



## **I.C.R. 16. Discovery and Inspection**

### **Idaho Criminal Rule 16. Discovery and Inspection**

**(a) Mandatory Disclosure of Evidence and Material by the Prosecution.** As soon as practicable after the filing of charges against the accused, the prosecuting attorney must disclose to defendant or defendant's counsel any material or information in the prosecuting attorney's possession or control, or that later comes into the prosecuting attorney's possession or control, that tends to negate the guilt of the accused as to the offense charged or that would tend to reduce the punishment for the offense. The prosecuting attorney's obligations under this paragraph extend to material and information in the possession or control of members of the prosecuting attorney's staff and of any others who have participated in the investigation or evaluation of the case who either regularly report, or have reported in that case, to the office of the prosecuting attorney. The prosecuting attorney must also disclose the general nature of evidence of other crimes, wrongs, or acts, it intends to introduce at trial as required by Rule 404(b) of the Idaho Rules of Evidence.

**(b) Disclosure of Evidence and Materials by the Prosecution on Written Request.** Except as otherwise provided in this rule, the prosecuting attorney must, at any time following the filing of charges, on written request by the defendant, disclose the following information, evidence and material to the defendant:

(1) *Statement of Defendant.* On written request of a defendant, the prosecuting attorney must permit the defendant to inspect and copy or photograph:

(A) any relevant written or recorded statements made by the defendant in the possession, custody or control of the state, the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence;

(B) the substance of any relevant, oral statement made by the defendant, whether before or after arrest, to a peace officer, prosecuting attorney or agent of the prosecuting attorney; and

(C) the recorded testimony of the defendant before a grand jury that relates to the offense charged.

(2) *Statement of a Co-Defendant.* On written request of a defendant, the prosecuting attorney must permit the defendant to inspect and copy or photograph:



(A) any written or recorded statements of a co-defendant; and

(B) the substance of any relevant oral statement made by a co-defendant, whether before or after arrest, in response to interrogation by any person known by the co-defendant to be a peace officer or agent of the prosecuting attorney.

(3) *Defendant's Prior Record.* On written request of the defendant, the prosecuting attorney must furnish the defendant copy of the defendant's prior criminal record, if any, if it is then or may become available to the prosecuting attorney.

(4) *Documents and Tangible Objects.* On written request of the defendant, the prosecuting attorney must permit the defendant to inspect and copy or photograph:

(A) books,

(B) papers,

(C) documents,

(D) photographs,

(E) tangible objects,

(F) buildings or places,

or copies or portions of them, that are in the possession, custody or control of the prosecuting attorney and that:

(A) are material to the preparation of the defense,



(B) are intended for use by the prosecutor as evidence at trial, or

(C) were obtained from the defendant or belong to the defendant.

(5) *Reports of Examinations and Tests.* On written request of the defendant, the prosecuting attorney must permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, that are in the possession, custody or control of the prosecuting attorney or the existence of which is known or is available to the prosecuting attorney by the exercise of due diligence.

(6) *State Witnesses.* On written request of the defendant, the prosecuting attorney must furnish to the defendant a written list of the names and addresses of all persons having knowledge of relevant facts who may be called by the state as witnesses at the trial, together with any record of prior felony convictions of any of them, that is within the knowledge of the prosecuting attorney. The prosecuting attorney must also furnish, on written request, the statements made by the prosecution witnesses or prospective prosecution witnesses to the prosecuting attorney or the prosecuting attorney's agents or to any official involved in the investigation of the case unless a protective order is issued as provided in subsection (I) of this rule.

(7) *Expert Witnesses.* On written request of the defendant, the prosecutor must provide a written summary or report of any testimony that the state intends to introduce at trial or at a hearing pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence. The summary provided must describe the witness's opinions, the facts and data for those opinions, and the witness's qualifications. Disclosure of expert opinions regarding mental health must also comply with the requirements of Idaho Code § 18-207. The prosecution is not required to produce any materials not subject to disclosure under subsection (g) of this Rule. This subsection does not require disclosure of expert witnesses, their opinions, the facts and data for those opinions, or the witness's qualifications, intended only to rebut evidence or theories that have not been disclosed under this Rule prior to trial.

(8) *Police Reports.* On written request of the defendant, the prosecuting attorney must furnish to the defendant reports and memoranda in possession of the prosecuting attorney that were made by a police officer or investigator in connection with the investigation or prosecution of the case.

(9) *Digital Media Recordings (Audio and Video Files).* On request, the prosecuting attorney must release to defendant digital media that may or may not contain protected information as defined by this Rule. The prosecuting attorney must state whether the disclosure contains protected information.

(A) *Unredacted Digital Media.* The prosecuting attorney may release unredacted digital media to defense counsel for the purpose of expediting a resolution in a case prior to trial or hearing. The obligation of defense counsel is as follows:



(i) Defense counsel, including agents of defense counsel, may review the unredacted digital media and discuss the content of the recording with the defendant but must not share the unredacted digital media in any manner with the defendant without prior consent of the prosecuting attorney or an order of the court.

(ii) With prior consent of the prosecuting attorney or an order of the court, defense counsel may allow the defendant to view the unredacted digital media in the presence of defense counsel or defense counsel's agent, but defense counsel must not allow the defendant to retain a copy of the digital media in any version, to take photographs, or to otherwise duplicate the digital media in any form.

(iii) Defense counsel must take reasonable steps to ensure that the unredacted digital media is safely stored and cannot be accessed by anyone other than defense counsel or defense counsel's agents.

(B) Redacted Digital Media. If the prosecuting attorney determines that the digital media contains protected information that requires redaction prior to disclosure, the prosecuting attorney must provide a redacted version of the digital media, along with a written explanation of the information that was redacted. Defense counsel may allow the defendant to view and retain a copy of any media that is redacted by the prosecuting attorney. If defense counsel disagrees with any of the prosecuting attorney's redactions, before allowing the defendant to review any unredacted media, a Motion to Compel must be filed and argued in accordance with these Rules.

(C) Self-Represented Defendants. When a defendant chooses to proceed without counsel, the prosecuting attorney may release unredacted digital media to the defendant but, if the prosecuting attorney determines that digital media should not be disclosed because it contains protected information, the prosecuting attorney must seek a Protective Order pursuant to subsection (d)(2)(B) of this Rule.

(10) *Disclosure by Order of the Court.* On motion of the defendant showing substantial need in the preparation of the defendant's case for additional material or information not otherwise covered by this Rule, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court may order the additional material or information to be made available to the defendant. The court may, on the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

**(c) Disclosure of Evidence by the Defendant on Written Request.** Except as otherwise provided in this rule, the defendant must, at any time following the filing of charges against the defendant, on written request by the prosecuting attorney, disclose the following information, evidence and material to the prosecuting attorney:



(1) *Documents and Tangible Objects.* On written request of the prosecuting attorney, the defendant must permit the prosecuting attorney to inspect and copy or photograph:

(A) books,

(B) papers,

(C) documents,

(D) photographs, and

(E) tangible objects,

or copies or portions of them, that are in the possession, custody or control of the defendant, and that the defendant intends to introduce in evidence at the trial.

(2) *Reports of Examinations and Tests.* On written request of the prosecuting attorney, the defendant must permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case if they are within the possession or control of the defendant, that the defendant intends to introduce in evidence at the trial, or that were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness.

(3) *Defense Witness.* On written request of the prosecuting attorney, the defendant must furnish the prosecuting attorney a list of names and addresses of witnesses the defendant intends to call at trial.

(4) *Expert Witnesses.* On written request of the prosecuting attorney, the defendant must provide a written summary or report of any testimony that the defense intends to introduce pursuant to Rules 702, 703 or 705 of the Idaho Rules of Evidence at trial or hearing. The summary provided must describe the witness's opinions, the facts and data for those opinions and the witness's qualifications. Disclosure of expert opinions regarding mental health must also comply with the requirements of Idaho Code § 18-207. The defense is not required to produce any materials not subject to disclosure under subsection (h) of this Rule, or any material otherwise protected from disclosure by defendant's constitutional rights.



**(d) Redacting Protected Information from Responses to Discovery.** The party providing discovery may redact protected information from the information or material provided.

(1) Protected information means:

(A) Contact Information. The home addresses, business addresses, telephone numbers (including cell phones), and email addresses of an alleged victim, or of a witness, or of the spouse, children, or other close family members of the alleged victim or witness, and the places where any of those persons regularly go, such as schools and places of employment and worship.

(B) Personal Identifying Information. The dates of birth and social security numbers of any persons other than the defendant.

(C) Private Information. Personal identification numbers (PINs), passwords, financial account numbers, information relating to financial transaction cards, and medical information protected by federal law that is not directly related to the crime charged.

(2) A prosecuting attorney who redacts protected information must follow the following procedure:

(A) If the defendant is represented by counsel, the prosecuting attorney must serve defendant's counsel with a redacted copy of the discovery printed on white paper at the same time as an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The defendant's attorney, including appellate counsel, must not disclose the protected information to the defendant or to a member of the defendant's family without the consent of the prosecuting attorney or an order of the court on a showing of need.

(B) If the defendant is not represented by counsel, the prosecuting attorney must serve the defendant with a redacted copy of the discovery and, within seven days of doing so, even if the disclosure was not in response to a discovery request, must file with the court and serve on the defendant a motion for a protective order with respect to the redacted information.

(3) A defense attorney or defendant who redacts protected information must serve the prosecuting attorney with a redacted copy of the discovery printed on white paper at the same time as an unredacted copy of the discovery printed on paper of a color that is clearly distinguishable from white. The State's attorney, including appellate counsel, must not disclose the protected information to the alleged victim or to a member of the alleged victim's family without the consent of the defendant or an order of the court on a showing of need.



(4) *Print on Colored Paper.* In any case where the prosecuting attorney provides discovery to defense counsel in an electronic format, if the attorney receiving the electronic discovery desires to print the discovery, the attorney must print the unredacted discovery on colored paper as required by subsection (d)(3) of this rule.

### **(e) Failure to Make Written Request, Waiver.**

(1) Any request by a party for information, evidence or material under subsections (b) and (c) of this rule must be in writing with the original request filed with the court and a copy served on the prosecuting attorney or the defense attorney or self-represented defendant. Failure to file and serve the request constitutes a waiver of the right to discovery under subsections (b) and (c) of this rule. If no written request for discovery is filed and served by the defendant, the defendant will not be permitted to raise as error in any subsequent proceeding the failure of the prosecution to disclose the information described in subsection (b) of this rule.

(2) *Form of Request.* A request for the information, evidence and material under subsection (b) of this rule must be in substantially the form found in Appendix A.

### **(f) Response to Request, Failure to File a Response.**

(1) *Response to Request.* The attorney or defendant on whom a request has been served must file and serve a written response within 14 days of service of the request by filing the original copy with the court and serving a copy on the opposing party, which must state one or more of the following:

(A) that the response has already been complied with and that the inquiring party has been furnished the information, evidence and material listed in the request;

(B) that there is no objection to the discovery of the information, evidence and materials sought by the request and that the opposing party will be permitted discovery at a time and place certain;

(C) that the responding party objects to part or all of the information, evidence and materials sought to be discovered, which objection must be specific and state all grounds for the objection.

(2) *Failure to Comply.* Unless otherwise ordered by the court on a showing of good cause or excusable neglect, the failure to file and serve a response within the time required by this rule constitutes a waiver of any objections to the request and is grounds for the imposition of sanctions by the court.



(3) A response to a request must be in the form found in Appendix A.

**(g) Prosecution Information Not Subject to Disclosure.**

(1) *Work Product*. Disclosure must not be required of:

(A) legal research or of records,

(B) correspondence, or

(C) reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecuting attorney's legal staff.

(2) *Informants*. Disclosure must not be required of an informant's identity unless the informant is to be produced as a witness at a hearing or trial, subject to any protective order under subsection (l) of this rule or a disclosure order under subsection (b)(6) of this rule.

**(h) Defense Information Not Subject to Disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant or prosecuting attorney or defense witnesses, or prospective state or defense witnesses to the defendant, defendant's agents or attorneys.

**(i) Failure to Call Witnesses.** The fact that a witness's name is on a list furnished under this rule and that witness is not called must not be commented on at the trial.

**(j) Continuing Duty to Disclose.** If, after compliance with a request issued pursuant to this rule, and prior to or during trial, a party discovers additional evidence or the evidence of an additional witness or witnesses, or decides to use additional evidence, witness or witnesses, the evidence is automatically subject to discovery and inspection under the prior request. The party must immediately notify the other party or that party's attorney and the court of the existence of the additional evidence or the names of the additional witness or witnesses in order to allow the other party to make an appropriate request for additional discovery or inspection.





**(k) Orders for Discovery.** If a party has failed to comply with a request for discovery under this rule, the court, on motion of a party, may:

- (1) order a party to permit the discovery or inspection,
- (2) prohibit the discovery of part or all of the information, evidence or material sought to be discovered, or
- (3) enter such other order as it deems just in the circumstances.

An order of the court granting discovery under this rule must specify the time, place and manner of making the discovery and inspection and provide reasonable terms and conditions.

**(l) Protective Orders.** At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve and seal the entire text of the party's statement.

**(m) Sexually Exploitative Material.**

(1) Any property or material that constitutes or is alleged to constitute sexually exploitative material as defined in Idaho Code § 18-1505B or Idaho Code § 18-1507 must remain in the care, custody, and control of either the court or a law enforcement agency.

(2) A court must deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes or is alleged to constitute sexually exploitative material as defined in Idaho Code § 18-1505B or Idaho Code § 18-1507, so long as the prosecuting attorney makes the property or material reasonably available to the defendant.

(3) For purposes of subsection (m)(2) of this rule, property or material is deemed to be reasonably available to the defendant if the prosecuting attorney provides ample opportunity for inspection, viewing, and examination of the property or material by the defendant, defense counsel, and any individual the defendant may seek to qualify to furnish expert testimony at trial.



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### **Links**

[1] <https://isc.idaho.gov/./rules/ICR/ICR-Adoption-Newly-Formatted-ICR-Feb-22-2017.pdf>