



U. S. Department of Justice

Office of the Deputy Attorney General


The Deputy Attorney General

Washington, D.C. 20530

September 29, 2010

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL AND  
THE ASSISTANT ATTORNEYS GENERAL FOR THE  
CRIMINAL DIVISION  
NATIONAL SECURITY DIVISION  
CIVIL RIGHTS DIVISION  
ANTITRUST DIVISION  
ENVIRONMENTAL AND NATIONAL RESOURCES DIVISION  
TAX DIVISION

ALL UNITED STATES ATTORNEYS

FROM: Gary G. Grindler   
Acting Deputy Attorney General

SUBJECT: Policy and Procedures Regarding Discoverable Information in the Possession  
of the Intelligence Community or Military in Criminal Investigations

National security and other cases<sup>1</sup> that may rely on or relate to classified information in the possession of the intelligence community (IC)<sup>2</sup> or other information in the possession of the military<sup>3</sup> pose unique discovery challenges. The Department must handle these cases properly in

<sup>1</sup> 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 drug cases, human trafficking cases, money laundering cases, and organized crime cases. In appropriate cases, prosecutors are encouraged to make a general practice of discussing with the agents on the prosecution team whether they have a specific reason to believe that the IC may be in possession of information that relates to their case. If any member of the prosecution team—including a supervisor involved in decision-making in the case—has specific reason to believe that the IC is in possession of information that relates to their case, regardless of the type of case, the prosecutors should follow the procedures set forth in this Policy.

<sup>2</sup> The IC includes the Office of the Director of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; the other offices within the Department of Defense (DoD) for the collection of specialized national foreign intelligence through reconnaissance programs; and the intelligence and counterintelligence components of the Department of State, Federal Bureau of Investigation, Drug Enforcement Administration, Department of Treasury, Department of Energy, Department of Homeland Security, and the respective military services. Exec. Order No. 12333 § 3.5(h) (2008).

<sup>3</sup> National security cases may also require collaboration with or assistance from DoD's non-IC and non-law enforcement components. For instance, DoD's non-IC, non-law enforcement components may have arrested or detained the defendant, or conducted a raid that produced evidence or other information relied on in the criminal case.

order to prosecute defendants accused of criminal conduct, safeguard defendants' rights, protect classified and other national security information, and avoid imposing an undue burden on the IC and military. This policy provides guidance to ensure that the Department effectively meets these important obligations.<sup>4</sup>

Due to the risks associated with the disclosure of national security information, prosecutors often will not be able to follow the policy presumptions that the Department has adopted in other contexts in favor of disclosing more information than the law requires or disclosing it earlier than the law requires.<sup>5</sup> Prosecutors should in all cases, of course, disclose in discovery information to which the defense is entitled by law, but national security interests will often militate against disclosing more than the law requires or disclosing it earlier than the law requires in national security cases. The Classified Information Procedures Act, 18 U.S.C. Appendix 3 (CIPA) sets forth procedures for protecting national security information, and prosecutors who handle national security cases should be fully familiar with CIPA. Moreover, disclosure of classified information, by definition, poses a risk to national security.<sup>6</sup> Disclosure of *unclassified* information relating to a national security investigation may also pose a risk to national security if, for instance, the information reveals investigative steps taken, investigative techniques or tradecraft used, or the identities of witnesses interviewed during a national security investigation.

Accordingly, decisions regarding the scope, timing, and form of discovery disclosures in national security cases must be made with these risks in mind, in consultation with the National Security Division, the Intelligence Community, and law enforcement agencies, taking full account of the need to protect against unnecessary disclosure of classified or unclassified information relating to national security investigations. Consistent with this Policy, the United States Attorney's Offices and Department of Justice litigating components should specifically state in their office-wide discovery policies that discovery in national security cases or cases involving

---

<sup>4</sup> The guidance set forth herein is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding, *see United States v. Caceres*, 440 U.S. 741 (1979), and does not have the force of law or a Department of Justice directive.

<sup>5</sup> The Department has adopted a general policy preference in non-national security cases in favor of "broad disclosure," beyond what may be required by the Constitution and the law, but it has also recognized that adhering to this policy may not be feasible or advisable in national security cases where "special complexities" arise. *See* Memorandum for Department Prosecutors from Deputy Attorney General David W. Ogden, "Guidance for Prosecutors Regarding Criminal Discovery," at 9 (Jan. 4, 2010) ("[W]hen considering providing discovery beyond that required by the discovery obligations . . . , prosecutors should always consider any appropriate countervailing concerns in the particular case, including . . . protecting national security interests."); *id.* ("[s]uch broad disclosure may not be feasible in national security cases."). *See also* USAM § 9-5.001 ("The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important . . . , and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (e.g. pursuant to the Classified Information Procedures Act)").

<sup>6</sup> *See* Exec. Order No. 12,958 at § 1.2 (2009) (information may be classified only if its disclosure reasonably could be expected to cause damage to the national security).

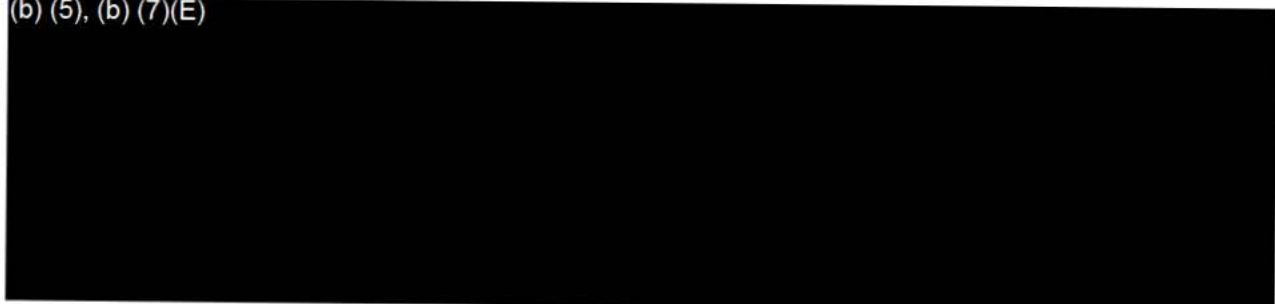
classified information must account for the special considerations that apply to those cases. Discovery policies should specify that prosecutors handling such cases may need to deviate from the component's general discovery policies in certain circumstances, based on an individualized assessment of the specific factors in the case and in a manner that is consistent with the law.

#### **A. Duty To Search and Disclose in National Security Cases**

Under the Supreme Court holding in *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have a duty to disclose any information that is favorable to the defense and material either to guilt or punishment. *Id.* at 88. Information favorable to the defense includes evidence which "would tend to exculpate [the defendant] or reduce the penalty," *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), and evidence regarding the reliability or credibility of a witness, *see Giglio v. United States*, 405 U.S. 150, 154-55 (1972). In addition, prosecutors have an obligation to search for and disclose any written or recorded statements of the defendant within the government's possession, custody, or control, upon the defendant's request, *see Fed. R. Crim. P.* 16, and any written or recorded statement of a witness called by the government to testify at a criminal proceeding, *see 18 U.S.C. § 3500; Fed. R. Crim. P.* 26.2. The information described in this paragraph that the government has a duty to disclose is referred to collectively herein as "discoverable information."

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that in order to satisfy the disclosure obligation, prosecutors have a "duty to learn" of information favorable to the defense known to others "acting on the government's behalf in the case." *Id.* at 437.<sup>7</sup> To apply *Kyles* in particular cases, lower courts have had to determine the circumstances under which government personnel or agencies are deemed to be acting on the government's behalf and thereby fall within the scope of the government's duty to search. The analysis they have developed is fact-specific, depending on factors such as the actions taken by investigators, prosecutors, and the other agencies and departments that have played a role in the case.

(b) (5), (b) (7)(E)



<sup>7</sup> *See also Strickler v. Greene*, 527 U.S. 263 (1999) (holding that the prosecution has a duty to disclose to the defense any exculpatory evidence known to a police investigator, even if it had not been shared with the prosecutor).

<sup>8</sup> The government's "duty to search" is intended to protect the due process right recognized by *Brady* and its progeny to receive any exculpatory, material information in the possession of the prosecution. We are aware of no case in which a court has found that failure to conduct a search violates due process even if the search would have uncovered no discoverable information.

<sup>9</sup> *But see n.1 supra.*



(b) (5), (b) (7)(E)

(b) (5), (b) (7)(E)

The government must consider the unique facts and competing interests of each national security case in order to determine whether it has a duty to search and, if it does, the scope of such a search.

There is a dearth of published case law regarding the contours of the government's duty to search in national security cases. Prosecutors must therefore attempt to apply the duty to search case law developed in ordinary criminal cases to national security cases, drawing principled distinctions where necessary to address the unique challenges and interests involved in the national security context. Moreover, the case law regarding discovery obligations in ordinary criminal cases is itself far from uniform; there are substantial variations from circuit to circuit, and prosecutors are encouraged to discuss the law or practice in their particular district or circuit with NSD. Applying the existing case law provides some *general* guidance to prosecutors handling national security cases regarding when there clearly is – and clearly is not – a duty to search.

### **Duty To Search**

Case law indicates that the government has a duty to search the relevant files of an IC or military component that has taken steps that significantly assist the prosecution. (b) (5), (b) (7)(E)


In addition, case law indicates that the government has a duty to search when the prosecution knows or has a specific reason to know<sup>10</sup> of discoverable information in the possession of the IC or military; has or reasonably should have searched a database accessible to the prosecution team that is maintained by the IC or military; or is responding to a specific and reasonable request for information from a defendant. For instance, the government may have a duty to search:

(b) (5), (b) (7)(E)


---

<sup>10</sup> Case law provides little guidance regarding how specific the government's belief must be in order to trigger a duty to search. Prosecutors should not assume that their knowledge of IC activities or collections is not sufficiently specific to trigger a duty to search; rather, prosecutors are encouraged to raise any questions they have in this regard with NSD.

(b) (5), (b) (7)(E)



(b) (5), (b) (7)(E)



- DOD Custodian: when DoD captures the suspect in a zone of active conflict (or during the course of repelling or responding to an act of piracy) and detains and interrogates the suspect before transferring him to the United States for prosecution.<sup>13</sup> However, the fact that some components of DoD were involved in the capture, detention, and interrogation of the defendant does not require the prosecution to search all of DoD for potentially discoverable material.<sup>14</sup>
- Joint Terrorism Task Force (JTTF): when the suspect is investigated by a JTTF. For instance, if the JTTF in Seattle investigated the suspect, the government must search for

---

<sup>11</sup> Cf. *United States v. Lujan*, 530 F.Supp.2d 1224, 1259 (D.N.M. 2008) (concluding that “the United States has a duty to seek out *Brady* information in FBI and other readily accessible databases.”); *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (“[N]on-disclosure is inexcusable where the prosecution has not sought out information readily available to it.”). It is also possible that a duty to search a particular database will arise even if the prosecution team has not used it during the course of its investigation if the database is deemed to be a readily available resource that the prosecution would be expected to search in such a case. See, e.g., *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (“That the prosecutor, because of the shortness of time, chose not to run an FBI or NCIC check on the witness, does not change ‘known’ information into ‘unknown’ information within the context of the disclosure requirements.”).

<sup>12</sup> Cf., e.g., *United States v. Risha*, 445 F.2d 298, 306 (3d Cir. 2006) (holding that a “*Brady* violation may be found despite a prosecutor’s ignorance of impeachment evidence . . . when the withheld evidence is under control of a state instrumentality closely aligned with the prosecution . . .”) (citation omitted); *In re Sealed Case*, 185 F.3d 887, 896 (D.C. Cir. 1999) (“[P]rosecutors in this circuit are responsible for disclosing *Brady* information contained in [Metropolitan Police Department] files, given the close working relationship between the Washington metropolitan police and the U.S. Attorney for the District of Columbia.”) (citation omitted).

<sup>13</sup> See, e.g., *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001) (imputing U.S. Marshall Service’s knowledge regarding a witness in the WitSec program to the prosecution team; “it is impossible to say in good conscience that the U.S. Marshal’s Service was not ‘part of the team’ that was participating in the prosecution, even if the role of the Marshal’s Service was to keep the defendants in custody rather than to go out on the streets and collect evidence”).

<sup>14</sup> See, e.g., *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (finding no duty to search a division of the Department of Labor (DOL) not involved with the prosecution; the fact “that other agents in the DOL participated in this investigation does not mean that the entire DOL is properly considered part of the prosecution team”); *United States v. Upton*, 856 F. Supp. 727, 750 (E.D.N.Y. 1994) (finding no duty to search the entire Federal Aviation Administration (FAA); “although the FAA provided two inspectors to assist in the investigation, the agency itself did not participate in the criminal investigation or prosecution”).



discoverable information in the possession of the Seattle JTTF.<sup>15</sup> The prosecution has no obligation, however, to search each agency participating in the JTTF or to search other JTTFs unless there is a specific reason to believe that a particular agency or JTTF possesses discoverable information or assisted in the investigation of the case.<sup>16</sup>

- Participation of Main Justice Supervisors: when Department of Justice officials who advise on or are involved in decision-making regarding the defendant's capture, detention (including pre-trial law of war detention), or prosecution, they may be considered part of the prosecution team, thereby triggering a duty to search for discoverable information in their possession or control.<sup>17</sup> Accordingly, when an NSD attorney is assigned to work with a United States Attorney's Office on a case, that attorney and his or her supervisors involved in decision-making in the case will be part of the prosecution team.

### **No Duty To Search**

The government does not have a duty to search an IC or military component that was not involved in the investigation or prosecution unless there is a specific reason to believe that the IC or military possesses discoverable material. The government does not have a duty to search in response to an overbroad request by the defendant that amounts to a "fishing expedition," *i.e.*, a speculative, unsubstantiated assertion by the defendant that an IC or military component may have discoverable information. The government generally will not have a duty to search:

- General Knowledge of Collection Program: when the prosecution team is generally aware of intelligence collection programs, but has no specific reason to believe that the IC possesses information on the suspect or any of the witnesses the government intends to use at trial. For instance, a suspect is stopped crossing the border from Canada by customs officials. A search of his car reveals precursor chemicals and bomb components along with jihadist literature. Under questioning, the suspect admits that he has been inspired by al Qaeda and that he planned to detonate the explosives at the Los Angeles International Airport. The fact that prosecutors are generally aware that the Central

---

<sup>15</sup> See, e.g., *United States v. Burnside*, 824 F. Supp. 1215, 1253 (N.D. Ill. 1993) ("[T]he fact that the ATF agents and the Chicago police officers who [worked on the cases] were aware of the *Brady* material makes knowledge of the *Brady* material attributable to the government for *Brady* purposes.").

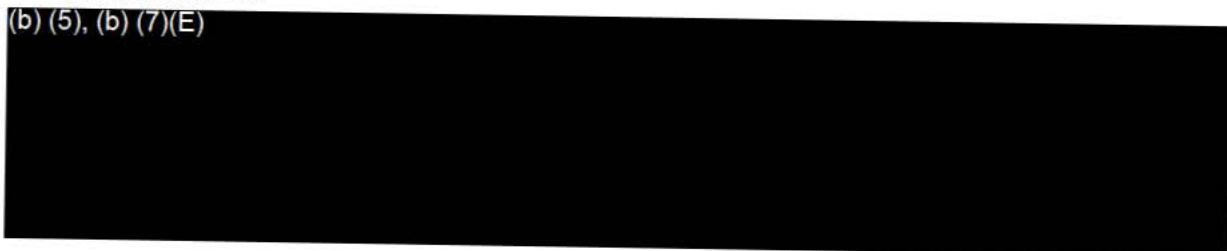
<sup>16</sup> See, e.g., *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993) (finding that there was no obligation to disclose impeachment evidence in a report prepared by FBI agents who were not part of the prosecution team but were investigating other criminal activity involving the same witness; "[e]ven assuming the reports' materiality, there is no evidence that the prosecution team in the instant case was aware of the reports that have subsequently come to light.").

<sup>17</sup> See, e.g., *United States v. Ghailani*, 687 F. Supp. 2d 365 (S.D.N.Y. 2010). In evaluating the defendant's Rule 16 request, the court concluded that Department of Justice officials who "participated in advising on or making the decisions" to hold Ghailani in a CIA detention center, transfer him to Guantanamo Bay, prosecute him in a military commission, and subsequently transfer him to the Southern District of New York for prosecution in an Article III court were part of the "the government" for Rule 16 purposes and were obligated to produce and disclose relevant documents, even if they were not otherwise involved in prosecuting the criminal case. *Id.* at 372.

Intelligence Agency (CIA) collects intelligence regarding al Qaeda members and affiliates does not give rise to a duty to search the CIA's files unless the CIA has provided the prosecution team with information relevant to the case or the prosecution team has a specific reason to believe that the CIA possesses information on the suspect or the statements of a government witness. The fact that the suspect *might* be an al Qaeda affiliate and that the CIA *might* have relevant information does not create an obligation to search when the information has not been relied on or used in any way in the government's investigation or case.<sup>18</sup> (That said, on these facts, prosecutors will undoubtedly wish to do a search to look for inculpatory material; such a search will then trigger an obligation to also look for discoverable information among the material that is searched.)

- Foreign Government Custody: when the defendant is held and interrogated by a foreign government before being transferred to United States custody and U.S. officers did not actively participate in the interrogations.<sup>19</sup> If, however, a foreign government has provided the prosecution team with information relevant to the case, prosecutors have an obligation to search the material provided to them for potentially discoverable documents or information.

(b) (5), (b) (7)(E)



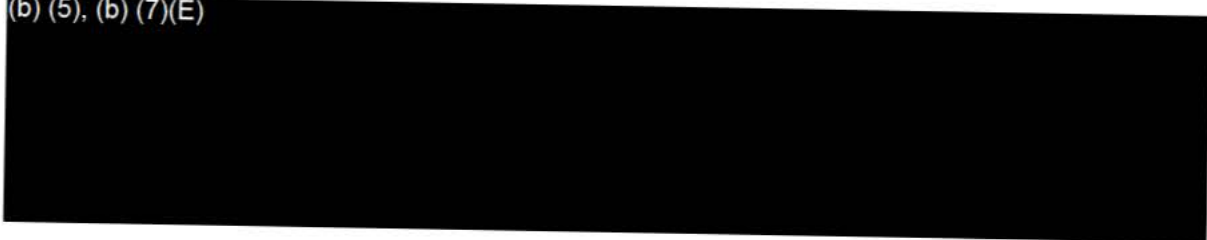
<sup>18</sup> See, e.g., *United States v. McDavid*, No. CR S-06-35 MCE, 2007 WL 926664, at \*3 (E.D. Cal. Mar. 27, 2007) ("Although defendant discusses the NSA's activities at length, he has failed to link them to this prosecution or to make any sort of showing that the prosecutor has knowledge of and access to any results of the NSA's surveillance."); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) ("*Brady* did not require the government here to seek out allegedly exculpatory information in the hands of the Office of Thrift Supervision ('OTS'), the Securities Exchange Commission ('SEC'), or the Internal Revenue Service ('IRS') when it had been unaware of the existence of that information [and] none of those agencies were part of the team that investigated this case or participated in its prosecution . . ."). But see *United States v. McVeigh*, 854 F.Supp. 1441, 1450 (D.Colo. 1997) ("The lawyers, appearing on behalf of the United States, speaking for the entire government, must inform themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial.") The *McVeigh* court, however, ultimately rejected defendant's request to require that the prosecution forward broad-based discovery requests to intelligence agencies based in part on the conclusion that the defendant's discovery requests were not sufficiently specific so as to demonstrate what was being sought and how it was material to the defense.

<sup>19</sup> *United States v. Reyerros*, 537 F.3d 270, 283 (3d Cir. 2008) (finding that there was no duty to search for or disclose documents in the possession of the Colombian government merely because Colombian officials permitted U.S. agents to interview the defendant while he was in Colombian custody and participated in a judicial proceeding that resulted in the defendant's extradition); *id.* (emphasizing as a key fact that there "was no joint investigation by the United States and Colombian governments regarding the events alleged in the Indictment").

<sup>20</sup> See, e.g., *United States v. Ferguson*, 478 F. Supp. 2d 220, 239-40 (D. Conn. 2007) (finding no duty to search the New York Attorney General's files: "The 'mere fact that the Government may have requested and received

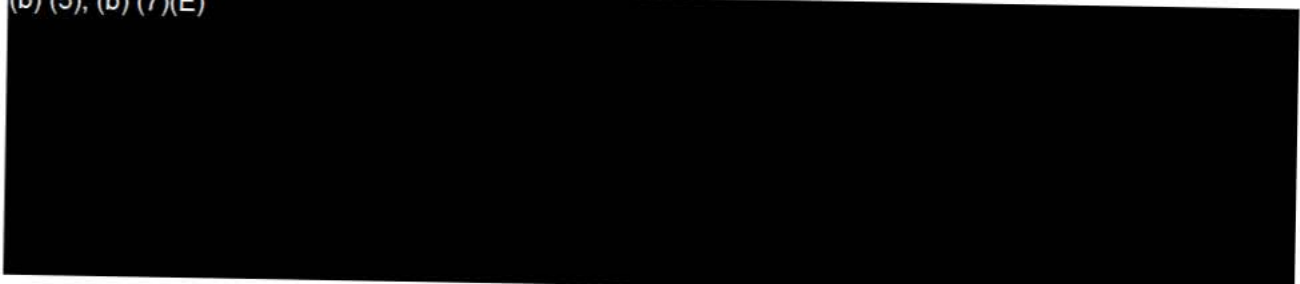


(b) (5), (b) (7)(E)



#### **Hybrid Departments and Agencies**

(b) (5), (b) (7)(E)



\* \* \*

As the above discussion suggests, the determination whether there is a duty to search an IC or military component for discoverable information relating to a national security case is complex and fact-specific. Moreover, even where there is a clear duty to search, determining the scope of that obligation – whether it extends to an entire department or agency, or just to certain components of a department or agency – depends on the unique facts of the case.

In light of these complexities, prosecutors should seek guidance from the National Security Division (NSD) whenever there is the possibility that they have a duty to search an IC or military component in a national security case. Early coordination with NSD will ensure that the Department takes consistent litigation positions across various federal districts and will facilitate coordination with relevant IC components.

#### **B. Prudential Searches**

A “prudential search” is a search of the files of an IC agency, usually prior to indictment, undertaken because the prosecution team has a specific reason to believe that the agency’s files may contain classified information that could affect the government’s charging decisions. A

---

documents from [another agency] in the course of its investigation does not convert the investigation into a joint one.”) (citation omitted); *United States v. Chalmers*, 410 F. Supp. 2d 278, 290 (S.D.N.Y. 2006) (holding that federal entities do not become part of the prosecution team – thereby triggering the attendant duty to search and disclose – merely because they “made documents available to the prosecution”).

<sup>21</sup> See *Poindexter*, 727 F. Supp. at 1478 (“[A] prosecutor who has had access to documents in other agencies in the course of his investigation cannot avoid his discovery obligations by selectively leaving the materials with the agency once he has reviewed them.”). Questions about whether an agency may be in possession of additional discoverable material that triggers an obligation to search should be directed to the relevant component at NSD.

<sup>22</sup> See, *supra*, n.16.



prosecutor should contact NSD to coordinate a prudential search for potentially discoverable information prior to indictment if he or she has a specific reason to believe that:

- the agency or department likely possesses information that could affect the decision whether, against whom, or for what offenses to charge;
- the IC or military likely possesses documents that will fall within the scope of the prosecutor's affirmative discovery obligations. In such cases, pre-indictment discussions about how to handle the documents and information could avoid conflicts, surprises, and disclose-or-dismiss dilemmas; or
- the case may raise other questions regarding classified evidence that should be resolved pre-indictment.<sup>23</sup>


While not legally required, prudential searches assist the prosecution team in identifying and managing potential classified information concerns before indictment and trial. They may also permit the prosecution team to tailor an indictment in a way that will reduce or eliminate the relevance of any classified information, and thereby reduce or eliminate the likelihood of facing a disclose-or-dismiss dilemma after the indictment is returned when the Classified Information Procedures Act (CIPA) and other protective measures do not provide sufficient protection. Prosecutors are strongly encouraged to contact NSD about the possibility of conducting a prudential search as soon as it becomes evident that information in the possession of the IC or military may be relied on, or may be discoverable, in a criminal case.

### C. Coordination of Search Requests

To ensure a consistent approach, avoid undue burdens on the IC and military, and best ensure a timely response, all search requests to a component of the IC or military by any Department of Justice (DOJ) prosecutor handling an investigation or prosecution that involves an identifiable link to national security or to information within the possession of the IC should be made through NSD, except as otherwise agreed by the Assistant Attorney General for NSD and the Assistant Attorney General for the Criminal Division, as follows:

- The Counterterrorism Section (CTS) should be contacted regarding search requests for investigations and prosecutions involving offenses that CTS is responsible for coordinating pursuant to the U.S. Attorney's Manual (USAM).<sup>24</sup>

(b) (5), (b) (7)(E)



<sup>24</sup> Pursuant to the USAM, all investigations, including criminal cases, that have an identified link to international terrorism; domestic terrorism; torture, war crimes, and genocide matters (in coordination with the Criminal Division); and weapons of mass destruction must be coordinated through CTS. USAM §§ 9-2.136—9-2.139.

- The Counterespionage Section (CES) should be contacted regarding search requests for investigations and prosecutions involving offenses that CES is responsible for coordinating pursuant to the USAM.<sup>25</sup>
- All other requests should be directed to NSD's Office of Law and Policy (L&P).

Requests should be made at the earliest opportunity and before any contact by the prosecutor with the IC. *See* USAM § 9-90.210. NSD will coordinate between the relevant DOJ prosecutors and the IC and military to ensure that potentially discoverable classified material is provided to the prosecution team for review. NSD, in close consultation with the relevant DOJ prosecutors, also will coordinate with the appropriate elements of the IC and the military to ensure that use authority or other approvals are received in a timely manner; declassification requests are promptly reviewed; and required disclosures are made pursuant to mutually agreed upon and appropriate mechanisms to protect the information.

Prosecutors should also consult with the relevant component of NSD if they are unsure as to whether or not a prudential search is warranted.

#### **D. Content of Search Requests**

Search requests should be focused, carefully reasoned, and based on case-specific facts, and should include the following information:

- the nature of the charges or likely charges (if pre-indictment), and potential defenses;
- all available identity information with respect to each known defendant/suspect and potential witness – *e.g.*, name (including full name, nicknames and aliases and any spelling variations the prosecutor wants searched), date of birth, citizenship, and any government identification numbers;
- the type of information sought;
- the time period to be covered (which will generally coincide with the time period covered by the criminal activity charged or to be charged);
- the components of the IC and/or military that have been involved in the case and a discussion of the nature of the involvement; and
- the grounds for the search request.

---

<sup>25</sup> Pursuant to the USAM, all economic espionage investigations where there is an intent to benefit a foreign government and other national security offenses listed in the USAM must be coordinated through CES. USAM §§ 9-90.020; 9-59.100.

### **E. Reviewing Responsive Information**

Once an IC or military component has identified documents responsive to the search request, the prosecution team or other attorneys from that office will review the documents, provided that each member has the necessary security clearances. In the rare event that the requisite security clearances cannot be obtained in a timely manner, NSD attorneys may review the responsive files.

DOJ prosecutors should review the responsive material to ensure the production is complete. If it appears that the response does not include all of the material that would be expected given the particular facts of the case, the prosecutors should coordinate with NSD prior to making any follow-up requests to the IC or military component involved. The materials also should be reviewed for information that suggests additional discoverable information may exist in the agency's files or elsewhere within the possession, custody, or control of the United States government.

### **F. Discovery Determinations**

If the prosecutors conclude that any of the classified information is relevant and arguably discoverable,<sup>26</sup> they should coordinate with the appropriate element of NSD to determine how to proceed. NSD will facilitate communication between the prosecutors and the IC or military component regarding declassification requests. Only the IC or military component that originally classified the material can declassify it, and its decision to do so must be based upon specific findings that use or disclosure will not result in harm to national security.

NSD also will facilitate discussions between prosecutors and the appropriate IC or military component regarding how to pursue measures to protect information that is used or disclosed in a prosecution. The Classified Information Procedures Act (CIPA) permits the government, in appropriate circumstances, to: (1) delete classified material from discovery with prior approval of the court; (2) disclose classified information to cleared defense counsel pursuant to a protective order; (3) declassify and disclose information pursuant to a protective order; (4) redact classified information in documents to be used or disclosed; (5) substitute an unclassified statement of the facts contained in a classified document; or (6) submit an unclassified summary of the information that protects sources and methods.<sup>27</sup> NSD can advise prosecutors and negotiate with the IC regarding how appropriately to use CIPA's protective measures to protect classified information that is used or disclosed in a prosecution.

If the relevant IC or military component does not approve use or disclosure of the information even under such protective measures, NSD can also assist prosecutors in tailoring the charges to avoid or to minimize reliance on classified information.

---

<sup>26</sup> Classified information may still be discoverable as *Brady*, *Giglio*, Rule 16, or Jencks material even if the government does not intend to offer it into evidence.

<sup>27</sup> See generally the Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1-16.



### **G. Foreign Intelligence Surveillance Act (FISA) Material**

As with other classified evidence, potentially discoverable information obtained pursuant to FISA must be reviewed and disclosed in accordance with applicable law and Department policies. Like CIPA, FISA provides specific procedures designed to facilitate the use of intelligence information in criminal proceedings while at the same time protecting sources and methods of intelligence collection. *See generally* 50 U.S.C. §§ 1806; 1825; 1845. Internal DOJ policy also requires that prosecutors obtain advance authorization before using FISA information in criminal proceedings.<sup>28</sup> The granting of FISA use authority is a related, but distinct, question from discovery and declassification questions. Use, discovery, and declassification determinations are time consuming, so early consultation with the appropriate components within NSD is advisable whenever a case involves FISA materials.

### **H. Contacting NSD**

Prosecutors submitting their search requests or making other inquiries regarding their discovery obligations should call the relevant component of NSD:

- CTS: 202-514-0849
- CES: 202-514-1187
- L&P: 202-514-1057

---

<sup>28</sup> See Memorandum to All Federal Prosecutors from Michael B. Mukasey, "Revised Policy on the Use or Disclosure of FISA Information," Jan. 10, 2008.