Memorandum

United States Attorney
Western District of Washington

Subject	Date
Discovery Policy	October 15, 2010

To	From
Criminal Division	Jenny A. Durkan United States Attorney

INTRODUCTION

Prosecutors in the Criminal Division must be familiar with and fully comply with their discovery obligations under Federal Rule of Criminal Procedure (Fed. R. Crim. P.") 16, the Jencks Act, Federal Rule of Evidence ("FRE") 404(b), the *Brady/Giglio* line of cases, and the policies of the Department of Justice and this office. In addition, prosecutors must be familiar with obligations imposed by the Local Rules for the United States District Court for the Western District of Washington. This Discovery Policy discusses the sources of the government's obligations to produce relevant information to a defendant in a criminal case and sets forth the discovery policies of the United States Attorney's Office for the Western District of Washington. This Discovery Policy supersedes any existing formal or informal discovery policies, practices, or protocols that the office has promulgated or adopted in the past. Moreover, nothing in this document is intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It also is not intended to have the force of law. *See United States v. Caceres*, 440 U.S. 741 (1979).

This Discovery Policy does not govern disclosure in cases involving terrorism and national security. Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult National Security Division (NSD) regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it

is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

1. Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

2. Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

3. Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

4. Other significant cases involving international suspects and targets; and

5. Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

I. DISCOVERY OBLIGATIONS

A. Brady/Giglio

Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The disclosure of exculpatory and impeachment evidence is required when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because *Brady* and *Giglio* are constitutional obligations, *Brady/Giglio* evidence must be disclosed regardless of whether the defendant makes a request for such exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *See United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

Exculpatory and impeachment evidence is material to a finding of guilt—and thus must be disclosed under the Constitution—when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Because it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must

take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439.

In addition, under *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), the Ninth Circuit Court of Appeals held that, upon a defendant's request, the government is required to review personnel files of law enforcement officials that the government intends to call as witnesses. There is no requirement that the defendant make a showing of materiality prior to the review.

B. Federal Rule of Criminal Procedure 16

Under Fed. R. Crim. P. 16, the government must disclose to the defendant, upon request, the following:

1. Any "relevant" oral statement made by the defendant in response to interrogation by a person the defendant knew was a government agent, if the government intends to use the statement at trial;

2. Any "relevant" written or recorded statement by the defendant in the government's control or that the government can obtain by due diligence, including any grand jury testimony by the defendant;

3. Statements by employees of an organizational defendant, if the employee was legally able to bind the defendant regarding the subject of the statement;

4. The defendant's prior record;

5. Documents and objects that are material to preparing the defense, may be used by the government in its case-in-chief, or have been obtained from the defendant;

6. Reports of any physical or mental examination or tests if the item is material to preparing the defense and the government intends to use the item in its case-in-chief;

7. A written summary of any expert testimony that the government intends to introduce at trial.

Federal Rule of Criminal Procedure 16 does not authorize the disclosure of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.

In addition to Fed. R. Crim. P. 16, Fed. R. Crim. P. 12.1, 12.2, and 12.3 may impose disclosure obligations on the government when the defendant raises an alibi defense, an insanity defense, or a public authority defense.

C. Western District of Washington Local Rule CrR16

Local Rule CrR16 for the Western District of Washington imposes additional discovery

obligations on prosecutors in this district. They include an obligation to conduct a discovery conference within fourteen days of arraignment, if the attorney for the defendant requests discovery at the time of arraignment, or thereafter in writing. Local Rule CrR16 also requires the government to permit the defendant's attorney to inspect and copy any search warrants and supporting affidavits; to inform the defendant's attorney about evidence seized through warrantless searches; to inform the defendant's attorney about any electronic eavesdropping; to comply, if requested, with *Brady* and *United States v. Agurs*; to advise the defendant's attorney whether the government will provide a list of the names and addresses of the witnesses it intends to call in its case-in-chief; and, in cases in which the defendant's attorney provides notice of an entrapment defense, to disclose a synopsis of any other crimes, wrongs, or acts that the government intends to use to rebut this defense.

D. The Jencks Act

Under the Jencks Act, 18 U.S.C. § 3500, the government must produce the prior statement of a government witness after the witness testifies on direct examination. Federal Rule of Criminal Procedure 26.2 implements the Jencks Act and sets forth procedures for applying the Act. Federal Rule of Criminal Procedure 12(h) states that Fed. R. Crim. P. 26.2 applies at a suppression hearings and therefore the government must produce prior relevant statements by government witnesses who testify at suppression hearings.

E. Federal Rule of Evidence 404(b)

Federal Rule of Evidence 404(b) provides that when the government in a criminal case seeks to introduce evidence of other crimes, wrongs, or acts committed by the defendant, it must, upon the request of a defendant, "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it tends to introduce at trial." Although the government should provide notice as early as possible, it is advisable to file a pretrial motion in limine seeking a ruling on the admissibility of the proposed FRE 404(b) evidence and delineating the evidence that the government will seek to introduce under the Rule.

F. Department Policy

The United States Attorneys' Manual, § 9-5.001, contains the following statement regarding the requirement of disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required:

> Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263,

280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

1. **Additional exculpatory information that must be disclosed**. A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

3. **Information**. Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

G. The Policy of the United States Attorney's Office for the Western District of Washington

1. General Discovery Policy

It is the policy and longstanding practice of this office that prosecutors be forthcoming in providing broad and timely access to discovery. This generally requires providing discovery

beyond what is required under Fed. R. Crim. P. 16 and other governing federal law. Providing liberal discovery in appropriate cases may facilitate the early resolution of some cases. Notwithstanding this commitment to liberal discovery where appropriate, prosecutors should understand that this is not the equivalent of an "open file," and that there will be occasions when it is not prudent to provide discovery beyond that mandated by law. In deciding whether to provide discovery beyond that mandated by law, a prosecutor must always weigh the impact that discovery might have on the safety of witnesses, informants, and victims of the alleged criminal activity and the likelihood that early disclosure will lead the defendant to create false evidence or otherwise obstruct an investigation.

In general, a case should not be indicted until the prosecutor has gathered and is ready to provide all *Brady* material and all of the discovery material that the government is obligated to produce under Fed. R. Crim. P. 16. Federal Rule of Criminal Procedure 16 material and *Brady* information, except for that contained in witness statements covered by the Jencks Act, should be provided to the defendant in compliance with Local Rule CrR16. Additional discoverable materials that come into the possession of the prosecutor should be produced as soon as possible. Jencks Act and *Giglio* material (that is, information that impeaches a government witness) ordinarily should be produced at a reasonable time prior to trial. Exceptions to this early discovery policy may be made when producing discovery may affect the safety of a witness, informant, or victim or for other compelling reasons. In addition, prosecutors who are producing information in discovery that may endanger a witness or victim should consider seeking a protective order to prevent dissemination of such information by defense counsel. If, for any reason, a prosecutor does not intend to produce discovery as set forth above, the prosecutor must consult with his or her supervisor.

2. Local Rules and Protocols

Although prosecutors have the discretion to provide discovery beyond the legal requirements of Fed. R. Crim. P. 16, it is important that such action by a prosecutor not be deemed a concession or acknowledgment that such discovery is legally required. To avoid any such inference from being drawn, all prosecutors should include a disclaimer of the following nature at the conclusion of discovery letters*: "The provision of the foregoing discovery shall not be construed as a concession or acknowledgment by the government that any or all of the foregoing discovery is required under Fed. R. Crim. P. 16, Jencks or other governing federal statutes or rules."*

Similarly, prosecutors should object to any effort to compel the government to produce discovery on any basis other than *Brady, Giglio*, the Jencks Act, Fed. R. Crim. P. 16, or Local Rule CrR16. In addition, any defense motions to compel discovery beyond that required by these authorities and rules should be immediately reported to the appropriate supervisor and the Chief of the Criminal Division so that they can monitor and coordinate litigation in this area.

3. Special Policy Regarding Electronic Communications

The United States Attorney's Office for the Western District of Washington is reviewing and evaluating policies and practices relating to electronic communications. Until this review is complete, the applicable guidance is as follows:

As explained in Part III below, substantive case-related communications may contain discoverable information. In particular, e-mails or text messages written by agents and witnesses may contain information such as witness statements or information about witnesses that could be construed as *Brady/Giglio* information, and other information that falls within Fed. R. Crim. P. 16 or the Jencks Act. For these reasons, prosecutors should encourage agents to take special care to avoid creating electronic communications (including e-mails and text messages) and voice mails containing information that may be subject to discovery. Similarly, prosecutors should abide by the same rules and avoid substantive email communications with agents and witnesses. In addition, prosecutors and agents should not engage in substantive case discussions in e-mails, text messages, or other forms of electronic communication with witnesses or potential witnesses of any kind. As a general rule, e-mails and text messages between prosecutors, between prosecutors and agents, between agents, and between witnesses and government personnel generally should be limited to scheduling or other procedural matters.

To ensure that prosecutors obtain all information that may be subject to discovery, a prosecutor should instruct agents working on a case to provide the prosecutor with any e-mails, voice mails, text messages or other electronic communications that the agent exchanged with a witness or a potential witness, or that mention a witness or potential witness. The prosecutor should review those communications to determine whether they contain information subject to discovery under Brady/Giglio, Fed. R. Crim. R. 16, or the Jencks Act. Text messages between agents and witnesses or potential witnesses also should be reviewed to determine if they contain substantive information. If the prosecutor discovers such information, the electronic communication itself should be disclosed. When in doubt about whether an electronic communication contains information subject to discovery, the prosecutor should consult with his or her supervisor and, if necessary, with the Office's Professional Responsibility Officer.

II. THE PROSECUTION TEAM

A. Department Policy

1. The United States Attorneys' Manual

The United States Attorneys' Manual, § 9-5.001, states the following regarding the prosecution team:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

2. The Ogden Memorandum

In a memorandum issued January 4, 2010, Deputy Attorney General Ogden elaborated on this requirement as follows:

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in deciding whether another agency is a member of the prosecution team and therefore, whether information in the custody or control of that information is part of the government's discovery obligations in a particular case include the following:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;

- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

- Whether the prosecutor knows of and has access to discoverable information held by the agency;

- Whether the prosecutor has obtained other information and/or evidence form the agency;

- The degree to which information gathered by the prosecutor has been shared with the agency;

- Whether a member of an agency has been made a Special Assistant United States Attorney;

- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and

- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the

prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

III. REVIEW

A. Files to Review

The Ogden Memorandum directs prosecutors to review "all potentially discoverable material within the custody or control of the prosecution team." As directed by the Ogden Memorandum, that review should include the following:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions, the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted. Therefore, the prosecutor can personally review the file or documents, or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant

portions for discovery purposes.

The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file. Prosecutors should take steps to protect non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety. Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a qui tam case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among

prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim/witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (see, e.g., Federal Rule of Criminal Procedure 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential Giglio issues, and they should follow the procedure established in USAM 9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Federal Rule of Evidence 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

a. Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))

b. Statements or reports reflecting witness statement variations (see below)

c. Benefits provided to witnesses including:
   - Dropped or reduced charges
   - Immunity

- Expectations of downward departures or motions for reduction of sentence
- Assistance in a state or local criminal proceeding
- Considerations regarding forfeiture of assets
- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties

d. Other known conditions that could affect the witness's bias such as:
- Animosity toward defendant
- Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
- Relationship with victim
- Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)

e. Prior Acts under Federal Rule of Evidence 608

f. Prior convictions under Federal Rule of Evidence 609

g. Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews should be memorialized by the agent. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or

investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM 9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A)-© or may themselves be discoverable under Federal Rule of Criminal Procedure 16(a)(1)(B). *See, e.g. United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vaffee*, 380 F. Supp. 2d 11, 12-14 (D. Mass. 2005).

B. Personnel Who Should Conduct the Review

The Ogden Memorandum contains the following statement with regard to who should conduct the review for discoverable material:

> Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review

is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

IV. GIGLIO AND IMPEACHMENT INFORMATION

A. Department Policy

The United States Attorneys' Manual, § 9-5.100, sets forth the Department's *Giglio* policy. That policy defines *Giglio* information as follows:

> The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; © prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

The Department's policy also sets forth procedures for disclosing potential impeachment information relating to Department of Justice employees. Although each investigative agency employee is obligated to inform prosecutors with whom that person works of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case, a prosecutor also may decide to request potential impeachment information from the investigative agency. The procedure for requesting information is set forth in Part IV. B. below.

B. The Giglio Policy of the United States Attorney's Office for the Western District of Washington

It is the policy of this office to fully satisfy the government's constitutional obligations to disclose impeachment material concerning agency witnesses in all criminal cases. Accordingly, all prosecutors must be familiar with their responsibilities under the *Giglio, Brady*, and *Henthorn* line of cases. Based on these cases, prosecutors are responsible for disclosing to the defense information that potentially (1) impeaches the honesty, credibility, or veracity of a government

witness, or (2) tends to exculpate the defendant or mitigate potential punishment. Prosecutors have special responsibilities under *Henthorn* for witnesses who are federal government employees or employees of state or local law enforcement agencies who are cross-designated as federal agents to the extent that the office has possession of their personnel files.

The procedures that must be followed to determine if there is any potentially impeaching information that is subject to disclosure are summarized below:

1. Request to Agencies

a. Requesting Official: The Department's *Giglio* policy requires that a single representative in this Office be designated as the Requesting Official who formally makes the request to agencies for potential impeaching material. The Giglio Coordinator and Requesting Official for this Office is the Chief of the Criminal Division.

b. Request: Although the Office has a single requesting official, each prosecutor is responsible for forwarding to the Requesting Official a list of all testifying law enforcement agents and their respective agencies. The letter is then prepared at the Requesting Official's direction making a request to the relevant agency for a review of the agent's file. The list of agency officials to whom the requests should be sent is maintained by the Requesting Official or his designee. If a State or local law enforcement officer will be a witness, a request seeking voluntary disclosure of *Giglio* information will be sent to that officer's agency. However, compliance with such a request cannot be compelled.

c. Timing: Requests for agency inquiries should be sent to the agencies at least 30 days before trial and preferably 45 days before trial. Requests may be sent further in advance, and such advance inquiries are encouraged.

d. Reply: Upon receiving a response from an agency to a request for *Giglio* material, the Requesting Official will promptly forward that reply to the trial prosecutor.

e. Review and Decision on Disclosure: The trial prosecutor will review the information received from the agency and determine whether that information should be disclosed to the court or to the defense. If the trial prosecutor believes that any potential information received from an agency should be disclosed as *Giglio* material, and the agency does not oppose disclosure, the information should ordinarily be disclosed. When the prosecutor is unsure whether to disclose information, or in any case in which the agency opposes disclosure, the prosecutor should consult with his or her supervisor. Prosecutors and their supervisors may consult with the Requesting Official or the Office's Professional Responsibility Officer ("PRO"). If the matter cannot be resolved by the prosecutor, the supervisor,

or the PRO, the matter should be referred to the Chief of the Criminal Division.

f. Review and Decision on Non-Disclosure: The prosecutor will review the information received from the agency and determine whether that information should be disclosed to the court or to the defense. If the prosecutor believes that any potential information received from an agency should not be disclosed as *Giglio* material, the prosecutor must confirm that decision with his or her supervisor. If the trial prosecutor and his or her supervisor agree that the information need not be disclosed, then disclosure need not be made. When any doubt exists about whether to disclose information, *or in any case in which the agency opposes disclosure*, the prosecutor should consult with his or her supervisor or the Office's PRO. If the matter cannot be resolved by the prosecutor, the supervisor, or the PRO, the matter should be referred to the Chief of the Criminal Division.

g. In Camera Review: When the office determines, after consultation with the agency, that guidance from the court is necessary to ascertain whether -- or to what extent -- disclosure is required, a submission may be made to the district court ex parte and in camera to seek a decision as to whether disclosure is required and, if so, the form or extent of the required disclosure. A prosecutor should not make an ex parte, in camera submission without permission from his or her supervisor.

h. Predisclosure Consultation with Agency: No disclosure of impeachment information obtained from an agency pursuant to this policy may be made without obtaining the agency's views on disclosure. The agency's views should be sought early enough to allow the agency time to review the decision to disclose the information and fully express its views. If the agency, after consultation with the prosecutor and his or her supervisor, objects to a decision to disclose, the matter should be referred to the Chief of the Criminal Division who will not resolve the dispute without consulting with the agency.

I. Protective Order: If the office decides to disclose potentially impeaching information about an agency witness, the trial prosecutor will, when appropriate, seek a protective order to limit the use and further dissemination of the information by defense counsel.

j. Copies of Disclosure: When the prosecutor discloses information to the court or the defense, the prosecutor will provide a copy of the information disclosed, along with any pertinent judicial rulings or pleadings, to the relevant agency officials and the Requesting Official.

k. Confidentiality: The Requesting Official and the prosecutor will preserve the security and confidentiality of potential impeachment

information through proper storage and restricted access.

l. Notice of Conclusion of Case: When a request has been made to an agency for information, the prosecutor must advise that agency when the need for such information has ended. This notification must be provided because the agency is under a continuing duty to provide any new impeaching information so long as the need for that information exists. The prosecutor may rely on the case agent or other agent assigned to the case to convey to the relevant agency that the case has been concluded. Notification to the agency shall be provided no later than the time of sentencing, acquittal, dismissal, or other final action.

m. Unsubstantiated Allegations: Information received from an agency concerning allegations that have not been substantiated, were not credible, or that resulted in exoneration ordinarily need not be disclosed to the defense. When in doubt, however, a prosecutor should consult with his or her supervisor. Special care should be taken to preserve the confidentiality of such information. Any such information, if not disclosed to the defense, shall be returned to the agency, along with all copies made, at the conclusion of the case.

n. System of Records: The office does not retain records containing potential impeachment information that was provided by an agency that can be accessed through the name of the agent.

2. Oral Inquiry to Witnesses

a. Inquiry Required: Prosecutors must conduct an oral inquiry of any federal, state, and/or local government employee witness before that witness submits any sworn statement or testifies at any proceeding. The inquiry should focus on anything in the witness's background that might affect his/her credibility. The obligation to conduct the inquiry extends to any agent who will testify under oath in any proceeding or who will be the affiant on a complaint, search warrant, or Title III affidavit.

If the agent answers any question in such a way that it raises a question concerning his or her credibility, the prosecutor should conduct an additional inquiry to elicit any potential impeachment information. That information should be recorded.

b. Determination to Disclose Information: If the prosecutor believes or harbors any doubt about whether information provided by an agent in response to the inquiry must be disclosed in a complaint, search warrant affidavit, or Title III application or provided to the defense, the prosecutor should consult with his or

her supervisor. If the supervisor agrees that the information should be disclosed, the prosecutor or his or her supervisor should obtain the agency's position on whether the information should be disclosed. If the agency objects to disclosure, then the matter should be referred to the Chief of the Criminal Division who will not resolve the dispute without consulting with the agency.

c. Protective Order: If the office decides to disclose potentially impeaching information about an agency witness, the trial prosecutor will, when appropriate, seek a protective order to limit the use and further dissemination of the information by defense counsel. If information provided by the agent is not disclosed, then the form and any notes or other documents created to record the agents disclosure should be maintained solely in the case file. At the conclusion of the case, the form may be maintained in the case file, but it should not be retained in any record that can be accessed by the name of the agent.

V. DISCLOSURES

A. The Government's Obligation

1. The Department's Policy

The Ogden Memorandum contains the following statement regarding the government's disclosure obligations:

> The Department's disclosure obligations are generally set forth in Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. § 3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that USAM 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.
>
> **Considerations Regarding the Scope and Timing of the Disclosures**: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad

and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction: protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the court may deem to have been part of the "file." When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. See USAM 9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying

discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed. R. Crim. P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed. R. Crim. P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

2. The Policy of the United States Attorney's Office for the Western District of Washington

Prosecutors must consider and, if applicable, comply with the district's policies developed by the Electronic Discovery Working Group. In particular, in cases involving a large volume of documents and/or a Title III wiretap, prosecutors should consult the following policies: (1) Best Practices for Electronic Discovery of Documentary Materials in Large Cases, and (2) Best Practices for Electronic Discovery of Materials Pertaining to Wiretaps.

B. Record

1. The Department's Policy

The Ogden Memorandum contains the following statement regarding the need to memorialize the production of discovery materials:

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how

information is disclosed or otherwise made available. While discovery matters are often the subject of ligation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

2. Policy of the United States Attorney's Office for the Western District of Washington

Prosecutors must maintain a specific and accurate record of the items they provide in discovery. Ordinarily, that means a complete Bates numbered set of the discovery provided, or, if the number of documents is too large, an accurate and complete description of the documents that were made available to the defense.