

STATE OF NEW YORK

3334

2017-2018 Regular Sessions

IN SENATE

January 20, 2017

Introduced by Sens. BAILEY, DILAN, LATIMER, MONTGOMERY, PARKER, PERKINS
-- read twice and ordered printed, and when printed to be committed to
the Committee on Codes

AN ACT to amend the criminal procedure law and the penal law, in
relation to criminal discovery; and to repeal certain provisions of
the criminal procedure law relating thereto

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. Article 240 of the criminal procedure law is REPEALED.
2 § 2. The criminal procedure law is amended by adding a new article 245
3 to read as follows:

ARTICLE 245 - DISCOVERY

Section 245.10 Availability of protective orders.

245.20 Phase one discovery obligation of prosecution.

245.30 Phase two discovery obligation of prosecution.

245.40 Reciprocal discovery obligation of the defendant.

245.45 Disclosure of prior misconduct or criminal acts.

245.50 Non-testimonial evidence from the defendant.

245.55 Court orders for preservation, access or discovery.

245.60 Material held by other governmental personnel.

245.65 Certificates of compliance.

245.70 Court ordered procedures to facilitate compliance.

245.75 Flow of information with police.

245.80 Continuing duty to disclose.

245.85 Work product.

245.90 Availability of remedies for violations.

245.95 Admissibility of discovery.

§ 245.10 Availability of protective orders.

1. Any discovery subject to protective order. Upon a showing of good
cause, the court may at any time order that discovery or inspection of
any kind of material or information under this article be denied,

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 restricted, conditioned or deferred, or make such other order as is
2 appropriate. The court may impose as a condition on discovery to a
3 defendant that the material or information to be discovered be available
4 only to counsel for the defendant. The court may permit a party seeking
5 or opposing a protective order under this section, or another affected
6 person, to submit papers or testify ex parte or in camera. Any such
7 papers and a transcript of such testimony shall be sealed and shall
8 constitute a part of the record on appeal. This section does not alter
9 the allocation of the burden of proof with regard to matters at issue,
10 including privilege.

11 2. Modification of time periods for discovery. Upon motion of a party
12 in an individual case, the court may alter the time periods for discov-
13 ery imposed by this article upon a showing of good cause.

14 3. Showing of good cause. Good cause under this section may include
15 constitutional limitations; danger to the integrity of physical
16 evidence; a substantial risk of physical harm, intimidation, economic
17 reprisal, bribery or unjustified annoyance or embarrassment to any
18 person; a substantial risk of an adverse effect upon the legitimate
19 needs of law enforcement, including the protection of the confidentiali-
20 ty of informants; danger to any person stemming from factors such as a
21 defendant's gang affiliation, prior history of interfering with
22 witnesses, or threats or intimidating actions directed at potential
23 witnesses; or other similar factors that outweigh the usefulness of the
24 discovery.

25 § 245.20 Phase one discovery obligation of prosecution.

26 1. Timing of phase one discovery for the defendant. The prosecution
27 shall perform its phase one discovery obligations under this section
28 within fifteen calendar days after the defendant's arraignment on an
29 indictment, superior court information, prosecutor's information, infor-
30 mation, or simplified information. Portions of materials claimed to be
31 non-discoverable may be withheld pending a determination and ruling of
32 the court under section 245.10 of this article; but the defendant shall
33 be notified in writing that information has not been disclosed under a
34 particular subdivision, and the discoverable portions of such materials
35 shall be disclosed if practicable. When the discoverable materials are
36 exceptionally voluminous, the time period in this subdivision may be
37 stayed by an additional forty-five calendar days without need for a
38 motion pursuant to subdivision two of section 245.10 of this article.

39 2. Phase one discovery for the defendant. The prosecution shall
40 disclose to the defendant as part of phase one discovery, and permit the
41 defendant to discover, inspect, copy or photograph, each of the follow-
42 ing items and information when it relates to the subject matter of the
43 case:

44 (a) All electronically stored police reports and law enforcement agen-
45 cy reports that are in the possession, custody or control of the prose-
46 cution, or persons under the prosecution's direction and control.

47 (b) All written or recorded statements, and the substance of all oral
48 statements, made by the defendant or a co-defendant to a public servant
49 engaged in law enforcement activity or to a person then acting under his
50 or her direction or in cooperation with him or her, other than state-
51 ments made in the course of the criminal transaction.

52 (c) A list of all tangible objects obtained from, or allegedly
53 possessed by, the defendant or a co-defendant. The list shall include a
54 designation by the prosecutor as to which objects were physically or
55 constructively possessed by the defendant and were recovered during a
56 search or seizure by a public servant or an agent thereof, and which

1 tangible objects were recovered by a public servant or an agent thereof
2 after allegedly being abandoned by the defendant. If the prosecution
3 intends to prove the defendant's possession of any tangible objects by
4 means of a statutory presumption of possession, it shall designate that
5 intention as to each such object. If reasonably practicable, it shall
6 also designate the location from which each tangible object was recov-
7 ered.

8 (d) The names of, and addresses or adequate alternative contact infor-
9 mation for, all persons other than law enforcement personnel whom the
10 prosecutor knows to have evidence or information relevant to any offense
11 charged or to a potential defense thereto, including a designation by
12 the prosecutor as to which of those persons may be called as witnesses.
13 Information under this paragraph relating to any person may be withheld,
14 and redacted from discovery materials, as provided in subdivision three
15 or four of this section. Information under this paragraph relating to a
16 confidential informant may be withheld, and redacted from discovery
17 materials, without need for a motion pursuant to section 245.10 of this
18 article; but the defendant shall be notified in writing that such infor-
19 mation has not been disclosed, unless the court rules otherwise for good
20 cause shown.

21 (e) The name, rank, shield number and business address of all law
22 enforcement personnel whom the prosecutor knows to have evidence or
23 information relevant to any offense charged or to a potential defense
24 thereto. Information under this paragraph relating to undercover person-
25 nel may be withheld, and redacted from discovery materials, without need
26 for a motion pursuant to section 245.10 of this article; but the defend-
27 ant shall be notified in writing that such information has not been
28 disclosed, unless the court rules otherwise for good cause shown.

29 (f) When written and recorded statements are in the possession of the
30 prosecution (not solely in the possession of police or another law
31 enforcement agency), all statements, written or recorded or summarized
32 in any writing or recording, made by persons who have evidence or infor-
33 mation relevant to any offense charged or to a potential defense there-
34 to. Statements solely in the possession of police or another law
35 enforcement agency at the time of phase one discovery are discoverable
36 under paragraph (c) of subdivision two of section 245.30 of this arti-
37 cle.

38 (g) When it is known to the prosecution (not solely known to police or
39 another law enforcement agency), all evidence and information, whether
40 or not admissible or recorded in tangible form, that tends to: (i)
41 exculpate the defendant; (ii) mitigate the defendant's culpability as to
42 a charged offense; (iii) support a potential defense to a charged
43 offense; (iv) provide a basis for a motion to suppress evidence on
44 constitutional grounds; (v) significantly impugn the credibility of an
45 important prosecution witness, informant or evidence; or (vi) mitigate
46 punishment. Favorable evidence and information known solely to police or
47 another law enforcement agency at the time of phase one discovery is
48 discoverable under paragraph (d) of subdivision two of section 245.30 of
49 this article.

50 (h) Whether a search warrant has been executed and all documents
51 relating thereto, including but not limited to the warrant, the warrant
52 application, supporting affidavits, a police inventory of all property
53 seized under the warrant, and a transcript of all testimony or other
54 oral communications offered in support of the warrant application.

55 (i) The approximate date, time and place of the offense or offenses
56 charged and of the defendant's arrest.

1 3. Prosecutor's option to restrict disclosure of contact information
2 by arranging witness interview. Within the prosecutor's discretion, the
3 address, telephone number or similar contact information for any person
4 whose name is disclosed pursuant to paragraph (d) of subdivision two of
5 this section may be withheld, and redacted from other discovery materi-
6 als, without need for a motion pursuant to section 245.10 of this arti-
7 cle, if the prosecutor makes the person available to counsel for the
8 defendant for an in person interview within the time period specified in
9 subdivision one of this section. This subdivision does not create any
10 right for the defendant personally to attend or to participate in such
11 an interview.

12 4. Prosecutor's option to restrict disclosure of contact information
13 in violent felony cases. (a) Where the defendant is charged with a
14 violent felony offense, within the prosecutor's discretion the address,
15 telephone number or similar contact information for any person whose
16 name is disclosed pursuant to paragraph (d) of subdivision two of this
17 section may be withheld, and redacted from other discovery materials,
18 without need for a motion pursuant to section 245.10 of this article;
19 except that a list of the addresses or adequate alternative contact
20 information for persons whose information has been withheld or redacted
21 shall be separately provided to counsel for the defendant in a document
22 clearly marked as confidential, unless a protective order pursuant to
23 section 245.10 of this article is issued by the court for good cause
24 shown. In addition discovery of this information may be conditioned on
25 the defendant's personal consent, given in open court in the presence of
26 the court at arraignment or at another time, to the use of the confiden-
27 tiality procedure set forth in this subdivision. The court shall
28 specifically caution the defendant, in the colloquy about use of this
29 procedure, concerning the offenses of tampering with a witness and
30 intimidating a victim or witness in article two hundred fifteen of the
31 penal law. Nothing in this subdivision precludes the court from issuing
32 a different protective order pursuant to section 245.10 of this article
33 for good cause shown.

34 (b) When the confidentiality procedure set forth in this subdivision
35 is used, the following requirements apply:

36 (i) Except as provided in subparagraph (ii) of this paragraph, counsel
37 for the defendant may not disclose or permit to be disclosed to a
38 defendant or to anyone else the list described in this subdivision or
39 its contents, unless specifically permitted to do so by the court for
40 good cause shown or unless the prosecutor gives written consent. The
41 court may allow a party seeking or opposing such permission, or another
42 affected person, to submit papers or testify ex parte or in camera. Any
43 such papers and a transcript of such testimony shall be sealed and shall
44 constitute a part of the record on appeal.

45 (ii) Notwithstanding subparagraph (i) of this paragraph, counsel for
46 the defendant may disclose or permit to be disclosed the listed contact
47 information for a potential witness to persons employed by the attorney
48 or to persons appointed by the court to assist in the preparation of a
49 defendant's case if that disclosure is required for that preparation.
50 Persons provided this information by the attorney shall be informed by
51 the attorney that further dissemination of the information, except as
52 provided by this subdivision, is prohibited. Within the prosecutor's
53 discretion, discovery of the listed contact information may be condi-
54 tioned on service of a written statement by counsel for the defendant of
55 the names of any employees who may be provided information pursuant to

1 this subsection, and describing any known prior connections between
2 those employees and all defendants in the case.

3 (iii) If the defendant is acting as his or her own attorney, the court
4 shall endeavor to protect the listed contact information for a potential
5 witness by providing for contact only through persons appointed by the
6 court to assist in the preparation of the defendant's case or by impos-
7 ing other reasonable restrictions, absent a showing of good cause.

8 § 245.30 Phase two discovery obligation of prosecution.

9 1. Timing of phase two discovery for the defendant. The prosecution
10 shall perform its phase two discovery obligations under this section
11 within ninety calendar days after the defendant's arraignment on an
12 indictment, superior court information, prosecutor's information, infor-
13 mation, or simplified information. Portions of materials claimed to be
14 non-discoverable may be withheld pending a determination and ruling of
15 the court under section 245.10 of this article; but the defendant shall
16 be notified in writing that information has not been disclosed under a
17 particular subdivision, and the discoverable portions of such materials
18 shall be disclosed if practicable. When the discoverable materials are
19 exceptionally voluminous, the time period in this subdivision may be
20 stayed by an additional thirty calendar days without need for a motion
21 pursuant to subdivision two of section 245.10 of this article.

22 2. Phase two discovery for the defendant. The prosecution shall
23 disclose to the defendant as part of phase two discovery, and permit the
24 defendant to discover, inspect, copy or photograph, each of the follow-
25 ing items and information when it relates to the subject matter of the
26 case and is in the possession, custody or control of the prosecution or
27 persons under the prosecution's direction or control:

28 (a) All transcripts of the testimony of a person who has testified
29 before a grand jury, including but not limited to the defendant or a
30 co-defendant. If in the exercise of reasonable diligence, and due to the
31 limited availability of transcription resources, a transcript is
32 unavailable for disclosure within the time period specified in subdivi-
33 sion one of this section, that period may be stayed by an additional
34 forty-five calendar days without need for a motion pursuant to section
35 245.10 of this article; except that the disclosure shall be made as soon
36 as practicable and not later than thirty calendar days before a sched-
37 uled trial date, unless an order is obtained pursuant to section 245.10
38 of this article.

39 (b) All police reports and law enforcement agency reports, including
40 those not electronically stored. Reports previously disclosed pursuant
41 to paragraph (a) of subdivision two of section 245.20 of this article
42 need not be disclosed again.

43 (c) All statements, written or recorded or summarized in any writing
44 or recording, made by persons who have evidence or information relevant
45 to any offense charged or to a potential defense thereto, including
46 those that were solely in the possession of police or another law
47 enforcement agency at the time of phase one discovery. Statements previ-
48 ously disclosed pursuant to paragraph (f) of subdivision two of section
49 245.20 of this article need not be disclosed again.

50 (d) All evidence and information, including that which was solely
51 known to police or other law enforcement agencies at the time of phase
52 one discovery, and whether or not it is admissible or recorded in tangi-
53 ble form, that tends to (i) exculpate the defendant; (ii) mitigate the
54 defendant's culpability as to a charged offense; (iii) support a poten-
55 tial defense to a charged offense; (iv) provide a basis for a motion to
56 suppress evidence on constitutional grounds; (v) impugn the credibility

1 of a prosecution witness, informant or evidence; or (vi) mitigate
2 punishment. Evidence or information previously disclosed pursuant to
3 paragraph (q) of subdivision two of section 245.20 of this article need
4 not be disclosed again.

5 (e) A summary of all promises, rewards and inducements made to persons
6 who may be called as witnesses, as well as requests for consideration by
7 persons who may be called as witnesses, and copies of all documents
8 relevant to a promise, reward or inducement.

9 (f) All tangible property that the prosecution intends to introduce in
10 its case-in-chief at trial or a pre-trial hearing. Discovery of items
11 under this paragraph may be conditioned on service of a demand to
12 produce made by the defendant, if in phase one discovery the prosecution
13 timely served notice on the defendant that a demand to produce items
14 under this paragraph would have to be served on the prosecution within
15 thirty days of that notice.

16 (g) All tapes or other electronic recordings which the prosecution
17 intends to introduce at trial or a pre-trial hearing.

18 (h) All photographs and drawings made or completed by a public servant
19 engaged in law enforcement activity, or which were made by a person whom
20 the prosecutor intends to call as a witness at trial or a pre-trial
21 hearing, or which the prosecution intends to introduce at trial or a
22 pre-trial hearing.

23 (i) All photographs, photocopies and reproductions made by or at the
24 direction of law enforcement personnel of any property prior to its
25 release pursuant to section 450.10 of the penal law.

26 (j) All reports and documents concerning physical or mental examina-
27 tions, or scientific tests or experiments or comparisons, relating to
28 the criminal action or proceeding which were made by or at the request
29 or direction of a public servant engaged in law enforcement activity, or
30 which were made by a person whom the prosecutor intends to call as a
31 witness at trial or a pre-trial hearing, or which the prosecution
32 intends to introduce at trial or a pre-trial hearing.

33 (k) Expert opinion evidence, including the name, business address,
34 current curriculum vitae, and a list of publications of each expert
35 witness whom the prosecutor intends to call as a witness at trial or a
36 pre-trial hearing, and all reports prepared by the expert that pertain
37 to the case, or if no report is prepared, a written statement of the
38 facts and opinions to which the expert is expected to testify and a
39 summary of the grounds for each opinion. This paragraph does not alter
40 or in any way affect the procedures, obligations or rights set forth in
41 section 250.10 of this title. If in the exercise of reasonable diligence
42 this information is unavailable for disclosure within the time period
43 specified in subdivision one of this section, that period shall be
44 stayed without need for a motion pursuant to section 245.10 of this
45 article; except that the disclosure shall be made as soon as practicable
46 and not later than sixty calendar days before a scheduled trial date,
47 unless an order is obtained pursuant to section 245.10 of this article.

48 (l) (i) If counsel for the defendant has access to a database by which
49 to obtain the complete criminal history of all defendants and all
50 persons designated as potential prosecution witnesses pursuant to para-
51 graph (d) of subdivision two of section 245.20 of this article, the
52 prosecutor shall either disclose a list of the birth dates and known
53 aliases of those persons, or provide the defendant with the criminal
54 history information. (ii) If counsel for the defendant lacks access to a
55 database by which to obtain the complete criminal history of all defend-
56 ants and all persons designated as potential prosecution witnesses

1 pursuant to paragraph (d) of subdivision two of section 245.20 of this
2 article, the prosecutor shall either provide counsel for the defendant
3 with access to such a database and disclose a list of the birth dates
4 and known aliases of those persons, or provide the defendant with the
5 criminal history information.

6 (m) When it is known to the prosecution, the existence of any pending
7 criminal action against all persons designated as potential prosecution
8 witnesses pursuant to paragraph (d) of subdivision two of section 245.20
9 of this article.

10 (n) In any prosecution alleging a violation of the vehicle and traffic
11 law, where the defendant is charged by indictment, superior court infor-
12 mation, prosecutor's information, information, or simplified informa-
13 tion, the most recent record of inspection, calibration and repair of
14 machines and instruments utilized to perform any scientific tests and
15 experiments and the certification certificate, if any, held by the oper-
16 ator of the machine or instrument, and all other disclosures required
17 under this article.

18 (o) In any prosecution alleging a violation of section 156.05 or
19 156.10 of the penal law, the time, place and manner such violation
20 occurred.

21 § 245.40 Reciprocal discovery obligation of the defendant.

22 1. Timing of reciprocal discovery for the prosecution. The defendant
23 shall perform his or her reciprocal discovery obligations under this
24 section within thirty calendar days after being served with the prose-
25 cution's certificate of compliance pursuant to subdivision one of
26 section 245.65 of this article. Portions of materials claimed to be
27 non-discoverable may be withheld pending a determination and ruling of
28 the court under section 245.10 of this article; but the prosecution
29 shall be notified in writing that information has not been disclosed
30 under this section, and the discoverable portions of such materials
31 shall be disclosed if practicable.

32 2. Reciprocal discovery for the prosecution. The defendant shall,
33 subject to constitutional limitations, disclose to the prosecution, and
34 permit the prosecution to discover, inspect, copy or photograph, each of
35 the following items and information when it is within the defendant's or
36 counsel for the defendant's possession or control:

37 (a) The names, known aliases, addresses and birth dates of all persons
38 other than the defendant whom the defendant intends to call as witnesses
39 at trial or a pre-trial hearing. Disclosure of this information for a
40 person whom the defendant intends to call as a witness for the sole
41 purpose of impeaching a prosecution witness is not required until after
42 the prosecution witness has testified.

43 (b) All statements, written or recorded or summarized in any writing
44 or recording, made by all persons other than the defendant whom the
45 defendant intends to call as witnesses at trial or a pre-trial hearing;
46 except that disclosure of such statements made by a person whom the
47 defendant intends to call as a witness for the sole purpose of impeach-
48 ing a prosecution witness is not required until after the prosecution
49 witness has testified.

50 (c) A summary of all promises, rewards and inducements made to persons
51 whom the defendant intends to call as witnesses at trial or a pre-trial
52 hearing, as well as requests for consideration by such persons, and
53 copies of all documents relevant to a promise, reward or inducement.

54 (d) All tangible property that the defendant intends to introduce in
55 the defendant's case-in-chief at trial or a pre-trial hearing.

1 (e) All tapes or other electronic recordings which the defendant
2 intends to introduce at trial or a pre-trial hearing.

3 (f) All photographs and drawings which the defendant intends to intro-
4 duce at trial or a pre-trial hearing.

5 (g) All reports and documents concerning physical or mental examina-
6 tions, or scientific tests or experiments or comparisons, which the
7 defendant intends to introduce at trial or a pre-trial hearing, or which
8 were made by a person whom the defendant intends to call as a witness at
9 trial or a pre-trial hearing.

10 (h) Intended expert opinion evidence, including the name, business
11 address, current curriculum vitae, and a list of publications of each
12 expert witness whom the defendant intends to call as a witness at trial
13 or a pre-trial hearing, and all reports prepared by the expert that
14 pertain to the case, or if no report is prepared, a written statement of
15 the facts and opinions to which the expert is expected to testify and a
16 summary of the grounds for each opinion. This paragraph does not alter
17 or in any way affect the procedures, obligations or rights set forth in
18 section 250.10 of this title. If in the exercise of reasonable diligence
19 this information is unavailable for disclosure within the time period
20 specified in subdivision one of this section, that period shall be
21 stayed without need for a motion pursuant to section 245.10 of this
22 article; except that the disclosure shall be made as soon as practicable
23 and not later than thirty calendar days before a scheduled trial date,
24 unless an order is obtained pursuant to section 245.10 of this article.

25 § 245.45 Disclosure of prior misconduct or criminal acts.

26 1. Use at trial. Not later than fifteen calendar days before a sched-
27 uled trial date, the prosecution shall disclose to the defendant a list
28 of all misconduct and criminal acts of the defendant not charged in the
29 indictment, superior court information, prosecutor's information, infor-
30 mation, or simplified information, which the prosecution intends to use
31 at trial for purposes of:

32 (a) impeaching the credibility of the defendant; or

33 (b) as substantive proof of any material issue in the case.

34 2. Notification for what purpose. In addition, the prosecutor shall
35 designate whether he or she intends to use each listed act for impeach-
36 ment and/or as substantive proof.

37 § 245.50 Non-testimonial evidence from the defendant.

38 1. Availability. After the filing of an accusatory instrument, and
39 subject to constitutional limitations, the court may, upon motion of the
40 prosecution showing probable cause to believe the defendant has commit-
41 ted the crime, a clear indication that relevant material evidence will
42 be found, and that the method used to secure it is safe and reliable,
43 require a defendant to provide non-testimonial evidence, including to:

44 (a) appear in a lineup;

45 (b) speak for identification by a witness or potential witness;

46 (c) be fingerprinted;

47 (d) pose for photographs not involving reenactment of an event;

48 (e) permit the taking of samples of the defendant's blood, hair, and
49 other materials of the defendant's body that involves no unreasonable
50 intrusion thereof;

51 (f) provide specimens of the defendant's handwriting; and

52 (g) submit to a reasonable physical or medical inspection of the
53 defendant's body.

54 2. Limitations. This section shall not be construed to alter or in any
55 way affect the issuance of a similar court order, as may be authorized
56 by law, before the filing of an accusatory instrument, consistent with

1 such rights as the defendant may derive from the state constitution or
2 the United States constitution. This section shall not be construed to
3 alter or in any way affect the administration of a chemical test where
4 otherwise authorized. An order pursuant to this section may be denied,
5 limited or conditioned as provided in section 245.10 of this article.
6 § 245.55 Court orders for preservation, access or discovery.

7 1. Order to preserve evidence. At any time, a party may move for a
8 court order to any individual, agency or other entity in possession,
9 custody or control of items which relate to the subject matter of the
10 case or are otherwise relevant, requiring that such items be preserved
11 for a specified period of time. The court shall hear and rule upon such
12 motions expeditiously. The court may modify or vacate such an order upon
13 a showing that preservation of particular evidence will create signif-
14 icant hardship, on condition that the probative value of that evidence
15 is preserved by a specified alternative means.

16 2. Order to grant access to premises. At any time, the defendant may
17 move for a court order to any individual, agency or other entity in
18 possession, custody or control of a crime scene or other premises that
19 relates to the subject matter of the case or is otherwise relevant,
20 requiring that counsel for the defendant be granted prompt and reason-
21 able access to inspect, photograph or measure that crime scene or those
22 premises, and that the condition of the crime scene or premises remain
23 unchanged in the interim. The court shall hear and rule upon such
24 motions expeditiously. The court may modify or vacate such an order upon
25 a showing that granting access to a particular crime scene or premises
26 will create significant hardship, on condition that the probative value
27 of that location is preserved by a specified alternative means.

28 3. Discretionary discovery by order of the court. The court in its
29 discretion may, upon a showing by the defendant that the request is
30 reasonable and that the defendant is unable without undue hardship to
31 obtain the substantial equivalent by other means, order the prosecution,
32 or any individual, agency or other entity subject to the jurisdiction of
33 the court, to make available for disclosure to the defendant any materi-
34 al or information which potentially relates to the subject matter of the
35 case or is otherwise relevant. A motion under this subdivision must be
36 on notice to any person or entity affected by the order. The court may,
37 upon request of any person or entity affected by the order, vacate or
38 modify the order if compliance would be unreasonable or oppressive. The
39 court may permit a party seeking or opposing a discretionary order of
40 discovery under this subdivision, or another affected person or entity,
41 to submit papers or testify ex parte or in camera. Any such papers and a
42 transcript of such testimony shall be sealed and shall constitute a part
43 of the record on appeal.

44 § 245.60 Material held by other governmental personnel.

45 Upon the defendant's request and designation of material or informa-
46 tion which would be discoverable under section 245.20 or 245.30 of this
47 article if in the possession, custody or control of the prosecution or
48 persons under the prosecution's direction or control, but which is, in
49 fact, in the possession, custody or control of other governmental
50 personnel, the prosecutor shall make a diligent, good faith effort to
51 ascertain the existence of such material or information and to cause it
52 to be made available for discovery. If the prosecutor's effort is unsuc-
53 cessful and such material or information or other governmental personnel
54 are subject to the jurisdiction of the court, the court, upon motion of
55 the defendant, shall issue suitable subpoenas or orders to cause such
56 material or information to be made available for discovery.

1 § 245.65 Certificates of compliance.

2 1. By the prosecution. When the prosecution has provided the discovery
3 required by sections 245.20 and 245.30 of this article, except for any
4 items or information that are the subject of an order pursuant to
5 section 245.10 of this article, it shall serve upon the defendant and
6 file with the court a certificate of compliance. The certificate shall
7 state that, after exercising due diligence and making reasonable
8 inquiries to ascertain the existence of material and information subject
9 to discovery, the prosecutor has disclosed and made available all known
10 material and information subject to discovery. It shall also identify
11 the items provided. If additional discovery is subsequently provided
12 prior to trial pursuant to section 245.80 of this article, a supple-
13 mental certificate shall be served upon the defendant and filed with the
14 court identifying the additional material and information provided. No
15 adverse consequence to the prosecution or the prosecutor shall result
16 from the filing of a certificate of compliance in good faith; but the
17 court may grant a remedy for a discovery violation as provided in
18 section 245.90 of this article.

19 2. By the defendant. When the defendant has provided all discovery
20 required by section 245.40 of this article, except for any items or
21 information that are the subject of an order pursuant to section 245.10
22 of this article, counsel for the defendant shall serve upon the prose-
23 cution and file with the court a certificate of compliance. The certif-
24 icate shall state that, after exercising due diligence and making
25 reasonable inquiries to ascertain the existence of material and informa-
26 tion subject to discovery, counsel for the defendant has disclosed and
27 made available all known material and information subject to discovery.
28 It shall also identify the items provided. If additional discovery is
29 subsequently provided prior to trial pursuant to section 245.80 of this
30 article, a supplemental certificate shall be served upon the prosecution
31 and filed with the court identifying the additional material and infor-
32 mation provided. No adverse consequence to the defendant or counsel for
33 the defendant shall result from the filing of a certificate of compli-
34 ance in good faith; but the court may grant a remedy for a discovery
35 violation as provided in section 245.90 of this article.

36 § 245.70 Court ordered procedures to facilitate compliance.

37 To facilitate compliance with this article, and to reduce or stream-
38 line litigation of any disputes about discovery, the court in its
39 discretion may issue an order:

40 1. requiring that the prosecutor and counsel for the defendant dili-
41 gently confer to attempt to reach an accommodation as to any dispute
42 concerning discovery prior to seeking a ruling from the court;

43 2. requiring a discovery compliance conference at a specified time
44 prior to trial between the prosecutor, counsel for all defendants, and
45 the court or its staff;

46 3. requiring the prosecution to file an additional certificate of
47 compliance that states that the prosecutor and/or an appropriate named
48 agent has made reasonable inquiries of all police officers and other
49 persons who have participated in investigating or evaluating the case
50 about the existence of any favorable evidence or information within
51 paragraph (d) of subdivision two of section 245.30 of this article,
52 including such evidence or information that was not reduced to writing
53 or otherwise memorialized or preserved as evidence, and has disclosed
54 any such information to the defendant; and/or

55 4. requiring other measures or proceedings designed to carry into
56 effect the goals of this article.

1 § 245.75 Flow of information with police.

2 1. Provision of law enforcement agency files. Upon request by the
3 prosecution, a New York state law enforcement agency shall make avail-
4 able to the prosecution a complete copy of its complete files related to
5 the investigation of the case or the prosecution of the defendant for
6 compliance with this article, unless exceptional circumstances as found
7 by senior law enforcement personnel justify withholding of any materi-
8 als; but the prosecution shall be notified in writing that information
9 has not been provided, unless exceptional circumstances require other-
10 wise.

11 2. Sufficient communication for compliance. The prosecutor shall
12 endeavor to ensure that a flow of information is maintained between the
13 police and other investigative personnel and his or her office suffi-
14 cient to place within his or her possession or control all material and
15 information pertinent to the defendant and the offense or offenses
16 charged, including any evidence or information which tends to exculpate
17 the defendant or to mitigate the defendant's culpability as to a charged
18 offense, or which tends to support a potential defense thereto, or which
19 tends to provide a basis for a motion to suppress evidence on constitu-
20 tional grounds, or which tends to impugn the credibility of a prose-
21 cution witness, informant or evidence, or which would tend to mitigate
22 the punishment of the defendant.

23 § 245.80 Continuing duty to disclose.

24 If either the prosecution or the defendant subsequently learns of
25 additional material or information which it would have been under a duty
26 to disclose pursuant to any provisions of this article at the time of a
27 previous discovery obligation or discovery order, it shall expeditiously
28 notify the other party and disclose the additional material or informa-
29 tion as required for initial discovery under this article. This
30 provision also requires expeditious disclosure by the prosecution of
31 material or information that became relevant to the case or discoverable
32 based upon reciprocal discovery received from the defendant pursuant to
33 section 245.40 of this article.

34 § 245.85 Work product.

35 This article does not authorize discovery by a party of those portions
36 of records, reports, correspondence, memoranda, or internal documents of
37 the adverse party which are only the legal research, opinions, theories
38 or conclusions of the adverse party or its attorney or the attorney's
39 agents, or of statements of a defendant, written or recorded or summa-
40 rized in any writing or recording, made to the attorney for the defend-
41 ant or the attorney's agents.

42 § 245.90 Availability of remedies for violations.

43 1. Need for remedy. (a) When material or information is discoverable
44 under this article but is disclosed belatedly, the court shall impose an
45 appropriate remedy if the party entitled to disclosure shows that it was
46 significantly prejudiced. If the untimely disclosure occurred because
47 the party responsible failed to make reasonably diligent efforts to
48 comply with this article, the court has discretion to impose an appro-
49 priate remedy if the party entitled to disclosure shows some prejudice.
50 In either situation the party entitled to disclosure shall be given
51 reasonable time to prepare and respond to the new material.

52 (b) When material or information is discoverable under this article
53 but cannot be disclosed because it has been lost or destroyed, the court
54 shall impose an appropriate remedy if the party entitled to disclosure
55 shows that the lost or destroyed material may have contained some infor-
56 mation relevant to a contested issue. The appropriate remedy is that

1 which is proportionate to the potential ways in which the lost or
2 destroyed material reasonably could have been helpful to the party enti-
3 tled to disclosure.

4 2. Available remedies. For failure to comply with any discovery order
5 imposed or issued pursuant to this article, the court may make a further
6 order for discovery, grant a continuance, order that a hearing be
7 reopened, order that a witness be called or recalled, instruct the jury
8 that it may draw an adverse inference regarding the noncompliance,
9 preclude or strike a witness's testimony or a portion of a witness's
10 testimony, admit or exclude evidence, order a mistrial, order the
11 dismissal of all or some of the charges, or make such other order as it
12 deems just under the circumstances; except that any sanction against the
13 defendant shall comport with the defendant's constitutional right to
14 present a defense, and precluding a defense witness from testifying
15 shall be permissible only upon a finding that the defendant's failure to
16 comply with the discovery obligation or order was willful and motivated
17 by a desire to obtain a tactical advantage.

18 3. Consequences of nondisclosure of statement of testifying prose-
19 cution witness. The failure of the prosecutor or any agent of the prose-
20 cutor to disclose any written or recorded statement made by a prose-
21 cution witness which relates to the subject matter of the witness's
22 testimony shall not constitute grounds for any court to order a new
23 pre-trial hearing or set aside a conviction, or reverse, modify or
24 vacate a judgment of conviction, in the absence of a showing by the
25 defendant that there is a reasonable possibility that the non-disclosure
26 materially contributed to the result of the trial or other proceeding;
27 provided, however, that nothing in this section shall affect or limit
28 any right the defendant may have to a reopened pre-trial hearing when
29 such statements were disclosed before the close of evidence at trial.

30 § 245.95 Admissibility of discovery.

31 The fact that a party has indicated during the discovery process an
32 intention to offer specified evidence or to call a specified witness is
33 not admissible in evidence or grounds for adverse comment at a hearing
34 or a trial.

35 § 3. Subdivision 9 of section 65.20 of the criminal procedure law, as
36 added by chapter 505 of the laws of 1985 and as renumbered by chapter
37 548 of the laws of 2007, is amended to read as follows:

38 9. (a) Prior to the commencement of the hearing conducted pursuant to
39 subdivision five of this section, the district attorney shall, subject
40 to a protective order, comply with the provisions of subdivision [~~one~~]
41 ~~two~~ of section [~~240.45~~] 245.30 of this chapter as they concern any
42 witness whom the district attorney intends to call at the hearing and
43 the child witness.

44 (b) Before a defendant calls a witness at such hearing, he or she
45 must, subject to a protective order, comply with the provisions of
46 subdivision two of section [~~240.45~~] 245.30 of this chapter as they
47 concern all the witnesses the defendant intends to call at such hearing.

48 § 4. Subdivision 5 of section 200.95 of the criminal procedure law, as
49 added by chapter 558 of the laws of 1982, is amended to read as follows:

50 5. Court ordered bill of particulars. Where a prosecutor has timely
51 served a written refusal pursuant to subdivision four of this section
52 and upon motion, made in writing, of a defendant, who has made a request
53 for a bill of particulars and whose request has not been complied with
54 in whole or in part, the court must, to the extent a protective order is
55 not warranted, order the prosecutor to comply with the request if it is
56 satisfied that the items of factual information requested are authorized

1 to be included in a bill of particulars, and that such information is
2 necessary to enable the defendant adequately to prepare or conduct his
3 defense and, if the request was untimely, a finding of good cause for
4 the delay. Where a prosecutor has not timely served a written refusal
5 pursuant to subdivision four of this section the court must, unless it
6 is satisfied that the people have shown good cause why such an order
7 should not be issued, issue an order requiring the prosecutor to comply
8 or providing for any other ~~[order]~~ remedy authorized by ~~[subdivision one
9 of]~~ section ~~[240.70]~~ 245.90 of this title.

10 § 5. Paragraph (c) of subdivision 1 of section 255.10 of the criminal
11 procedure law, as added by chapter 763 of the laws of 1974, is amended
12 to read as follows:

13 (c) granting discovery pursuant to article ~~[240]~~ 245; or

14 § 6. Section 340.30 of the criminal procedure law is amended to read
15 as follows:

16 § 340.30 Pre-trial discovery and notices of defenses.

17 The provisions of article two hundred ~~[forty]~~ forty-five, concerning
18 pre-trial discovery by a defendant under indictment in a superior court,
19 and article two hundred fifty, concerning pre-trial notice to the people
20 by a defendant under indictment in a superior court who intends to
21 advance a trial defense of mental disease or defect or of alibi, apply
22 to a prosecution of an information in a local criminal court.

23 § 7. Subdivision 14 of section 400.27 of the criminal procedure law,
24 as added by chapter 1 of the laws of 1995, is amended to read as
25 follows:

26 14. (a) At a reasonable time prior to the sentencing proceeding or a
27 mental retardation hearing:

28 (i) the prosecutor shall, unless previously disclosed and subject to a
29 protective order, make available to the defendant the statements and
30 information specified in subdivision ~~[one]~~ two of section ~~[240.45]~~
31 245.20 and subdivision two of section 245.30 and make available for
32 inspection, photographing, copying or testing the property specified in
33 ~~[subdivision one of section 240.20]~~ such sections; and

34 (ii) the defendant shall, unless previously disclosed and subject to a
35 protective order, make available to the prosecution the statements and
36 information specified in subdivision two of section ~~[240.45]~~ 245.40 and
37 make available for inspection, photographing, copying or testing,
38 subject to constitutional limitations, the reports, documents and other
39 property specified in ~~[subdivision one of section 240.30]~~ such section.

40 (b) Where a party refuses to make disclosure pursuant to this section,
41 the provisions of ~~[section 240.35, subdivision one of section 240.40 and
42 section 240.50]~~ sections 245.55, 245.70 and 245.90 shall apply.

43 (c) If, after complying with the provisions of this section or an
44 order pursuant thereto, a party finds either before or during a sentenc-
45 ing proceeding or mental retardation hearing, additional material
46 subject to discovery or covered by court order, the party shall promptly
47 make disclosure or apply for a protective order pursuant to section
48 245.10.

49 (d) If the court finds that a party has failed to comply with any of
50 the provisions of this section, the court may enter any of the ~~[orders]~~
51 remedies specified in subdivision one of section ~~[240.70]~~ 245.90.

52 § 8. The opening paragraph of paragraph (b) of subdivision 1 of
53 section 440.30 of the criminal procedure law, as added by chapter 19 of
54 the laws of 2012, is amended to read as follows:

55 In conjunction with the filing or consideration of a motion to vacate
56 a judgment pursuant to section 440.10 of this article by a defendant

1 convicted after a trial, in cases where the court has ordered an eviden-
2 tiary hearing upon such motion, the court may order that the people
3 produce or make available for inspection property, [~~as defined in subdivi-~~
4 ~~vision three of section 240.10 of this part,~~] in its possession, custo-
5 dy, or control that was secured in connection with the investigation or
6 prosecution of the defendant upon credible allegations by the defendant
7 and a finding by the court that such property, if obtained, would be
8 probative to the determination of defendant's actual innocence, and that
9 the request is reasonable. The court shall deny or limit such a request
10 upon a finding that such a request, if granted, would threaten the
11 integrity or chain of custody of property or the integrity of the proc-
12 esses or functions of a laboratory conducting DNA testing, pose a risk
13 of harm, intimidation, embarrassment, reprisal, or other substantially
14 negative consequences to any person, undermine the proper functions of
15 law enforcement including the confidentiality of informants, or on the
16 basis of any other factor identified by the court in the interests of
17 justice or public safety. The court shall further ensure that any prop-
18 erty produced pursuant to this paragraph is subject to a protective
19 order, where appropriate. The court shall deny any request made pursuant
20 to this paragraph where:

21 § 9. Subdivision 10 of section 450.10 of the penal law, as added by
22 chapter 795 of the laws of 1984, is amended to read as follows:

23 10. Where there has been a failure to comply with the provisions of
24 this section, and where the district attorney does not demonstrate to
25 the satisfaction of the court that such failure has not caused the
26 defendant prejudice, the court shall instruct the jury that it may
27 consider such failure in determining the weight to be given such
28 evidence and may also impose any other [~~sanction~~] remedies set forth in
29 [~~subdivision one of~~] section [~~240.70~~] 245.90 of the criminal procedure
30 law; provided, however, that unless the defendant has convinced the
31 court that such failure has caused him undue prejudice, the court shall
32 not preclude the district attorney from introducing into evidence the
33 property, photographs, photocopies, or other reproductions of the prop-
34 erty or, where appropriate, testimony concerning its value and condi-
35 tion, where such evidence is otherwise properly authenticated and admis-
36 sible under the rules of evidence. Failure to comply with any one or
37 more of the provisions of this section shall not for that reason alone
38 be grounds for dismissal of the accusatory instrument.

39 § 10. Subdivision 5 of section 480.10 of the penal law, as added by
40 chapter 655 of the laws of 1990, is amended to read as follows:

41 5. In addition to information required to be disclosed pursuant to
42 article two hundred [~~forty~~] forty-five of the criminal procedure law,
43 when forfeiture is sought pursuant to this article, and following the
44 defendant's arraignment on the special forfeiture information, the court
45 shall order discovery of any information not otherwise disclosed which
46 is material and reasonably necessary for preparation by the defendant
47 with respect to a forfeiture proceeding brought pursuant to this arti-
48 cle. Such material shall include those portions of the grand jury
49 minutes and such other information which pertain solely to the special
50 forfeiture information and shall not include information which pertains
51 to the criminal charges. Upon application of the prosecutor, the court
52 may issue a protective order pursuant to section [~~240.40~~] 245.10 of the
53 criminal procedure law with respect to any information required to be
54 disclosed pursuant to this subdivision.

55 § 11. Section 460.80 of the penal law, as added by chapter 516 of the
56 laws of 1986, is amended to read as follows:

1 § 460.80 Court ordered disclosure.

2 Notwithstanding the provisions of article two hundred [~~forty~~] forty-
3 five of the criminal procedure law, when forfeiture is sought pursuant
4 to section 460.30 of this [~~chapter~~] article, the court may order discov-
5 ery of any property not otherwise disclosed which is material and
6 reasonably necessary for preparation by the defendant with respect to
7 the forfeiture proceeding pursuant to such section. The court may issue
8 a protective order denying, limiting, conditioning, delaying or regulat-
9 ing such discovery where a danger to the integrity of physical evidence
10 or a substantial risk of physical harm, intimidation, economic reprisal,
11 bribery or unjustified annoyance or embarrassment to any person or an
12 adverse effect upon the legitimate needs of law enforcement, including
13 the protection of the confidentiality of informants, or any other factor
14 or set of factors outweighs the usefulness of the discovery.

15 § 12. This act shall take effect on the one hundred eightieth day
16 after it shall have become a law; provided that the amendments to subdi-
17 vision 9 of section 65.20 of the criminal procedure law made by section
18 three of this act shall not affect the repeal of such section and shall
19 be deemed repealed therewith.