DISTRICT OF HAWAII
OFFICE PROCEDURES MEMORANDUM

SUBJECT: Discovery in Criminal Litigation

DATE: October 15, 2010

OPM NO.: 3-5

All attorneys representing the United States in criminal cases are expected to have a thorough understanding of the Memorandum from the Deputy Attorney General issued on January 4, 2010, entitled "Guidance for Prosecutors Regarding Criminal Discovery" (hereinafter "Guidance"), and the provision of the United States Attorney's Manual ("USAM"), Section 9-5.001, cited in the Memorandum. 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. Prosecutors must thus also be conversant with the memorandum issued by the Deputy Attorney General on September 29, 2010, entitled “Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations” (hereinafter “Policy”).

This memorandum reiterates and elaborates on some provisions in those documents. All guidance, including this office procedures memorandum, is prospective only, from the dates of issuance of the respective memoranda. It is subject to legal precedent, court orders, and local rules and is not intended to have the force of law or to create or confer any rights, privileges, or benefits.

The Prosecution Team

Prosecutors should err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Guidance, p. 3. In most cases, the prosecution team will include the federal agents, state and local law enforcement officers, and other government officials working on the case. Whether information known to other persons from the same agency who are not working on the case or other agencies should be sought or reviewed depends on case law and factors discussed in the Guidance, pp. 2-4.

In determining who should be considered part of the prosecution team, an AUSA must determine whether the relationship is close enough to warrant inclusion for discovery purposes. When in doubt, prosecutors should consult with supervisors and/or the Discovery Coordinator. Examples of considerations are:

1. Multi-district investigations: the prosecution team could include the AUSAs and agents from the other district(s).

2. Regulatory agencies: the prosecution team could consist of employees from agencies such as SEC, FDIC, U.S. Trustee, etc. which are non-criminal investigative agencies.

3. State/local agencies – police officers who are a part of a multi-agency task force the AUSA is directing and those who gathered evidence pertinent to the charges are among those who could be included as part of the prosecution team.

Generally, an intelligence agency or non-investigatory military component which has taken steps "that significantly assist the prosecution" is considered part of the prosecution team for the purposes of searching relevant files for discovery. Policy, p. 4. However, if a component of an agency has not been involved in a case and there is no specific reason to believe it possesses discoverable information, there is no duty to consider that component to be part of the prosecution team merely because another part of the same agency assisted in the case. Policy, p. 8.

What to Review

Review of Agency Files. For investigative agencies considered to be part of the prosecution team, the prosecutor should personally review the agency file or request production of potentially discoverable materials from the case agents. The agency's entire investigative file, including documents such as FBI Electronic Communications, inserts, e-mails, etc., should be reviewed for discoverable information. Prosecutors should discuss with the investigative agency whether files from other investigations or non-investigative files, such as confidential human source files, might contain discoverable information. Guidance, pp. 4, 5.

Prudential Searches. A "prudential search" is a search of the files of an intelligence agency or non-investigatory military

component undertaken, usually prior to indictment, because the prosecution has a specific reason to believe that the agency's files may contain classified information that could affect the government's charging decisions. Prudential searches should be conducted if the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe:

1. The agency or component likely possesses information that could affect the decision whether, against whom, or for what offenses to charge;
2. The agency or component likely possesses documents that will fall within the scope of the prosecutor's affirmative discovery obligations;
3. The case may raise questions regarding classified evidence that should be resolved pre-indictment. Policy pp. 8-9.

As previously noted, 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. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has a specific reason to believe that a member of the intelligence community or a non-investigatory military component possesses 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 intelligence community or a non-investigatory military component possesses discoverable material, the prosecutor should consult with the Department's National Security Division (NSD) regarding whether to make a request through NSD for a prudential search.

If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that a member of the intelligence community or a non-investigatory military component possesses discoverable material, then a prudential search generally is not necessary.

Confidential Human Sources (CHS). The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources defines this term as "any individual who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information, or relationship with the FBI warrants confidential handling." Prior to the issuance of those Guidelines in 2007, those individuals were referred to as "confidential informants," "cooperating witnesses," or "assets." For the purpose of this memorandum, the definition for "confidential human source" will apply to individuals dealing with any investigative agency, not just the FBI.

If a CHS is testifying, the entire CHS 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 reviewed. Guidance, pp. 4-5. Under some circumstances, a review of a non-testifying CHS's file may be deemed necessary. Guidance, p. 5.

Database Searches. The search of an intelligence database for inculpatory material will generally create an obligation to search the same database for discoverable information. It is also possible that a duty to search a database may arise even if the prosecution team has not used it, where the database, such as NCIC, is a readily available resource the prosecution would be expected to search. Policy, pp. 4-5.

Civil Attorneys and Regulatory Agencies. If a regulatory agency is a member of the prosecution team, that agency's files should be reviewed. If an agency is not part of the team but is nonetheless conducting an investigation or proceeding on the same

matter, consideration should be given to reviewing that agency's files. In parallel proceedings, such as *qui tam* actions, civil case files should be reviewed. Guidance, p. 5.

Case-Related Communications through Electronic Media. AUSAs should refrain from communicating with other AUSAs, agents, victims, or witnesses through any electronic means, including but not limited to e-mail and text messages, especially where those communications involve trial or investigative strategy, witness statements, witness credibility or trial exhibits. Any AUSA who does communicate through these media should be mindful that those communications may have to be disclosed to the defense or the court. Such media should only be used when the AUSA has no other means of communication available and immediate communication is essential.

AUSAs should also discourage agencies from using e-mail and other electronic communication media for substantive discussion of case work, including communications among agents or with victims or witnesses.

Electronic records must be printed and stored in the agency files just as any other written records would need to be preserved. AUSAs should also preserve, in hard copy, any substantive case-related communications through electronic media to which they are parties.

Potential *Giglio* Information Relating to Law Enforcement Witnesses. The office procedure for obtaining potential impeachment information relating to federal law enforcement officers contained in personnel files of the officers' agencies is set out in OPM 3-34.

Generally, personnel files of non-federal law enforcement officers are not within the possession of the prosecution and are therefore not subject to the same search procedure outlined in OPM 3-34. Nonetheless, prosecutors should at least make a written inquiry to each testifying non-federal law enforcement officer using the form provided in the Criminal Forms Directory (0010b). Consideration should be given to searching the personnel files of non-federal law enforcement officers where there is reason to believe that potential exculpatory or impeachment information is contained therein.

Witness Interviews. Generally, witness interviews other than for the purpose of trial preparation are memorialized by a law enforcement agent. When a prosecutor participates in a non-trial preparation interview, note-taking responsibilities should

be determined prior to the interview. Regardless of that determination, all prosecutor and agent notes should be preserved at least until the conclusion of the case. Guidance, p. 7.

Prosecutors should not conduct any witness interview, even for trial preparation, without an agent present. If circumstances make it impossible for an agent to be present, another office employee should be present. Guidance, p. 7.

Material variances in witness statements should be memorialized, even if they are in the same interview, and disclosed to the defense. Guidance, p. 8. If there is some question as to materiality, consideration should be given to an in camera review by the court.

Agent notes of an interview should be reviewed if:

1. There is a reason to believe that the notes are materially different from the memorandum of interview;

2. A written memorandum was not prepared;

3. The precise words used by the witness are significant; or

4. The witness disputes the agent's account of the interview. Guidance, p. 8.

Conducting the Review

Because the prosecutor is ultimately responsible for compliance with discovery obligations, he or she decides how to conduct a review of gathered information to identify discoverable information. Prosecutors may delegate responsibility for the review but should not delegate the disclosure determination itself. Guidance, p. 8. If the prosecutor delegates responsibility for review, the identity of the persons to whom the delegation is made and the scope of the responsibility should be documented at least in the prosecutor's records.

All search requests to an intelligence agency or non-investigatory military component should be made through NSD. Policy, p. 9.

Making the Disclosure

Scope of the Disclosures. Prosecutors are 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 imposed by law. Prosecutors should never describe the discovery being provided as "open file." Guidance, p. 9.

When considering providing discovery beyond that required by discovery obligations, prosecutors should consider any appropriate countervailing concerns, including, but not limited to:

1. Protecting victims and witnesses;
2. Protecting privileged information;
3. Protecting national security interests;
4. Protecting the integrity of ongoing investigations;
5. Guarding against obstruction;
6. Investigative agency concerns

Guidance, p. 9.

Timing. Under local rules, Rule 16 discovery and *Brady* material other than impeachment information is to be made available to the defense within seven days after the arraignment, without a formal request from the defendant. Aside from the local rules, exculpatory information (including information which the defense may assert is exculpatory) must be disclosed promptly after discovery. Impeachment information will typically be disclosed at a reasonable time prior to trial depending on the prosecutor's decision on who will be called as witnesses. This determination is generally not known until right before trial. See USAM § 9-5.001.

When making discovery timing decisions, prosecutors should always consider the factors referenced above in regard to granting discovery beyond that which is required, as well as any other strategic considerations. Guidance, p. 9.

Making a Record. Prosecutors should make a record of when and how information is disclosed or otherwise made available.

The record should be detailed enough to identify which documents, information, data, objects, or other items were disclosed.

Disclosure in National Security Cases
Other Cases Involving Classified Information

As stated in the Guidance, p. 3, although many of the same considerations generally apply in national security cases, "special complexities arise in that context." "[D]iscovery in national security cases or cases involving classified information must account for the special considerations that apply to those cases." Policy, p. 2. Thus, prosecutors handling those types of cases may need to deviate from general discovery policies, including the presumption in favor of disclosing more information than the law requires or disclosing it earlier than the law requires, based on an individualized assessment of the specific factors in the case and in a manner that is consistent with the law. Policy, p.3.

Any determination that classified information is relevant and arguably discoverable must be coordinated with NSD. Policy, p. 11.

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