

MASSACHUSETTS STATE POLICE CRIME LABORATORY

DISCOVERY MATERIALS POLICY FOR THE OFFICE OF ALCOHOL TESTING

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1 INTRODUCTION

The Case Management Unit (CMU) is responsible for reviewing and fulfilling OAT discovery requests. CMU works collaboratively with OAT to fulfill requests for OAT discovery. Consultation with Massachusetts State Police (MSP) legal counsel and the OAT Discovery Ombudsman may be necessary during this process.

Requests made pursuant to G.L. c. 66 (the public records law) will be reviewed and fulfilled by MSP legal counsel. CMU and/or pertinent MSP Crime Laboratory (“the Laboratory”) units may assist with gathering materials to fulfill these requests.

This policy describes:

- the materials available on the eDiscovery Portal
- the materials available through an online ADA SharePoint portal to District Attorney’s Offices with authorized access
- procedures for requesting additional materials from CMU or OAT

2 DOCUMENTS AVAILABLE ON THE eDISCOVERY PORTAL

2.1 The eDiscovery Portal is a publicly accessible website that allows any registered user to view information related to evidential breath testing. Registration is open to any member of the public and is not limited to attorneys.

2.2 The eDiscovery Portal allows access to many of the documents generated by OAT and data generated by law enforcement in the field pertaining to evidential breath test instruments. See section 2.5 for a description of data generated in the field that is available on eDiscovery.

2.2.1 There are times when specific records, data, or documents are not immediately available on eDiscovery; please contact OAT by phone or email if you are looking for information that you cannot locate on eDiscovery.

2.3 To access these records, please refer to the instructions on the eDiscovery Portal at: <https://oatediscovery.chs.state.ma.us>

2.4 OAT has the regulatory mandate to certify evidential breath test instruments in the Commonwealth. OAT has uploaded documents associated with instrument certifications as well as additional documents to the eDiscovery Portal. These documents include, but are not limited to, the following:

2.4.1 Instrument Files, including but not limited to certification documents, repair records, and chain of custody

2.4.2 Certificates of Analysis for Dry Gas and Purchased Solutions

2.4.3 Reference Materials including but not limited to

2.4.3.1 Quality Control (QC) Documents (e.g., Dry Gases, Solutions, Barometers, Digital Thermometers, Pipettes, Scales, Water Purification System)

2.4.3.2 Current OAT Protocols and Archived OAT Protocols dating back to at least August of 2018

2.4.3.3 Breath Test Operator and Officer in Charge Training Materials

2.4.3.4 Data Dictionary

2.4.3.5 Accreditation Documents

2.4.3.6 Performance Verifications (a performance verification is used to assess the functionality of instruments, software, and equipment. For example, OAT has completed performance verifications prior to the approval of new software used in the Laboratory and the use of new version of instrument firmware. OAT has also completed performance verifications prior to the approval of an alternate instrument mouthpiece and the use of dry gas cylinders from a new vendor)

2.4.3.7 OAT Organizational Chart

2.4.3.8 Any OAT system error nonconformance and corrective action workflows. Analyst-specific quality assurance notes, nonconformance workflows, and corrective action workflows are available upon request.

2.4.4 If OAT learns that a document which would ordinarily be uploaded to the eDiscovery Portal is no longer available, OAT will upload a placeholder document containing a notice that the document is not available.

2.5 Data generated in the field is transmitted to the eDiscovery Portal through Criminal Justice Information Services (CJIS).

2.5.1 Data generated when a breath test administered by a Breath Test Operator (BTO) is taken, terminated, or refused by a subject in the field, is available on the eDiscovery Portal. These records do not contain personal identifying information pursuant to applicable privacy and CORI laws.

2.5.2 Data generated from Periodic Tests conducted in the field by the Officer in Charge (OIC) in furtherance of their responsibilities pursuant to 501 CMR 2.10 and 2.12 are also available on the eDiscovery Portal.

2.6 Data generated at the Laboratory during breath test instrument certifications is transmitted to the eDiscovery Portal through CJIS.

- 2.7 Data generated at the Laboratory during performance verifications and certifications completed by OAT analysts in training is transmitted to the eDiscovery Portal through CJIS.
- 2.8 Pursuant to the April 19, 2022, joint settlement in *Commonwealth v. Ananias*, Laboratory-issued notices regarding OAT casework are posted to the eDiscovery Portal.
- 2.8.1 Every District Attorney in the Commonwealth may designate at least one Assistant District Attorney as a “BT (Breathalyzer Test)-ADA” representative. The BT-ADAs will be copied on each of the notices posted pursuant to this section.
- 2.8.2 The OAT Discovery Ombudsman or MSP legal counsel will post a notice to the eDiscovery Portal in each of the following circumstances:
- 2.8.2.1 If the Laboratory or an accrediting body determines that a nonconformance affecting casework/certification has occurred at OAT, a notice will be posted detailing the nonconformance and any corrective actions. This notice will ordinarily be posted after the nonconformance workflow and/or corrective action workflow(s) are completed, unless the OAT Discovery Ombudsman or MSP legal counsel determines that notice must be made immediately.
- 2.8.2.2 If OAT determines that data contained in an instrument’s internal memory cannot be reconciled with the replicated CJIS database, a notice will be posted detailing the irregularity.
- 2.8.2.3 When OAT receives a final reaccreditation or continuation of accreditation decision or a change to the accreditation scope from the ANSI National Accreditation Board (ANAB), a notice will be posted.
- 2.8.2.4 When there has been a revision to an OAT protocol, a notice will be posted.
- 2.8.2.5 MSP legal counsel and the OAT Discovery Ombudsman may post any other notices to the eDiscovery Portal on the basis that the information is potentially exculpatory or for any other reason. If a given issue affects a limited number of breath tests and the breath tests in question have been identified, MSP legal counsel and the OAT Discovery Ombudsman reserve the right to notify only the BT-ADAs for the impacted districts.

3 ANALYST AND LABORATORY MATERIALS

- 3.1 The following materials are available through an online ADA SharePoint portal, which is only accessible by authorized personnel.
- 3.2 District Attorney's Offices are authorized to access the ADA SharePoint portal. Each District Attorney's Office has established employee permissions.
- 3.3 The materials available through the ADA SharePoint portal will be updated according to the timeframes listed below.
- 3.4 Additional information regarding the documents can be found within the applicable folder by selecting the document labeled "READ FIRST".
- 3.5 Materials available on the ADA SharePoint portal include:
 - 3.5.1 Curriculum Vitae (CV) of Laboratory Personnel
 - 3.5.1.1 CVs posted are for current MSPCL employees only and are updated on a quarterly basis. The date of the latest update will be reflected in the file/folder names.
 - 3.5.2 Proficiency Testing (PT) Records
 - 3.5.2.1 Proficiency Tests available through the ADA SharePoint portal will include graded Proficiency Test case files and any associated Notes to File and QA Notes.
 - 3.5.2.2 The PT files will contain the analyst documentation associated with the test, as well as the expected results and the results of the grading performed by the laboratory (i.e., evaluation of the results and work performed on the test).
 - 3.5.2.3 The PT files may not include batch files or electronically stored information such as chain of custody, electronically stored photos, or electronic DNA data; however, these records can be provided upon request.
 - 3.5.2.4 Test information will be provided on a PT Summary Form if a Proficiency Test case file no longer exists due to record retention laws.
 - 3.5.2.5 Proficiency Testing Records are updated weekly
 - 3.5.3 Audit Documentation
 - 3.5.3.1 External audits completed since the 2022 re-accreditation assessment of the laboratory will be available.

3.5.3.2 If additional audit documentation is required, please contact the CMU directly.

3.5.4 Non-Conformity Log

3.5.4.1 The Non-conformity log which is a summary of nonconforming work will be provided in a searchable Excel spreadsheet which will be updated weekly. The date of the latest update will be reflected in the file name.

4 REQUESTS, SUBPOENAS, AND COURT ORDERS FOR DISCOVERY

- 4.1 The OAT Discovery Ombudsman is available to all attorneys for consultation on OAT discovery.
- 4.2 All documentation that is not publicly available on the eDiscovery Portal or ADA SharePoint portal is subject to a request, subpoena, or court order.
- 4.3 Requests should be submitted using the online MSPCL Office of Alcohol Testing Discovery Request located on www.mass.gov.
- 4.4 Requests, subpoena, or court order can also be sent to:
OATdiscoveryrequest@mass.gov
 - 4.4.1 Any requests for OAT discovery sent directly to the CMU will be forwarded to the OATdiscoveryrequest@mass.gov email address.
- 4.5 CMU may refer any discovery requests to MSP legal counsel or the OAT Discovery Ombudsman on the basis that the requesting party is not from a prosecuting attorney's office or the Registry of Motor Vehicles (RMV). The requesting party may be required to verify that they are the attorney of record for an individual who has been charged in a criminal case or is the subject of an RMV proceeding. Where appropriate, a requesting party may be asked to obtain a court order or file a public records request.
- 4.6 The requested materials will be provided to the requesting party unless the request, subpoena, court order, or this policy specifies otherwise. Where materials are sent on behalf of a criminal defendant, the prosecuting attorney's office shall also be sent a copy of the materials.
- 4.7 The discovery request or subpoena / court order for documents, and any subsequent correspondence with external agencies or attorneys will be retained by the Laboratory.
- 4.8 The Laboratory will make every effort to produce the documents by the time frame specified in the request, subpoena, or court order. This period of time will be dependent upon each request and the current capacity of the unit.

- 4.8.1 If there are any questions about the request, subpoena, or court order, the Laboratory shall contact the requestor or ordering court for clarification.
- 4.9 The below listed materials shall be provided in discovery upon request if available (the Laboratory will determine the volume of records responsive to the request and, if voluminous, schedule an appointment for representatives to view the material):
- 4.9.1 An instrument certification packet with an accompanying business records affidavit from a Keeper of Records. This packet will include the BT Certification Form and any documents created by OAT during the certification procedure.
- 4.9.1.1 For completed certifications, the packet will also include the Alcotest 9510 Certificate of Calibration.
- 4.9.1.2 If there are any incomplete certifications within the certification event, CMU will also provide the BT Certification Form and any other documents created by OAT during the incomplete certification procedure.
- 4.9.1.3 A request, subpoena, or court order for an instrument certification packet with an accompanying business records affidavit from a Keeper of Records should be submitted via the online MSP Office of Alcohol Testing Discovery Request Form on www.mass.gov or by providing the following information:
- 4.9.1.3.1 The courthouse
- 4.9.1.3.2 The assigned trial date or discovery compliance date
- 4.9.1.3.3 Docket number
- 4.9.1.3.4 Name of the breath test subject
- 4.9.1.3.5 Date of the breath test
- 4.9.1.3.6 Draeger Alcotest 9510 serial number
- 4.9.1.3.7 Name of the requestor
- 4.9.1.4 Unless otherwise requested, a paper copy of the documents enumerated in section 4.9.1 will be sent directly to the court clerk's office designated by the requestor.
- 4.9.2 Quality assurance records not included in the Non-Conformity Log on the ADA SharePoint portal or available on eDiscovery (e.g., preventive actions, risk assessment workflows, supporting documentation for corrective actions, analyst-specific summary of training, analyst specific training and/or competency supporting documentation records, testimony reviews, and corrective action workflows).

- 4.9.2.1 Upon any request for OAT documents received from a prosecuting attorney's office, including requests for an instrument certification packet pursuant to section 4.9.1, CMU will provide a scanned copy of documents sent to the Clerk's office as well as a link to the ADA SharePoint portal via email to the prosecuting attorney's office.

4.9.3 Draeger Alcotest 9510 Raw Data:

- 4.9.3.1 Draeger Alcotest 9510 instruments deployed in Massachusetts generate raw data that is transmitted to and stored on a CJIS server. A copy of this data is made available to OAT via the Executive Office of Public Safety and Security.
- 4.9.3.2 The following raw data generated by the Draeger Alcotest 9510 evidential breath test instruments shall be provided by OAT upon request:
 - 4.9.3.2.1 Raw data generated in the field when a breath test is taken, terminated, or refused by a subject (Test Types 1, 2, and 3);
 - 4.9.3.2.2 Raw data generated in the field by a police officer taking a training breath test (Test Type 4);
 - 4.9.3.2.3 Raw data generated when CalCheck tests are conducted by OAT or Draeger (Test Type 6);
 - 4.9.3.2.4 Raw data generated when ABA (Air-Breath-Air) tests are conducted by OAT or Draeger (Test Type 7);
 - 4.9.3.2.5 Raw data generated by OAT when it conducts a certification of the instrument (Test Types 8, 10, and 13);
 - 4.9.3.2.6 Raw data generated in the field by the OIC conducting a Periodic Test (Test Type 9);
 - 4.9.3.2.7 Raw data generated when Calibrating Device/Standard Certification tests are conducted by OAT or Draeger (Test Type 11);
 - 4.9.3.2.8 Raw diagnostic data generated during the pilot program (Test Type 17);
 - 4.9.3.2.9 Message records generated by the instrument (Test Type 18);
 - 4.9.3.2.10 Watchdog records generated by the instrument (Test Type 19); and
 - 4.9.3.2.11 Curve data.

4.9.3.3 Any requests for raw data shall indicate the instrument serial number, test types, and a time period.

4.9.4 Breath Test Operator training information

4.9.4.1 Available Breath Test Operator training information includes the officer's date of current certification, date the officer took the written exam, date the officer took the practical exam, and the date the officer's certification expires.

4.9.4.2 Requests for Breath Test Operator training information should include the officer's name and department.

4.9.5 Portable breath test (PBT) instrument information

4.9.6 BATS Data Not Transmitted Forms received by OAT

4.10 Requests for any information that is not listed above shall be reviewed by MSP legal counsel in consultation with technical personnel and the OAT Discovery Ombudsman.

5 DELIVERY OF DISCOVERY

5.1 CMU will send discovery documents electronically.

5.2 Business Record Affidavits are shipped via UPS with tracking.

5.3 If an expedited request is made due to a court compliance date, discovery may be sent via an overnight delivery service, picked up from the Laboratory by a designee of the prosecuting attorney's office, or sent via email.

6 EXCULPATORY EVIDENCE/ITEMS AND INFORMATION FAVORABLE TO THE DEFENSE

6.1 The Laboratory recognizes that the prosecution has an obligation to disclose exculpatory evidence, and this obligation extends to "scientific tests, at least those conducted by the Commonwealth's own crime laboratory." *Commonwealth v. Martin*, 427 Mass. 816, 824 (1998). As a result, the obligation to disclose exculpatory evidence applies to documents maintained by the Laboratory.

6.2 Exculpatory evidence is "evidence tending to establish a criminal defendant's innocence. The prosecution has a duty to disclose evidence in its possession or control when the evidence may be material to the outcome of the case." Exculpatory evidence, *Black's Law Dictionary* (11th ed. 2019).

6.3 Additionally, *Brady v. Maryland* defines exculpatory evidence as information that is "favorable to an accused" and "is material either to guilt or to punishment." *Brady v.*

Maryland, 373 U.S. 83, 87 (1963).

- 6.4 The MSPCL recognizes that the prosecutor is required to “disclose to the defense, and permit the defense to discover, inspect, and copy, all items and information favorable to the defense in the possession, custody, or control of . . . any member of the prosecution team . . . without regard to whether the prosecutor considers the items or information credible, reliable, or admissible and without regard to whether any such information has been reduced to tangible form.” Mass. R. Crim. P. 14(a)(2)(b)(2)(B).
- 6.5 Items and Information Favorable to the Defense is Defined in Rule 14(a)(2)(b)(2)(B), which is available [here](#).
- 6.6 “Forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government who were or are involved in the investigation or prosecution of the case” are members of the prosecution team for pretrial discovery purposes. Mass. R. Crim. P. 14(a)(1)(C).

7 PUBLIC RECORDS REQUESTS

- 7.1 All public records requests shall be forwarded to MSP legal counsel. A public records request may be sent directly to MSP.CrimeLab@pol.state.ma.us.
- 7.2 MSP legal counsel will review the request and determine if the Laboratory is in possession of the information requested and if the public records law permits disclosure.