Memorandum

United States Attorney
Eastern District of California

Subject	Date
Discovery Policy	August 24, 2012
To	**From**
Criminal Division	BENJAMIN B. WAGNER United States Attorney

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This memorandum sets forth this Office's policy regarding discovery in criminal cases. Any Assistant United States Attorney with a question concerning compliance with any portion of this policy should consult his or her supervisor.

I. Overview

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2; 18 U.S.C. § 3500 (Jencks Act); *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. USAM § 9-5.001. And reference can be made to USABook, which contains recently updated sections on discovery.

II. Rules and Cases Governing Discovery

A. Rule 16

When requested by the defendant, Rule 16 requires the production of a variety of items:

- Defendant's oral statement made to a government agent in response to interrogation that the government intends to introduce at trial - 16(a)(1)(A);
- Defendant's written or recorded statement, including one in response to interrogation by a government agent, or the defendant's testimony before the grand jury - 16(a)(1)(B);
- Statement of a person who could legally bind a corporate defendant - 16(a)(1)(C);
- Defendant's prior criminal record - 16(a)(1)(D);

- Any item in the government's possession, custody, or control, including any item obtained through the execution of a search warrant, that: (1) is material to the defendant in preparing his defense, (2) the government intends to use in its case-in-chief; or (3) was obtained from or belongs to the defendant - 16(a)(1)(E);
- the results or reports of any physical or mental examination, and of any scientific test or experiment, that is material to preparing the defense, or that the government intends to use in its case-in-chief - 16(a)(1)(F);
- the written summary of any expert witness testimony the government intends to introduce in its case-in-chief - 16(a)(1)(G).

B. Rule 26.2

Rule 26.2 requires a party, including the defendant, who called a witness to testify, to produce to the other side upon its request any statement of the witness that relates to the testimony. Under the rule, production does not have to be made until after the witness has testified on direct examination.

C. The Jencks Act - 18 U.S.C. § 3500

The Jencks Act requires the government to produce to the defendant any statements previously made by a witness who has been called by the government to testify at trial, where the statements relate to the witness's testimony. Under the rule, production does not take place until after the witness has testified on direct. Although a FBI 302 (report of interview) of the witness is generally not considered to be a statement within the meaning of the Jencks Act (*United States v. Claiborne*, 765 F.2d 784, 801-02 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), *abrogated on other grounds*, *Ross v. Oklahoma*, 487 U.S. 81 (1988)), it is the office's policy generally to produce such reports as if they are Jencks Act statements.

D. Brady v. Maryland

Under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the government is required to produce evidence that exculpates a defendant when such evidence is material to guilt or punishment. 373 U.S. at 87. Because this is a Constitutional obligation, *Brady* material must be disclosed regardless of whether the defendant makes a request for it. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995).

Since a determination of what is *Brady* material depends on the defense being offered, there may be occasions when you should state on the record in Court that in order to fully comply with its *Brady* obligations, the government needs to know the theory of the defense.

E. Giglio v. United States

Under *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny, the government is required to produce material that impeaches a witness when such evidence is material to guilt or punishment. 405 U.S. at 154. As with *Brady* material, impeachment material under *Giglio* must be disclosed regardless of whether the defendant has asked for it. *Kyles v. Whitley*, 514 U.S. at 432-33.

F. Department of Justice Guidance

As set forth more fully in the United States Attorney's Manual, Department 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). USAM § 9-5.001 (C).

G. Classified Information

The Classified Information Procedures Act (CIPA), Title 18, United States Code, Appendix 3, controls the disclosure of classified information in discovery.

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 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:

- Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;
- Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;
- Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;
- Other significant cases involving international suspects and targets; and
- 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.

If your case involves or implicates classified information, contact the Office's National Security Coordinator, ATAC Coordinator, or Criminal Chief at the earliest possible juncture.

III. The Prosecutor's Obligations

A. Gathering and Reviewing Discoverable Information

1. Where to Look

USAM § 9-5.001 requires that federal prosecutors, in preparing for trial, seek all exculpatory and impeachment information from all members of the prosecution team. Those members include federal, state, and local law enforcement officers and other governmental officials participating in the investigation and prosecution of the criminal case against the defendant.

In most cases, the "prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. Multi-district and multi-agency investigations, as well as parallel proceedings with regulatory agencies such as the SEC, FDIC, or the EPA, pose special discovery challenges. Recent guidance issued by the Department (which is attached to this memorandum) lists factors one should consider in determining whether to review potentially discoverable information from another federal, state, or local agency.

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.

If your case involves an intelligence agency or any foreign conduct, see Section II G above.

2. What to Review

Generally, all potentially discoverable material within the custody or control of the prosecution team should be reviewed. The review process should cover the following areas:

a. The Investigative Agency's File

The agency's 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 should be reviewed. This includes the entire investigative file, including FBI Electronic Communications (ECs), inserts, emails,

and the like. If discoverable information is contained in any of these documents, you may, depending upon the circumstances, be able to discharge your obligation to produce that information by producing a redacted copy or sending a letter to defense counsel containing the discoverable information.

b. Confidential Informant (C/I), Witness (CW), Human Source (CHS), or Source (CS) Files

You are entitled to access the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of the relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, should be included in the review.

Depending on the circumstances, it may be necessary to review a non-testifying source's file. If so, you should follow the agency's procedures for requesting review of the file.

With respect to any of these files, you need to take steps to protect the non-discoverable, sensitive information contained in them. You may be able to discharge your obligation by providing a summary letter to defense counsel without having to produce the actual file or documents contained therein.

c. Evidence and Information Gathered During Investigation

Whenever practicable, all evidence and information gathered during an investigation should be reviewed, including evidence obtained during searches or by way of grand jury subpoenas.

d. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Proceeding

The files of a regulatory agency that is a member of the prosecution team should be reviewed. Civil case files concerning an ongoing parallel civil proceeding in which Department civil attorneys are participating should also be reviewed.

e. Substantive Case-Related Communications

Substantive case-related communications, which may

be memorialized in emails, memoranda, or notes, should be reviewed. These 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.

"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.

A prosecutor should bear in mind that the format of the information generally does not determine whether it is discoverable. Material exculpatory information that a prosecutor receives during a conversation with an agent or witness is generally as discoverable as if that same information were contained in an email, letter, or report. Depending on the circumstances, information received orally should be provided to the defense by way of a letter from the prosecutor or a report prepared by the agent memorializing the information.

As set forth more fully in the office policy entitled "Use and Retention of Emails," communicating via email with agents and witnesses about substantive case-related matters is generally discouraged. Make sure that if substantive new information is contained in an email from the witness or agent that you either print and file the email or advise the agent to include that information in a formal report to satisfy our discovery obligations.

f. Potential *Giglio* for Law Enforcement Witnesses

We presently have a formal procedure in place to request from the relevant federal law enforcement agency potential *Giglio* material for any of its agents. Prosecutors should also 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.

It is generally desirable to inquire of an agent before he testifies or acts as an affiant if he:

- has sustained negative findings relating to his official duties;
- is the subject of any pending investigation

for official or off-duty conduct;

- has been the subject of any allegations of impropriety that have received publicity;

- has been the subject of any negative credibility findings by a judge or prosecutor; or

- has been arrested, charged, or convicted of a crime.

These same questions should also be posed to state and local law enforcement officers. It is understood, however, that in adoptive cases, these questions may very well have to come after investigative actions have already been undertaken, or state criminal charges have already been brought.

g. Potential *Giglio* for Non-Law Enforcement Witnesses

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. Examples of such information are set out in the Department's guidance, which is attached hereto.

h. Information Obtained in Witness Interviews

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 an agent is not available, a prosecutor should try to have another office employee present for the interview.

Generally speaking, witness interviews should be memorialized by the agent. Agent and prosecutor notes, as well as original recordings, should be preserved.

(i) Witness Statement Variations - that are material and made during the course of an investigation, or even a single interview, should be memorialized and provided to the defense as *Giglio* information;

(ii) Trial Preparation Meetings with Witnesses - need not be memorialized. New information that is exculpatory or is impeachment, however, should be disclosed, even if it is first disclosed during a pre-trial witness preparation session. If the new information represents a variance from the witness's prior statement, you should consider whether the statement should be memorialized and produced, as noted above.

(iii) Agent Notes - should be reviewed if there is reason to believe that the notes are materially different from the report of interview, if a report 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.

B. Conducting the Review

The prosecutor is ultimately responsible for compliance with discovery obligations, and it is therefore preferable for a prosecutor to review personally the foregoing materials. When that is impractical, the prosecutor should develop a process for reviewing the material, including identifying who should participate in the review, but the prosecutor should not delegate the disclosure determination itself. In cases involving voluminous evidence, the prosecutor should consider providing defense access to the documents. Such broad disclosure, however, may not be feasible in cases involving classified information.

C. Making the Disclosures

1. Considerations Concerning the Scope and Timing

Providing broad and early discovery 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, such as those listed in the attached Departmental guidance.

Recognizing that 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. In that regard, USAM § 9-5.001 requires production of such information beyond that which is material. For example, a prosecutor must disclose information that is inconsistent with any element of any crime, or information that establishes a recognized affirmative defense. Moreover, the prosecutor must disclose information that either casts substantial doubt upon the accuracy of any witness or might have a significant bearing on the admissibility of the prosecution's evidence. All of this information must be disclosed irrespective of its admissibility and even if the prosecutor does not believe the information will make the difference between conviction and acquittal of the defendant.

And a prosecutor must disclose all information whose cumulative effect would meet this standard.

Prosecutors should not describe the discovery being provided as "open file" since it is always possible that something will be inadvertently omitted from production. In addition, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for a failure to disclose documents a court may deem to have been part of a "file."

2. Timing

Discovery required by Rule 16 should be provided in accordance with the Local Rules (Local Rule 440).

Exculpatory information, regardless of whether it is memorialized, must be disclosed to the defendant reasonably promptly after discovery.

Impeachment information, which depends on the prosecutor's decision concerning trial witnesses, will typically be disclosed at a reasonable time before trial.

Information concerning sentencing factors should be produced no later than at the time of the commencement of the presentence investigation.

Supervisory approval is necessary before a prosecutor can delay production of impeachment or exculpatory information because of its classified nature. Upon approval, a prosecutor should provide notice to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

If it is unclear whether information should be produced under *Brady* or *Giglio*, the prosecutor should submit the material *in camera* and ask the Court to decide if it must be disclosed. If disclosure is ordered and circumstances warrant, the prosecutor should seek a protective order from the Court.

3. Form of Disclosure

There are instances when it is not advisable to turn over discoverable information in its original form because, for example, it would generate security concerns, or it is contained in internal agency documents or Suspicious Activity Reports. In that case, prosecutors should take great care to ensure that the

full scope of pertinent information is provided to the defendant in whatever form (e.g., letter to counsel) it is produced.

D. Making a Record

Prosecutors should make a record of when and how discovery was disclosed or otherwise made available to defense counsel. It is a good practice to number documents and send a letter to counsel identifying which numbered documents are being produced. In those cases where there is a voluminous amount of discovery, it is a good practice to prepare an index identifying all of the discovery that is being made available to defense counsel.

IV. Conclusion

No policy can take into account every eventuality or set of circumstances. Thus, the fact that a prosecutor has not made discovery available according to this policy does not necessarily mean he or she has acted inappropriately or in bad faith.

This discovery policy does not create a general right of discovery in criminal cases. This policy is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).