State of Vermont
Department of Public Safety
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To: House Committee on Government Operations
From: Department of Public Safety
Date: April 21, 2022
Re: S. 250 - An act relating to law enforcement data collection and interrogation (As Passed by the Senate)

The Department of Public Safety supports the direction of reforms in S. 250, including the provisions for increased data collection, establishing a statewide *Giglio* database, and recording custodial interrogations. These measures will help build trust and consistency in the criminal justice system.

However, the Department does not support the current version of the proposed *Giglio* database because more work is needed to clarify its basic operation. The Department recommends working with stakeholder to revise this version consistent with the following concerns. The proposed database received little attention and testimony in the Senate Committee on Government Operations, and the following topics require greater clarity in statute:

- The categories of potential impeachment information;
- The gatekeepers, if any, who determine what information is included in the database;
- Those who can contribute information to the database other than a law enforcement agency's executive officer, and;
- A due process mechanism for notice to officers and opportunity to challenge the information proposed to be included in the database.

The proposed *Giglio* database in S. 250 requires a database of "potential impeachment information" based on broad categories similar to the categories of potential impeachment information in Department of Justice (DOJ) Policy 9-5.100.[1] These categories in DOJ policy are part of a multi-step gatekeeping process to review the credibility and relevance of the information by agency officials and prosecutors before ultimately determining whether to include the information in a "*Giglio* system of records." S. 250 uses broad categories like DOJ

[1] These categories include "*any allegation* of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation, "information that *may be used to suggest* that the law enforcement officer is biased for or against a defendant," and "information that reflects that the law enforcement officer's ability to perceive and recall truth is impaired" (emphasis added). Information fitting these categories requires an individual judgment, presumably by an agency's executive officer, that could be avoided with more concrete categories. These categories are also silent on the handling of allegations that are unsubstantiated, not credible, or have resulted in exoneration.

policy, but it lacks the DOJ gatekeeping process to determine the credibility and relevance of the potential impeachment information subject to inclusion in the database.

Under DOJ policy, allegations that are unsubstantiated, not credible, or have resulted in exoneration generally are not considered potential impeachment information and are only disclosed to the prosecuting office under certain circumstances. Agency officials disclose other potential impeachment information to the prosecutor, who "asses[es] the information" in light of the particular case and determines what information is subject to disclosure to the court or defense. Finally, the prosecutor can determine whether to add the information to a "*Giglio* system of records" under certain circumstances, along with any "written analysis or substantive communications, including legal advice, relating to that disclosure or decision." This multi-step gatekeeping process narrows the information included in a system of records from the broad categories of potential impeachment information under the DOJ policy. Under this bill, this multi-step gatekeeping process does not exist, but the broad categories remain. This raises basic questions about the scope of the proposed categories and the process to determine what information should be included in the database.

For example, the proposed categories currently include findings that an officer engaged in an unlawful search or seizure. This category would include every court decision granting a motion to suppress or dismiss based on a challenged search or seizure. Such findings may have nothing to do with an officer's credibility, but may rather be the result of a reasonable but mistaken belief about what the law permitted at the time. This category does not make this distinction. More broadly, S. 250 is silent on the treatment of allegations that are unsubstantiated, not credible, or have resulted in exoneration. To address these and similar concerns, the Department recommends narrowing and clarifying the categories, establishing a gatekeeping process, or both. The Department also recommends clarifying who can contribute information to the database beyond an agency's executive officer. It is unclear, for example, whether prosecutors or others in the criminal justice system can contribute information to the database.

Additionally, the Department recommends providing a due process mechanism in statute for notice to officers and an opportunity to challenge the information proposed to be included in the database. Other states, including Colorado and New Hampshire, have such provisions.[2] The Department recommends tailoring a provision to Vermont law that provides a timely and practical mechanism to challenge the inclusion of information in the database while satisfying due process considerations for the affected officers.

The Department welcomes the opportunity to work with stakeholders to address these issues, including the Department of State's Attorneys and Sheriffs and the Vermont Criminal Justice Council.

[2] See Colo. Rev. Stat. Ann. § 24-31-303(1)(t); N.H. Rev. Stat. Ann. § 105:13-d.