



## **MDAO Post-Conviction Open File Discovery Policy**

### **WHAT IS POST-CONVICTION OPEN FILE DISCOVERY**

The Middlesex District Attorney's Office (MDAO) is deeply committed to ensuring fairness and transparency in its discovery processes both pretrial and post-conviction. In recognition of this commitment, the MDAO has enacted a progressive post-conviction open file discovery policy that exceeds its obligations under the law.

Unlike pretrial discovery pursuant to Mass. R. Crim. P. 14, post-conviction discovery is not automatic. Under Mass. R. Crim. P. 30(c)(4), a defendant must file a motion and affidavits that establish a prima facie case for post-conviction relief before the court may, in its discretion, authorize discovery. However, the MDAO recognizes that, in order to make such a prima facie showing, a defendant may need to receive basic discovery from the Commonwealth's file.

As such, even in the absence of an initial showing by the defendant of a prima facie case for post-conviction relief, the MDAO will make all reasonable efforts to provide a defendant who presents a plausible claim of factual innocence or wrongful conviction with access to evidence currently in its case file in order to ensure the defendant is able to properly prepare for and explore legal challenges to their conviction. This information includes, where appropriate:

- Written or recorded statements made by the defendant or co-defendant(s);
- Grand jury minutes;
- All expert reports;
- Police reports,<sup>1</sup> photographs, tangible objects, exhibits, reports of physical examinations of any person or scientific tests or experiments, written or recorded statements, or other statements of fact;
- Any existing materials related to identification procedures (if applicable); and
- Promises, rewards, or inducements offered, or ultimately made, to witnesses the Commonwealth called to testify at trial.

The MDAO reserves the right to (1) redact or withhold documents in its discretion in order to protect the privacy of victims or witnesses and to comply with any applicable court order or statute, (2) seek protective orders before providing the defendant with discovery where appropriate, (3) withhold documents if required to do so by law; and (4) redact privileged information unless that privileged information contains exculpatory evidence or statements of fact.

As noted above, this policy does not provide general access to attorney-client privileged material or attorney work product because such material is, by definition, non-evidentiary in nature.<sup>ii</sup> Further, information pertaining to the identity of confidential informants and identifying information of Commonwealth witnesses in proffer letters and cooperation agreements will not typically be provided. The Commonwealth will document any materials withheld from disclosure and the reasons for withholding them, and will preserve the withheld materials in its case file.

## **HOW TO MAKE A POST-CONVICTION OPEN FILE DISCOVERY REQUEST**

Unlike pretrial discovery pursuant to Mass. R. Crim. P. 14, post-conviction discovery is not automatic. In order for the MDAO to consider a defendant's request for post-conviction open file discovery, a defendant or their counsel should send a written request by mail to

Public Records Access Officer  
Re: Post-Conviction Open File Discovery Request  
Middlesex District Attorney's Office  
15 Commonwealth Avenue  
Woburn, MA 01801

or by email at [NOR-MDAOPublicRecords@mass.gov](mailto:NOR-MDAOPublicRecords@mass.gov). This written request must contain the following:

1. An articulation of a basic legal claim or theory you would like to explore that has not been raised before – such articulation will assist the MDAO in producing appropriately responsive materials;
2. Confirmation that the requestor does not already have the information sought in their possession;
3. *For pro se defendants*: Confirmation that the defendant first tried to obtain their file from trial counsel; and
4. *For post-conviction counsel*: Confirmation that post-conviction counsel made all reasonable efforts to obtain the information sought from other sources including (1) the defendant's prior counsel, (2) the applicable court(s), and (3) their client.

The MDAO will review each request and notify the defendant or post-conviction counsel if the request has met the above four requirements of the MDAO post-conviction open file discovery policy.<sup>iii</sup> If a request is granted, an Assistant District Attorney will work with the requestor to provide discovery as appropriate. Inspection of the MDAO file may be satisfied by delivering print or electronic copies to the requestor, and the MDAO may set a reasonable limit on the number of copies of the same document it provides to the same requestor.<sup>iv</sup>

If the request is denied, the requestor may attempt to cure any deficiencies in their original request by resubmitting their request.

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<sup>i</sup> The MDAO has an obligation to protect a victim or witness' privacy years after a case's conclusion. As such, victim and witness dates of birth, addresses, and social security numbers will be redacted from all police reports provided. However, if a defendant articulates a specific investigatory need for this identifying information, the MDAO will provide such information in its discretion.

<sup>ii</sup> This policy does not provide a defendant with unfettered access to MDAO files. For instance, aside from portions of documents that constitute exculpatory evidence or statements of fact, a defendant is not entitled to MDAO work product, which includes, but is not limited to, a prosecutor's notes, theories, opinions, conclusions, or legal research. See "Expanded Discovery in Criminal Cases: A Policy Review," [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death\\_penalty\\_reform/expanded\\_20discovery20policy20briefpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded_20discovery20policy20briefpdf.pdf). ("Open file discovery grants the defense access to all unprivileged information that (with due diligence) is known or should be known to the prosecution, law enforcement agencies acting on behalf of the prosecution, or other agencies such as forensics testing laboratories working for the prosecution."). Attorney work product includes legal research, memoranda and other documents prepared by attorneys in their role as legal advocates. See Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 314 (2009), "that convey[] the 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'" Attorney Gen. v. Facebook, Inc., 487 Mass. 109, 127 (2021), quoting Mass. R. Civ. P. 26(b)(3). See Mass. R. Crim. P. 14(a)(5) (defining work product as "those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff . . ."). See also A.B.A. STANDARDS FOR CRIMINAL JUSTICE – DISCOVERY, Part VI: Limitations on Disclosure, Standard 11-6.1 (i) Automatic Limitations, 4<sup>th</sup> Edition (2020) (open file discovery does not entitle defendant to "legal research, records, correspondence, reports, or memoranda made by the prosecutor . . . or members of their legal or investigative staff, to the extent that they contain the opinions, theories, or conclusions of the prosecutor . . . or members of those attorneys' legal or investigative staff.").

<sup>iii</sup> The MDAO, in its discretion, may choose to provide open file discovery even where all four requirements are not met.

<sup>iv</sup> See Massachusetts Conviction Integrity Working Group, "Conviction Integrity Programs: A Guide to Best Practices for Prosecutorial Offices," p. 27, ¶ 22 (March 2021).