



# COMMONWEALTH of VIRGINIA

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The Honorable Holly B. Smith  
Commonwealth's Attorney  
County of Gloucester  
Post Office Box 456  
Gloucester, Virginia 23061

Dear Ms. Smith:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether the Commonwealth must reveal the names, addresses, and phone numbers of her trial witnesses, including confidential informants in narcotics cases, as part of the Commonwealth's discovery obligation.

## Response

It is my opinion that the Commonwealth is under no general obligation to disclose the names, addresses, and telephone numbers of her witnesses as part of the discovery process in a criminal case. Nevertheless, it is my further opinion that pursuant to *Brady v. Maryland*,<sup>1</sup> due process of law requires the Commonwealth to disclose the identity of those witnesses who have information that is favorable to the accused, when that evidence is material to the defendant's guilt or punishment. Finally, it is my opinion that, when a confidential informant in a narcotics case possesses exculpatory information under the *Brady* standard, or is an "active participant" in the criminal activity at issue at trial, the prosecution must disclose the informant's identity to the defense within a reasonable time in advance of trial.

## Background

You relate that your office, in "open file" discovery, provides detailed information regarding whether an informant has been paid for his information, may receive consideration for a pending charge, and the extent of his criminal history. You further state that you do not normally provide the name, address, or telephone number of the informant as part of discovery.

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<sup>1</sup> 373 U.S. 83 (1963).

### Applicable Law and Discussion

There is no general right to discovery in a criminal case.<sup>2</sup> Nonetheless, the Commonwealth is bound by the discovery rules established by the Supreme Court of Virginia and by any constitutional due process constraints that may require the prosecution to disclose certain information to the defendant.

The Rules of the Supreme Court generally prescribe the scope of discovery, and they provide only limited discovery rights to criminal defendants.<sup>3</sup> Such Rules do not include a requirement for the Commonwealth to disclose witnesses' names, addresses, or phone numbers.<sup>4</sup> Rather, Rule 3A:11 provides only that upon the timely motion of a defendant accused of a felony in Circuit Court or any misdemeanor brought on direct indictment, the court shall order the Commonwealth to permit the inspection and copying or photographing of certain enumerated items.<sup>5</sup> The identities and other information of witnesses are not included among the list of discoverable material.<sup>6</sup> Moreover, this Rule, by its express terms, "does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth," or otherwise command the disclosure of witness information.<sup>7</sup>

Correspondingly, Rule 7C:5, which applies to all criminal and traffic cases in the General District Court, provides that upon the timely motion of a defendant accused of a misdemeanor punishable by confinement or in advance of a preliminary hearing for a felony, the court shall order the Commonwealth to permit the inspection and copying or photographing of certain express items.<sup>8</sup> This Rule does not require the disclosure of witness information. Accordingly, I conclude that the discovery rules do not require the Commonwealth to disclose witness information.

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<sup>2</sup> *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Watkins v. Commonwealth*, 229 Va. 469, 479, 331 S.E.2d 422, 430 (1985) (citing *Weatherford*, 429 U.S. at 559); *Lowe v. Commonwealth*, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977) (citing *Weatherford*, 429 U.S. at 559); see also 1993 Op. Va. Att'y Gen. 128, 129 (citing *Lowe*, 218 Va. at 679, 239 S.E.2d at 118).

<sup>3</sup> Part Four of the Rules of the Supreme Court governs pretrial procedures, depositions, and production at trial, Va. Sup. Ct. Rs. 4:0 through 4:15, but is expressly limited to civil actions. See Va. Sup. Ct. R. 4:0. Part Three A of the Rules, Va. Sup. Ct. Rs. 3A:1 through 3A:25, which contains provisions applicable to criminal proceedings, includes only one rule that is related to discovery. See Va. Sup. Ct. R. 3A:11. That rule, by its terms, applies only to criminal proceedings "in circuit courts and juvenile and domestic relations district courts (except proceedings concerning a child in a juvenile and domestic relations district court)." *Id.* at Subpart (a).

<sup>4</sup> *Lowe*, 218 Va. at 679, 239 S.E.2d at 118 ("Our rule providing for discovery in a criminal case contains no provision requiring the Commonwealth to furnish the names and addresses of the eyewitnesses to a crime."); *Watkins*, 229 Va. at 479, 331 S.E.2d at 430-31 (citing *Weatherford*, 429 U.S. at 559; *Lowe*, 218 Va. at 679, 239 S.E.2d at 118) (finding that the trial court properly denied the defendant's discovery motion seeking the names and addresses of all potential witnesses for the Commonwealth).

<sup>5</sup> Va. Sup. Ct. R. 3A:11(a), (b). The Commonwealth generally is required to provide discovery pursuant to the Rules "only where the defendant requests such evidence, and the trial court orders the discovery of the requested evidence." *Lawson v. Commonwealth*, 35 Va. App. 610, 622, 547 S.E.2d 513, 519 (2001) (emphasis in original).

<sup>6</sup> Applicable here is the maxim of statutory construction "expressio unius est exclusio alterius," which "provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute." *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)).

<sup>7</sup> Va. Sup. Ct. R. 3A:11(b)(2).

<sup>8</sup> Va. Sup. Ct. R. 7C:1, 7C:5(a), (c).

The Due Process Clause similarly does not place a general or express duty on the Commonwealth to disclose her witnesses' names or other information before trial.<sup>9</sup> Nevertheless, as ruled by the United States Supreme Court in *Brady v. Maryland*,<sup>10</sup> due process does require the Commonwealth to provide a defendant with evidence that is both favorable (either because it is exculpatory or impeaching) and material to the defendant's guilt or punishment.<sup>11</sup> The Court of Appeals of Virginia addressed the application of the Due Process Clause to the disclosure of the identities of confidential informants in a narcotics case in its foundational decision in *Commonwealth v. Keener*.<sup>12</sup> The Court specifically considered whether the defendant's conviction should be reversed based on the Commonwealth's failure to disclose the identity of a confidential informant, an alleged *Brady* violation.<sup>13</sup>

The *Keener* Court differentiated between two classes of informants: "active participants" (individuals who are present and witness material events) and "mere tipsters" (those who solely provide information to the police).<sup>14</sup> Because the informant in *Keener* had arranged both a meeting and the drug transaction between the defendant and the undercover officer, she was an "active participant" in the drug distribution that gave rise to the defendant's criminal charges.<sup>15</sup> The Court therefore found that the informant's testimony may have established a defense of entrapment or provided a mitigating factor for the jury to consider in sentencing the defendant.<sup>16</sup> Even though the informant testified during trial, the Court ruled that late disclosure of her identity prejudiced the defendant.<sup>17</sup> Thus, the Court determined that the Commonwealth had violated the defendant's due process rights by failing to disclose the identity of the police informant before trial.<sup>18</sup> The Court stated that "disclosure of the informant's identity is required where the informer is an actual participant, particularly where he helps set up the criminal

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<sup>9</sup> *Watkins*, 229 Va. at 479, 331 S.E.2d at 430-31 (citing *Weatherford*, 429 U.S. at 559; *Lowe*, 218 Va. at 679, 239 S.E.2d at 118).

<sup>10</sup> 373 U.S. 83, 87 (1963).

<sup>11</sup> *Id.* at 87; *Lowe*, 218 Va. at 679, 239 S.E.2d at 118; *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also* *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

<sup>12</sup> 8 Va. App. 208, 380 S.E.2d 21 (1989). *See also* *Hatcher v. Commonwealth*, 17 Va. App. 614, 616-17, 440 S.E.2d 416, 418-19 (1994).

<sup>13</sup> *Keener*, 8 Va. App. at 210, 380 S.E.2d at 22. The defendant in *Keener* did not specifically request disclosure of the informant's identity, *see* *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), but instead made a general request for discovery and exculpatory evidence pursuant to *Brady*, which the trial court granted. *Keener*, 8 Va. App. at 210, 215, 380 S.E.2d at 22, 25.

<sup>14</sup> *Keener*, 8 Va. App. at 212-13, 380 S.E.2d at 24.

<sup>15</sup> *Id.* at 213, 380 S.E.2d at 24.

<sup>16</sup> *Id.* at 213, 216, 380 S.E.2d at 24 (citing *Roviaro*, 353 U.S. at 64), 26.

<sup>17</sup> *Id.*, at 216, 380 S.E.2d at 26.

<sup>18</sup> *Id.* In your letter, you note that the confidential informants will testify at trial, and thus, the defendant will be aware of the informant's identity and have the opportunity to cross-examine this witness.

occurrence.”<sup>19</sup> Moreover, disclosure of exculpatory evidence must be made before trial to “afford [the defendant] a reasonable time to investigate and prepare [for] trial.”<sup>20</sup>

Therefore, based upon these constitutional due process principles, I conclude that the Commonwealth has an obligation to disclose the identity of those individuals with exculpatory information,<sup>21</sup> including any witnesses who are “active participant” informants.<sup>22</sup> This conclusion represents an exception to the general rule that “the identity of a person furnishing the prosecution with information concerning criminal activities is privileged,”<sup>23</sup> and thus not discoverable under the provisions of Rule 3A:11.

### Conclusion

Accordingly, it is my opinion that the Commonwealth is under no general obligation to disclose the names, addresses, and telephone numbers of her witnesses as part of the discovery process in a criminal case. Nevertheless, it is my further opinion that pursuant to *Brady v. Maryland*, due process of law requires the Commonwealth to disclose the identity of those witnesses who have information that is favorable to the accused, when that evidence is material to the defendant’s guilt or punishment. Finally, it is my opinion that, when a confidential informant in a narcotics case possesses exculpatory information under the *Brady* standard, or is an “active participant” in the criminal activity at issue at trial, the prosecution must disclose the informant’s identity to the defense within a reasonable time in advance of trial.<sup>24</sup>

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>19</sup> *Id.* at 213, 380 S.E.2d at 24 (quoting *United States v. Price*, 783 F.2d 1132, 1138 (4th Cir. 1986), quoting *McLawn v. North Carolina*, 484 F.2d 1, 5 (4th Cir. 1973)) (internal citations omitted).

<sup>20</sup> *Gilchrist v. Commonwealth*, 227 Va. 540, 546-47, 317 S.E.2d 784, 787 (1984).

<sup>21</sup> *Keener*, 8 Va. App. at 216, 380 S.E.2d at 26. Conceivably, there could be a case in which knowledge of the witness’ phone number and address is material and beneficial to a defendant, such as to show contact between parties (or the absence thereof) in phone records. In such a case, the Commonwealth also should provide this information to the defendant. The duty to determine in the first instance whether evidence is exculpatory rests with the individual prosecutor. *Cherricks v. Commonwealth*, 11 Va. App. 96, 101, 396 S.E.2d 397, 400 (1990); *see also* 1993 Op. Va. Att’y Gen. at 130.

<sup>22</sup> Nonetheless, to what extent witness information must be disclosed in a particular case is beyond the scope of this Opinion.

<sup>23</sup> *Hatcher v. Commonwealth*, 17 Va. App. at 616, 440 S.E.2d at 418, (quoting *Daniel v. Commonwealth*, 15 Va. App. 736, 739, 427 S.E.2d 423, 425 (1993), and citing *Gray v. Commonwealth*, 233 Va. 313, 328, 356 S.E.2d 157, 165, *cert. denied*, 484 U.S. 873 (1987)).

<sup>24</sup> *See* 1993 Op. Va. Att’y Gen. at 130-31.