76 mental examinations of the defendant. Upon request from the
77 defendant, the prosecutorial official shall provide any such
78 information or material in the same electronic format and file type, if
79 any, in which the state maintains such information or material. If prior
80 to or during trial, the prosecutorial official discovers additional
81 information or material that must be disclosed to the defendant under
82 this subsection, the prosecutorial official shall immediately disclose

83 such information or material.

84 (d) In the case of a defendant charged with a class A, B or C felony,
85 before (1) the court accepts a plea of guilty or nolo contendere, (2) the
86 court requires a defendant to accept or reject a plea agreement, the
87 rejection of which would cause the case to go to trial, or (3) trial, the
88 defendant and the prosecutorial official shall acknowledge, in writing
89 or otherwise on the record in open court, the disclosure of all
90 information or material provided to the defendant under this section.

91 (e) The prosecutorial official shall provide to the defendant an
92 itemized list of information or material disclosed pursuant to this
93 section. The listing of such information or material shall be in the order
94 in which the prosecutorial official disclosed such information or
95 material. The defendant shall acknowledge receipt of any such list on
96 the record.

97 (f) A party may object to any requirement to disclose under this
98 section and the court shall evaluate and make a determination
99 concerning such objection in the same manner as provided in section
100 40-8 of the Connecticut Practice Book, as amended from time to time.

101 Sec. 2. Section 54-86b of the general statutes is repealed and the
102 following is substituted in lieu thereof (*Effective January 1, 2020*):

103 [(a) In any criminal prosecution, after a witness called by the
104 prosecution has testified on direct examination, the court shall on
105 motion of the defendant order the prosecution to produce any
106 statement oral or written of the witness in the possession of the
107 prosecution which relates to the subject matter as to which the witness
108 has testified, and the court shall order said statement to be delivered
109 directly to the defendant for his examination and use.]

110 (a) In any criminal prosecution, except as provided in sections 54-
111 86d and 54-86e, not later than the thirtieth day before the date that jury
112 selection is scheduled to begin or in the case of a trial without a jury, or
113 not later than the thirtieth day before the date that presentation of

114 evidence is scheduled to begin, the defendant or the attorney for the
115 defendant or prosecutorial official may request that the other party
116 disclose the name and address of any person the party receiving such
117 request may use as a witness at trial to present evidence. Such
118 disclosure shall be made in writing not later than the tenth day after
119 receiving such request and subject to the provisions of section 40-10 of
120 the Connecticut Practice Book, as amended from time to time. On
121 motion of a party and after notice from the moving party to the other
122 parties, the court may order an earlier date on which one or more of
123 the other parties must disclose such requested information.

124 (b) If the [prosecution fails to comply with the order of the court]
125 defendant or the attorney for the defendant or the prosecutorial official
126 fails to comply with the provisions of subsection (a) of this section, the
127 court [shall] may strike from the record the testimony of the witness
128 and the trial shall proceed unless the court in its discretion shall
129 determine that the interests of justice require that a mistrial be
130 declared.

131 Sec. 3. Section 54-86c of the general statutes is repealed and the
132 following is substituted in lieu thereof (*Effective January 1, 2020*):

133 [(a) Not later than thirty days after any defendant enters a plea of
134 not guilty in a criminal case, the state's attorney, assistant state's
135 attorney or deputy assistant state's attorney in charge of the case shall
136 disclose any exculpatory information or material which he may have
137 with respect to the defendant whether or not a request has been made
138 therefor. If prior to or during the trial of the case, the prosecutorial
139 official discovers additional information or material which is
140 exculpatory, he shall promptly disclose the information or material to
141 the defendant.

142 (b) Any state's attorney, assistant state's attorney or deputy assistant
143 state's attorney may request an ex parte in camera hearing before a
144 judge, who shall not be the same judge who presides at the hearing of
145 the criminal case if the case is tried to the court, to determine whether
146 any material or information is exculpatory.]

147 [(c)] Each peace officer, as defined in subdivision (9) of section 53a-
148 3, shall disclose in writing any exculpatory information or material
149 which [he] such peace officer may have with respect to any criminal
150 investigation to the prosecutorial official in charge of [such case] any
151 criminal case for which such peace officer knows or should know such
152 investigation is relevant. Not later than thirty-five days prior to the
153 start of trial, the prosecutorial official shall represent to the defendant
154 and the court that such prosecutorial official has inquired of each
155 peace officer in the case whether such peace officer has made the
156 prosecutorial official aware of all such information or material and that
157 all such information or material has been disclosed to the defendant.

158 Sec. 4. Subsection (b) of section 54-86k of the general statutes is
159 repealed and the following is substituted in lieu thereof (*Effective*
160 *January 1, 2020*):

161 (b) If the results of the DNA analysis tend to exculpate the accused,
162 the prosecuting authority shall disclose such exculpatory information
163 or material to the accused in accordance with section [54-86c] 54-86a,
164 as amended by this act.

165 Sec. 5. (NEW) (*Effective January 1, 2020*) (a) Notwithstanding the
166 provisions of sections 54-86a to 54-86c, inclusive, of the general
167 statutes, as amended by this act, any disclosure of information or
168 material made by a prosecutorial official or a defendant pursuant to
169 said sections may be limited in the same manner as provided in
170 sections 40-14 and 40-31 of the Connecticut Practice Book, as amended
171 from time to time.

172 (b) Notwithstanding the provisions of sections 54-86a to 54-86c,
173 inclusive, of the general statutes, as amended by this act, a party to a
174 criminal case may move for a protective order to prevent the
175 disclosure of certain information or material in accordance with the
176 provisions of 40-40 to 40-43, inclusive, of the Connecticut Practice
177 Book, as amended from time to time, in which case the court may issue
178 an order in the same manner and form as provided in said sections of
179 the Connecticut Practice Book.

180 (c) Upon motion of a party, the court may find that an opposing
181 party failed to comply with disclosure requirements under the
182 provisions of sections 54-86a to 54-86c, inclusive, of the general
183 statutes, as amended by this act, in which case the court may issue an
184 order in the same manner and form as provided in section 40-5 of the
185 Connecticut Practice Book, as amended from time to time.

186 (d) Unless the court orders otherwise for good cause, if a party to a
187 criminal case intends to perform a scientific test or experiment on any
188 material subject to disclosure under the provisions of sections 54-86a to
189 54-86c, inclusive, of the general statutes, as amended by this act, and
190 such test or experiment may preclude or impair any further tests or
191 experiments on such material, such party shall give reasonable notice
192 and opportunity to be present to any other party to the criminal case
193 and any other person known to have or believed to have an interest in
194 the matter, unless the court orders otherwise for good cause. Such
195 other party or other person may have an expert observe or participate
196 in the test or experiment.

This act shall take effect as follows and shall amend the following sections:

Section 1	<i>January 1, 2020</i>	54-86a
Sec. 2	<i>January 1, 2020</i>	54-86b
Sec. 3	<i>January 1, 2020</i>	54-86c
Sec. 4	<i>January 1, 2020</i>	54-86k(b)
Sec. 5	<i>January 1, 2020</i>	New section

JUD *Joint Favorable*

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 20 \$	FY 21 \$
Criminal Justice, Div.	GF - Cost	577,135	1,017,509
State Comptroller - Fringe Benefits ¹	GF - Cost	188,871	398,517

Note: GF=General Fund

Municipal Impact: None

Explanation

The bill expands the types of evidence that must be disclosed to defense counsel by request and within 45 days and results in a cost of \$766,006 in FY 20 (partial year costs) and \$1,416,026 in FY 21 associated with new personnel, equipment, and related fringe benefits. It is anticipated that this bill will significantly increase the workload of each of the judicial districts (JD) and that each JD will require one (two in the JDs with the highest traffic – Hartford and New Haven) additional paralegal (\$61,138), one high speed scanner (\$7,200) to fulfill the requirements of the bill, and \$50,000 for various other costs (transcripts, media/thumb drives, etc).

The Out Years

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation.

¹The fringe benefit costs for most state employees are budgeted centrally in accounts administered by the Comptroller. The estimated active employee fringe benefit cost associated with most personnel changes is 41.19% of payroll in FY 20 and FY 21.

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)