

Memorandum



To: Criminal AUSAs and SAUSAs
Northern District of Iowa

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Subject: Policy for Discovery in Criminal Cases

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I. Introduction

This Memorandum sets forth the policy for the Northern District of Iowa regarding discovery in criminal cases.¹ This Memorandum also contains specific, case-related considerations that may warrant a departure from the uniform discovery practices of the office and the procedures prosecutors² are required to follow to obtain supervisory approval to depart from the uniform practices in an appropriate case.

PROSECUTORS SHOULD BE FAMILIAR WITH THE *Guidance for Prosecutors Regarding Criminal Discovery* ISSUED BY THE DEPUTY ATTORNEY GENERAL ON JANUARY 4, 2010. A copy of that memorandum is attached (Attachment 1). That Guidance provides “a methodical approach to consideration of discovery obligations that prosecutors should follow in every case” and focuses on our obligations to ensure, in the first instance, we have all of the discovery that may need to be disclosed to defendants. This policy focuses on what we disclose and how we provide access to our discovery. Of course, prosecutors must also be familiar with the circuit and district court precedent and the local rules. Where there is or develops an inconsistency between those authorities and this policy, the former controls.

Prosecutors should also be familiar with statutory, rule-based, and case-based discovery obligations under Rule 16, the Jencks Act, *Brady v. Maryland*, and *Giglio v. United States*.

Finally, prosecutors should be aware that the U.S. Attorney’s Manual (USAM § 9-5.001) “requires prosecutors to go beyond the minimum obligations required by the Constitution and establishes broader standards for disclosure of exculpatory and impeachment information.”³ In short, DOJ policy requires disclosure of “information beyond that which is ‘material’ to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995),” and encourages prosecutors to “err on the side of disclosure.” USAM

¹ This memorandum provides only internal guidance for the United States Attorney’s Office for the Northern District of Iowa. It is not intended to, does not, and may not be relied upon to create any substantive or procedural rights enforceable at law by any person in any administrative, civil, or criminal matter or case. Nor are any limitations hereby placed on the otherwise lawful litigation prerogatives of the United States Department of Justice. See United States Attorney’s Manual (USAM) § 1-1.100. See also *United States v. Caceres*, 440 U.S. 741 (1979).

² The term “prosecutor” includes Assistant United States Attorneys and Special Assistant United States Attorneys.

³

§ 9-5.001(F). The policy requires prosecutors to produce “information,” not just “evidence,” and counsels that the prosecutor must consider the cumulative impact of items of information. Id.

II. National Security Cases

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 the National Security Division 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;
- Those cases in which one or more targets are, or have previously been, associated with an intelligence agency; and
- Other significant cases involving international suspects and targets.

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.

III. Nature of Discovery Disclosures

The Northern District of Iowa will provide prompt discovery in criminal cases consistent with the law, security requirements, and policy set forth below. We will also provide copies of certain discovery to defendants in either paper or electronic form. The policy regarding producing copies of discovery to defendants will vary, however, depending on the nature of the case and the nature of the discovery, as set forth in more detail below.

A. A Note on Terminology

We will not refer to our discovery policy as an “open file” discovery policy. That does not mean the scope of our discovery disclosure is any less expansive than before. Rather, it reflects the reality that the term “open file” discovery can be misleading. First, we will not always disclose everything in discovery (for example, we may not disclose a document in discovery if there is a safety issue, as explained in more detail below). Second, we may rightfully withhold items as allowed by Rule 16. Accordingly, we should refrain from referring to our discovery policy as “open file.” Rather, we will describe our policy as an “expanded discovery” policy.

B. A Note on Redaction

The need to redact discovery to protect other investigations and the identity of witnesses and victims will arise repeatedly in criminal cases. The circumstances when redaction may be appropriate are outlined below. When discovery is redacted, it must be done in a manner that makes it clear to the reader the discovery has been redacted. For documents, the redaction should be made with a black marker or there must be some written notation of a redaction whenever it is done. The best practice is to also document that the prosecutor has alerted defense counsel that discovery has been redacted. This should be either in the form of a letter or a note in the discovery identifying the discovery redacted and the nature of the redaction.

C. Stipulated Discovery Order

We will agree, in most cases, to enter into a stipulated discovery order with defendants. A copy of the Stipulated Discovery Order is attached. (Attachment 2). Prosecutors should agree to the stipulated discovery order in all cases unless there is a safety or security concern or doing so would not be in the best interest of the United States. Before a prosecutor declines to enter into a stipulated discovery order, the prosecutor must obtain supervisory approval under Section VII. If a defendant refuses to enter into the Stipulated Discovery Order, the prosecutor should immediately report this to his or her supervisor. The prosecutor must then make a decision, with approval of his or her supervisor, regarding the discovery the government will provide to the defendant.

D. Access v. Copies

Prosecutors should, whenever possible and within the limits set forth in Department policies and this section, endeavor to provide copies of discovery to defense counsel. The extent to which we will provide copies of discovery to counsel will depend on both the nature of the case and the nature of the information. Prosecutors retain the discretion to request defense counsel review the discovery file and identify information they wish copied before providing copies of discovery pursuant to this policy.

1. Narcotics, Firearm, Violent Crime, and Other Cases In Which Cooperating Witnesses May Be In Danger

Circulation of copies of interview reports or recordings can endanger cooperators, informants, and witnesses. Accordingly, in cases in which cooperating witnesses may be in danger, prosecutors should not provide defendants with copies of statements by cooperators and informants, or other documents such as plea agreements or proffer agreements, that would reveal the fact of cooperation or assistance provided to the government. Unless mere disclosure of the witness' identity would create a safety risk, the defendant should still be provided access to the information in discovery. Defense counsel may make notes of the information but will not be provided a copy of the information. If the prosecutor believes it is necessary for safety or other reasons to conceal identifying information about a witness, the prosecutor may redact the discovery. Of course, the prosecutor must still comply with the case law and the Jencks Act (18 U.S.C. § 3500). Either a copy of the discovery or the information contained in the discovery must be produced to defendant in a manner and as required by the Jencks Act, the Stipulated Discovery Order, the Court's Trial Scheduling Order, and the Local Rules in the event the case proceeds to trial or the Jencks Act is otherwise implicated.

2. Victim Cases

In some cases, victims may continue to be victimized by defendants and their associates, or be subject to harassment or embarrassment, if copies of discovery pertaining to the victims were provided to defendants. Accordingly, a prosecutor may choose not to provide defense counsel with copies of discovery in these cases when the discovery pertains to victims of the crime. Again, access to the documents should nevertheless be provided to defense counsel in discovery. Personal identification information pertaining to victims should be redacted from discovery. See 18 U.S.C. § 3771(a)(8). The prosecutor must still comply with the case law, Jencks Act, Stipulated Discovery Order, Court's Trial Scheduling Order, and Local Rules.

3. Grand Jury Transcripts

Copies of grand jury transcripts, properly watermarked regarding further distribution, may be provided to defendants in discovery as long as it is otherwise provided consistent with Rule 6(e) of the Federal Rules of Criminal Procedure. As stated above, in narcotics or violent crime cases or cases involving victims, and in any other case where safety or security is an issue, prosecutors may chose not to provide copies of grand jury transcripts to defense counsel in discovery. Absent supervisory approval, however, copies of grand jury transcripts should be made available to defense counsel for their review.

4. Tax Records

Copies of tax records, properly watermarked regarding further distribution, belonging to the defendant may be provided to the defendant as part of the discovery consistent with other provisions of this policy. To the extent the discovery file contains tax documents pertaining to other people, those copies may not be provided or disclosed to other defendants as part of our expanded discovery without supervisory approval.

5. Check-out Copies of Documents

In some cases where we do not provide copies of discovery to defense counsel (such as interview reports in narcotics cases), there may be instances where defense counsel requests permission to show a copy of a particular document or documents to the defendant. Occasionally, defendants do not trust the defense attorney's notes and if the defendant can actually see the document(s), it helps resolve the case. In those instances, prosecutors may allow the defense attorney to check out a watermarked copy of the relevant document(s) with the understanding that no copies may be made, the attorney may only show it to his or her client, and the attorney must return the copy to the prosecutor. These limitations should be memorialized in a cover letter or other document provided to the defense attorney with the copy of the requested documents.

6. Other

Issues may arise regarding privacy, practicalities (such as volume, the nature of the information that makes copying difficult, or timing), or other factors that would make providing copies of discovery unworkable. Our office retains the discretion to not provide copies of expanded discovery to defendants.

Moreover, the office will retain the discretion not to provide copies of expanded discovery to defense counsel who have demonstrated an abuse of the courtesy or with regard to defense counsel with whom our office is unfamiliar or has no track record. Approval by the Criminal Chief is required when a prosecutor does not wish to provide copies of expanded discovery based on the identity of the defense counsel.

IV. Gathering and Reviewing Discovery Materials

It is the obligation of prosecutors to ensure that defendants are provided with all discovery required by the Federal Rules of Criminal Procedure, statute, and case law. This requires prosecutors to become intimately familiar with the case file, including those materials in the possession of government agencies involved in the case. It is the obligation of the prosecutor to gather all potentially discoverable material within the possession of the “prosecution team” and to review it in order to determine whether it should be disclosed as part of discovery. This obligation cannot be delegated by the prosecutor except when the discovery material is voluminous and the prosecutor remains responsible for organizing and overseeing the gathering and review process. The obligation to gather potentially discoverable information requires an understanding of the “prosecution team” concept and a recognition of other issues that may arise in the gathering process.

A. The Prosecution Team

The “prosecution team” includes all agents and law enforcement officers, whether federal, state, or local, who helped develop the case or worked with or under the supervision of the prosecutor during the investigation. The prosecution team may also include other agencies, including civil and regulatory agencies. If an investigation involves parallel civil or administrative proceedings, the scope of the “prosecution team” may expand to cover those agencies. Similarly, if the investigation spans multiple federal districts or involves prosecutors from a Department litigating component, the prosecution team expands to include those entities. Prosecutors should err on the side of inclusiveness when considering which agencies and entities fall within the definition of the prosecution team for purposes of gathering potentially discoverable material. Prosecutors should also keep in mind the distinction between gathering potentially discoverable material and disclosing material ultimately deemed discoverable. In other words, just because we obtain material does not necessarily mean that the material will be discoverable.

In determining the scope of the prosecution team for purposes of gathering potentially discoverable material, prosecutors should consider the following factors:

- 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 investigation and/or prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in target 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 from 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 or actions; 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.

In cases arising out of investigations conducted by multi-agency task forces or otherwise involving state or local law enforcement agencies, the prosecutor also should consider the following additional factors:

- Whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control;
- The extent to which state and local agencies are part of a team, are participating in a joint investigation, or are sharing resources; and
- Whether the prosecutor has ready access to the evidence.

For further guidance regarding the scope of the "prosecution team," see USAM § 9-5.001.

B. Potentially Discoverable Information

Prosecutors should review information in the following sources for potentially discoverable information:

1. The Agency's Investigative Files

Prosecutors should review all of the agency's investigative files, including all portions of the substantive case file and any other file or documents the prosecutor has reason to believe may contain discoverable information. This includes reports of interview and investigative activity, inserts, e-mails, text messages, and similar documents. In the event the agency considers a document to be "intelligence" or an internal or administrative document not within the scope of discovery, the prosecutor should discuss the matter with the agency and/or the prosecutor's supervisor and consider options such as redaction of non-discoverable information, converting the discoverable information into another form, a protective order, or some other solution that furthers the interests of the agency while fulfilling our discovery obligation. Prosecutors should also ensure that agencies provide any information that may be potentially discoverable regarding the case, regardless of how the agency may internally maintain the documents. In other words, agencies sometimes segregate reports into "investigation files" and may not think to look at or review reports maintained in another investigation file that contains potentially discoverable information in the prosecutor's case. In an effort to ensure we get the necessary information from government agencies, prosecutors should send a letter to any government agency in the prosecution team requesting production of information. A form letter to government agencies is attached (Attachment 3). While the form letter may assist a prosecutor's efforts in obtaining all discoverable information, it is not a substitute for thorough communication with government agencies about materials in their possession and a prosecutor's familiarity with the materials maintained and retained by government agencies.

2. The Agency's Informant Files

Prosecutors should review all of the informant files, by whatever name the agency labels these, for such witnesses as are expected to testify or whose credibility may otherwise be at issue. Agencies that make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may keep multiple files containing different records about those witnesses. Thus, inquires to agencies about informants should include a request for review of every kind of file that might contain information about the individual. The entire file, not just the part relating to the current case, should be reviewed. If a prosecutor believes that the circumstances of the case may warrant review of a non-testifying source's file, the prosecutor should discuss this matter with a

supervisor and, if warranted, follow the agency's procedures for requesting review of such a file.

Again, prosecutors should recognize the difference between gathering potentially discoverable information and producing discoverable information. It is imperative that prosecutors review the entire informant file for potentially discoverable information – such as compensation to the informant, drug use, misrepresentations and the like – with particular attention paid to anything exculpatory or that would go to the informant's credibility. Not all information in the file may be discoverable and the production of the discoverable information may take a different form. In other words, production may not consist of a copy of the file, but, rather, a summary of the discoverable information out of the file. As long as the discoverable information is disclosed to a defendant, the government has complied with its discovery obligations.

Our district will not generally disclose to the defense the identity of mere "tipsters" or informants who merely provided a tip to law enforcement but who were neither involved in the criminal activity nor anticipated to testify in a case. The cases are legion in the Eighth Circuit Court of Appeals holding that the government generally does not have to disclose the identity of such informants, and they set out the procedure for disclosure of the information in camera and ex parte to the court for review and ruling when this issue arises. See, e.g., *United States v. Lindsey*, 284 F.3d 874, 877 (8th Cir. 2002) (collecting cases, holding there is a strong presumption against disclosure of a "mere tipster"). Where the informant is involved in the criminal conduct or transaction or is an eyewitness to the criminal conduct, we may need to disclose the identity of the informant. See *Rovario v. United States*, 353 U.S. 53, 64-65 (2004). In any event, when reviewing the agency's informant files, the prosecutors should keep these distinctions in mind and always consider the potential *Brady* or *Giglio* implications. When in doubt, the prosecutor should err on the side of disclosure, but it is important to work and communicate with the agency on these issues.

3. Evidence Obtained Via Subpoena, Searches, Surveillance, and Other Legal Process

Prosecutors should review all evidence and information obtained or gathered during the investigation via subpoena, search warrants, consent searches, surveillance, or other legal process. With respect to electronically-stored evidence, including e-mails, sufficient time must be allotted for search of hard drives, disks, and other storage hardware. With respect to evidence seized during a search, the prosecutor should personally review the evidence for both inculpatory and exculpatory information. Such evidence should normally be made available for review by defense counsel. This complies with our obligation to disclose exculpatory information as long as we are operating under the stipulated discovery order.

4. Evidence Gathered by Civil or Regulatory Agencies

Prosecutors should review all evidence and information gathered by civil or regulatory agencies (including the Department of Justice and the Civil Division of the USAO) that are included within the scope of the “prosecution team.” It is advisable to document all inquiries of and responses from such agencies.

5. Dangerous and Contraband Evidence

Prosecutors should take particular care to ensure that firearms and physical evidence that may qualify as contraband, including drug evidence and child pornography, will be preserved until the time of trial. Prosecutors should confer with a supervisor if an agency expresses a desire to dispose of any physical evidence, such as bulk drug evidence, prior to the conclusion of the prosecution. See USAM § 9-100.100.

6. Substantive Communications Between Prosecutors, Agents, Witnesses, Victims, Victim-Witness Coordinators, Etc.

Prosecutors should review all substantive communications, whether written or in electronic format, between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, and anyone else whose communication may contain factual information about the case or information that would go to the credibility of a government witness. What constitutes substantive electronic communications is explained below.

7. Informants and Witnesses Testifying Under Plea or Immunity Agreements

Prosecutors should investigate informants and witnesses who have agreed to testify pursuant to a plea agreement or under a grant of immunity. With regard to informant, recognize that this may require looking beyond the agency’s informant files. Among other things, prosecutors should gather any information regarding the following issues that may affect the credibility of the witness:

- The witness’s relationship with the defendant;
- The witness’s motivation for testifying;
- Drug and alcohol problems;
- All benefits the witness is receiving, including money, housing, immigration status, taxes, or anything else in whatever form that constitutes a benefit;

- Any notes, diaries, journals, e-mails, letters, blogs, facebook or other social internet site postings, or other writings by the witness;
- Prison files and recordings of telephone calls;
- *Brady* or *Giglio* information in a witness's Presentence Investigation Reports;⁴ and
- Criminal history.

8. Potential Impeachment Information Relating to Non-Law Enforcement Witnesses

Prosecutors have a duty to inquire any time the government has reason to question a witness's credibility. Thus, 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:

- Prior inconsistent statements (including potentially inconsistent attorney proffers)
- Statements or reports reflecting witness statement variations;
- Benefits provided to the witness, including the type described in section 7 above;
- Other known conditions that could affect the witness's bias, such as animosity toward the defendant, animosity toward a group of which the defendant is a member or with which the defendant is affiliated, relationship with any victim, and known but uncharged criminal conduct;
- Specific instances of misconduct involving dishonesty (Fed. R. Evid. 608(b));
- Criminal history;
- Untruthful character evidence (Fed. R. Evid. 609);
- Physical or mental incapacity; and

⁴ Note that prosecutors must seek a court order and *in camera* review of any PSR believed to contain discoverable information. See *United States v. Garcia*, 562 F.3d 947, 952-53 (8th Cir. 2009).

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

9. Impeachment Evidence for Hearsay Declarants

Prosecutors must review potential Giglio information for any witness whose hearsay statement will be offered under Federal Rule of Evidence 801(d)(2)(A), (D), or (E), even if the witness will not be called. This is because, under Rule 806, the credibility of such a declarant is implicated at trial regardless of whether the declarant testifies.

10. Giglio Information for Law Enforcement Officers

Prosecutors should candidly discuss any potential *Giglio* issues with every law enforcement officer they intend to call as a witness or they intend to use as an affiant. Inside the back cover of each criminal file is a form for an "Oral Request for Giglio Information" that is to be completed by the prosecutor for each such witness. If a law enforcement officer discloses potential *Giglio* information, the procedure for dealing with such information is set forth below in the Disclosure of Discoverable Information section. Prosecutors should oppose all defense requests for "fishing expeditions" designed to search agency records for potential impeaching information on law enforcement officers.

11. Information Obtained in Witness Interviews and Trial Preparation Meetings with Prosecutors

Prosecutor's notes raise a number of discovery issues.

First, the prosecutor should be aware that, if the witness statement is noted in verbatim or essentially verbatim form, it may constitute Jencks Act material that would have to be produced to the defendant like any other Jencks Act material.

Second, if, during the trial preparation session, a witness makes a statement on a material fact that is arguably inconsistent with prior statements, it may constitute *Brady* or *Giglio* information that has to be disclosed to the defendant.

Third, if, during the trial preparation session, a witness makes a statement that is exculpatory, this information must be disclosed to the defendant.

It may not be obvious to the prosecutor at the time of the trial preparation session that a statement may constitute *Giglio* or *Brady* material, but it may become apparent at a later time or during trial. For that reason, prosecutors must retain their notes, be cognizant of the potential they may contain *Giglio* or *Brady* material, and review them if

an issue arises at trial that would alert the prosecutor that the notes may contain discoverable information.

Prosecutors should never have any substantive conversations with potential witnesses without a law enforcement agent present and should avoid even non-substantive contact with potential witnesses. Prosecutors should participate in witness interviews when appropriate and prepare witnesses for trial.

During investigation interviews, prosecutors should have the agent take notes and prepare a report of the interview. During these interviews when a law enforcement officer is taking notes, the prosecutor should consider limiting the extent of personal note-taking, relying upon the officer's notes instead.

During hearing or trial preparation sessions the prosecutor should generally take the notes and the agent should not. When a witness reveals new information or *Brady* or *Giglio* information during a witness preparation session, the prosecutor should have the agent take notes regarding that portion of the preparation session and generate a report containing that information for disclosure to the defendant. Prosecutors should review their own notes from the trial preparation sessions, both while making them and later during trial, to determine if, in light of other evidence or developments in the case, the prosecutor deems they may contain discoverable information.

V. Disclosure of Discoverable Information

Once a prosecutor obtains or identifies materials or information that may be discoverable in a criminal case, the prosecutor must determine what must and should be disclosed.

A. Rule 16 and Jencks Act Information

Prosecutors must disclose any information that falls under the scope of Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act. The requirement for producing witness statements is also set forth in Federal Rule of Criminal Procedure 26.2. The obligation to produce witness statements exists not just at trial but also extends to suppressions hearings (Rule 12), preliminary hearings (Rule 5.1(h)), sentencing hearings (Rule 32(i)(2)), revocation hearings (Rule 32.1(e)), detention hearings (Rule 46(j)), and proceedings under 28 U.S.C. § 2255 (Rule 8 of Rules Governing Section 2255 Proceedings).

B. Production of Reports and Recordings of Interviews

Generally, absent safety or other concerns, reports and recordings of interviews of witnesses should be included in discovery in all cases covered by this policy. This information may be withheld for safety concerns. Where the witness is a mere tipster,

the prosecutor may redact information that would disclose the identity of the witness. In the event other reasons dictate exclusion of interview reports or recordings from the discovery file, supervisory approval is required.

C. Production of Substantive Case-Related Communications

While this portion of the policy focuses primarily on communications via e-mail,⁵ the general principles regarding disclosure of substantive case-related communications should apply to communications in whatever form.

1. Use of E-mail for Case-related Communications

There are three general categories within which most case-related e-mails fall: (a) potentially privileged communications; (b) substantive communications; and (c) purely logistical communications. Each of these terms is defined below.

a. Potentially Privileged Communications

“Potentially privileged” e-mails include “attorney-client privileged” or “work product” communications (1) between prosecutors on matters that require supervisory approval or legal advice, e.g., prosecution memoranda, *Touhy* approval requests, *Giglio* requests, etc, and case strategy discussions; (2) between prosecutors and other USAO personnel⁶ on case-related matters, including but not limited to organization, tasks that need to be accomplished, research, and analysis; (3) between prosecutors and agency counsel on legal issues relating to criminal cases such as *Giglio* and *Touhy* requests; (4) from USAO personnel and personnel at other United States Attorneys’ Offices and the Department of Justice personnel on case-related matters, approval, or legal advice; and (5) from the prosecutor to an agent⁷ or USAO personnel giving legal advice or

⁵In this policy, the term “e-mail” includes any form of written electronic messaging using devices such as computers, telephones, and blackberries, including, but not limited to, e-mails, text messaging, instant messages, tweets, and voice mail messages that are automatically converted to text (e.g., Google voice, Spinvox, etc.).

⁶“USAO personnel” includes, but is not limited to, paralegals, auditors, legal assistants, victim-witness staff, the LEC coordinator, student interns, and contractors in the Northern District of Iowa.

⁷“Agent” includes, but is not limited to, any person conducting investigation on the case such as local, state, and federal law enforcement officers, revenue agents, auditors, financial analysts and civil investigators participating in affirmative civil enforcement investigations. It could also include USAO personnel such as paralegals and auditors if such personnel are asked to complete tasks that are investigative in nature such as

requesting investigation of certain matters in anticipation of litigation (“to-do” list). These e-mails are generally not discoverable. E-mails from USAO personnel or an agent to the prosecutor in response to “to-do” list e-mails could possibly fall within the “substantive” communications that may not be privileged. Also, privileged communications may point to *Brady*, *Giglio*, or Rule 16 information that is not in, or obviously in, the case file.

b. Substantive Communications

“Substantive” communications include reports about investigative activity⁸, interviews of or interactions with witnesses or victims, and issues relating to credibility. These e-mails are likely discoverable. In some cases, e-mails discussing the relative merits of evidence and characterizations of potential testimony may be deemed substantive and may likewise be discoverable.

c. Purely Logistical Communications

“Purely logistical” communications include e-mails that only contain travel information or dates and times of hearings or meetings. E-mail may be used to communicate purely logistical information, to send formal investigative reports as attachments, or to communicate efficiently regarding non-substantive issues such as scheduling meetings, interviews, and court appearances. These e-mails are generally not discoverable.

2. Retention of E-mails

All “substantive” e-mails must be printed and maintained in the case file in accordance with the Federal Records Act and 36 CFR 1234.2. This includes all “potentially privileged” e-mails that contain “substantive” case-related information. The Act requires retention of e-mails that contain substantive case-related information, including “potentially privileged” information. These records need to be reviewed by prosecutors as potential discovery material.

researching electronic databases, analyzing records, etc.

⁸ E-mail communications from paralegals, auditors, student interns, or other USAO personnel may become Jencks Act material if such communications relate to matters on which they later become a witness, e.g., e-mails relating to results of searches of electronic databases, analysis of financial records, etc.

3. Guidelines for Handling Substantive Communications

When substantive communications are sent via e-mail, these guidelines should be followed:

- a. If e-mail is used to communicate substantive case-related information with agents, victims, witnesses, or anyone else, the e-mail must be printed and maintained in the case file.
- b. As part of the discovery collection and review process, prosecutors should routinely ask USAO personnel and agents to provide copies of all e-mails that contain substantive case-related information. This includes, but is not limited to, communications between agents and from agents to prosecutors, any USAO personnel, or anyone else, just as any formal reports would be collected and reviewed.
- c. While substantive e-mails need to be maintained and reviewed during the discovery phase, any discoverable information may be disclosed in a redacted or alternative form (e.g., a letter or memo) in appropriate circumstances, particularly when agency policy or practice disfavors disclosure of e-mails. Redaction may also be appropriate if an e-mail contains a mix of substantive, potentially privileged, or purely logistical communications.
- d. Prosecutors and any USAO personnel who interact with victims and witnesses should limit e-mail exchanges to nonsubstantive matters such as the scheduling of interviews or notification of dates and times of hearings. Similarly, prosecutors should strongly encourage agents to limit e-mail exchanges with victims or witnesses to non-substantive matters. Any substantive information received from a victim or witness should be considered potential *Jencks Act* material and also be maintained for *Brady/Giglio* review. If USAO personnel other than the prosecutor receive a substantive e-mail from a victim or witness, such e-mail should be forwarded to the prosecutor(s) assigned to the investigation or case.

D. Giglio Information

1. Duty of Disclosure

Iowa prosecutors bear specific responsibilities under the Iowa Rules of Professional Responsibility that the district's Court Rules make applicable to all attorneys practicing in federal court in the Northern District of Iowa. See Local Rule 83.2(g)(1). Prosecutors have certain "special responsibilities," including the duty to

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Iowa Rule 32:3.8(d). Commentary to this rule further provides that "evidence tending to negate the guilt of the accused includes evidence that tends to impeach a witness for the State." See also the Deputy Attorney General's discovery memo dated January 4, 2010, for guidance on information to be disclosed pursuant to *Brady* (exculpatory evidence) and *Giglio* (impeachment information) at <http://www.justice.gov/dag/discovery-guidance.html>.

Information that would tend to impeach a government witness or disprove a defendant's guilt will, of course, vary depending on the offenses charged, nature of the evidence, and defenses asserted. *Giglio* material includes information that tends to impeach agents and officers who conducted an investigation, and this policy is intended to address how such material is defined, collected, handled, and disclosed by this office.

2. Policy: Impeachment Materials Generally

a. DOJ Policy Regarding Impeachment Information

In addition to following the guidance issued by the Deputy Attorney General in January 2010, prosecutors must comply with Department of Justice policy concerning the disclosure of material favorable to a defendant, whether exculpatory or impeaching. The policy is set out in § 9-5.001 of the U.S. Attorney's Manual that can be accessed at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

USAM § 9-5.001(C) requires disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally mandated, including (1) any information inconsistent with an element of a crime charged or consistent with a recognized affirmative defense; (2) any information that casts a substantial doubt upon the accuracy of evidence or that may have significant impact on the admissibility of

government evidence; (3) information without regard to its admissibility, and; (4) information which, viewed in isolation, may not call for disclosure but cumulatively satisfies the policy's requirement for disclosure.

USAM § 9-5.001(D) addresses the timing of disclosure and requires information be turned over in time to allow a defendant to effectively use the information, generally in advance of the beginning of the trial or other proceeding. Exculpatory material is to be disclosed reasonably promptly after it is discovered. Impeachment information will typically be disclosed at a reasonable time before trial to allow the case to proceed efficiently. The policy allows prosecutors to consider other legitimate significant interests, such as witness security, and to disclose after a witness has testified pursuant to the Jencks Act. Any exculpatory or impeachment information that casts doubt on an aggravating sentencing factor but is not pertinent to proof of guilt must be disclosed "no later than the court's initial presentence investigation." Finally, if disclosure is to be delayed due to the classified nature of the information, a supervisor must approve the delay and defendant must be notified regarding when and how disclosure will occur.

Any disclosure should be documented in writing.

b. USAO NDIA Policy on *Giglio* Disclosures

It is the policy of this office to produce material required to be disclosed pursuant to *Giglio* at the earliest time possible while accounting for witnesses' safety, the integrity of other investigations, national security, and legitimate privacy concerns of witnesses. The same policy will be applicable when information is learned by the prosecution later in the litigation and when information becomes significant or pertinent after a trial or hearing is underway.

In general terms:

- Prosecutors should make appropriate inquiry of all witnesses, including law enforcement agents and officers, to determine whether information subject to the prosecutors' disclosure obligations exists. (See policy regarding law enforcement agents at Section IV(C)(3).) Appropriate questions and extent of the inquiry will vary from witness to witness. For example, inquiries should routinely be made about matters such as criminal history (including arrests), accusations of dishonesty made against the witness (including lawsuits), and disciplinary actions previously brought against law enforcement personnel. More extensive inquiry will be necessary of witnesses where circumstances suggest impeachment information likely exists. This refers to witnesses who receive benefits based on their testimony or may have other biases or a known history of criminal conduct.

- Although disclosure of information favorable to defendants satisfies due process obligations, disclosure does not necessarily equate to admissibility at trial. Further, even if evidence is deemed admissible, the court may place limitations on defendants' use of the impeachment material. Note that *Brady* and *Giglio* address disclosure, not admissibility, and defendants' use of impeachment information could be limited under the Federal Rules of Evidence by use of motions in limine and protective orders.
3. Policy: Handling Allegations of Law Enforcement Officer Misconduct and Negative Findings of Credibility

On occasion, credibility findings regarding or allegations of misconduct by federal agents (or local or state officers associated with federal cases and task forces) are made. When these matters arise, they should be handled with uniformity, propriety, and consistency within Department of Justice policy. When a prosecutor becomes aware of a negative finding or comment by a judicial officer about the credibility or integrity of any law enforcement officer (federal, state, or local), the prosecutor must promptly report the finding or comment to a supervisor and the *Giglio* coordinator.

a. DOJ Policy Regarding Impeachment Information on Agents

The Attorney General first issued DOJ's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy") in December of 1996. Essentially, the DOJ policy (subsequently amended) is intended to ensure prosecutors receive sufficient information from law enforcement personnel files to satisfy disclosure obligations and defendants' constitutional rights "while protecting the legitimate privacy rights of Government employees [agents and officers]." DOJ's "Giglio Policy" (with 14 procedural provisions) is set out in USAM § 9-5.100 and can be accessed at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm

The official policy applies to DOJ and Treasury Department law enforcement agents. The USAO has historically used the same policy in handling impeachment material concerning all agents and officers working on federal cases.

b. Requesting Impeachment Information from Agencies

USAM § 9-5.100 establishes a procedure by which the USAO may obtain, from a law enforcement agency's files, impeachment information concerning an agent or other agency employee. Pursuant to the policy, a written request for information is made by the USAO's *Giglio* coordinator to an official at the agency after a prosecutor has contacted the *Giglio* coordinator about the need for the request. Normally, the request is necessary because a prosecutor has reason to believe impeachment information

exists based on routine inquiries the prosecutor has made of an agent before the agent testifies or swears out an affidavit. The policy further addresses how the USAO should protect the information, when appropriate, from unnecessarily broad dissemination.

c. USAO NDIA Procedures Regarding Impeachment
Information on Agents and Officers

To implement and comply with DOJ policy, the USAO has adopted the following procedures:

**1. RESPONSIBILITIES OF PROSECUTORS AND LAW
ENFORCEMENT AGENCY EMPLOYEES**

The principal way the USAO will obtain *Giglio* information concerning law enforcement agents or officers is by face-to-face discussions with those agents or officers. The questions to be asked of an agent or officer, prior to testimony or submission of an affidavit, are printed on the right inside cover of the USAO's criminal file folders. The prosecutor will note the date of the conversation, agent name, and result of the inquiry.

Federal agencies are obliged to instruct their employees regarding the need for this discussion with prosecutors. Agents also have an ongoing obligation to advise the prosecutor of potential impeachment information of which they become aware.

Prosecutors are obliged to make this inquiry of agents and officers who are to be affiants and witnesses and are urged to have the discussion as early as possible. In some instances, for example, when an agent will be actively involved in an investigation in an undercover capacity, the *Giglio* inquiry should occur at the outset of the investigation.

It is the responsibility of every prosecutor to promptly advise a supervisor and the *Giglio* coordinator whenever (1) a law enforcement official (federal, state, or local) discloses problematic information during the *Giglio* inquiry, (2) a judicial officer makes any adverse finding concerning a law enforcement officer's credibility, or (3) a law enforcement officer has become the subject or target of an investigation or is charged as a defendant in a criminal case.

**2. ACTIONS TAKEN AFTER CONSULTATION WITH SUPERVISOR
AND GIGLIO COORDINATOR**

After consultation with a supervisor and the *Giglio* coordinator, decisions will be made regarding how each situation should be handled. If an agent discloses matters pertaining to job-related misconduct or disciplinary matters, a formal

written request for information from the agency's personnel file will be made by the *Giglio* coordinator. This request for *Giglio* information from an agency may be made at any time, and disclosure by an agent is not a prerequisite for an official request for information from a file.

When the USAO must handle potential impeachment information regarding an agent, the professional reputation of the agency employee (and the agency) is generally implicated. USAO personnel must treat the information with care and professionalism. After the *Giglio* coordinator receives information from an agency, provisions of USAM § 9-5.100 dictate how the material will be handled and what limitations are placed on accessibility. The material may not be generally accessible, and only prosecutors who need to know should be given access. *Giglio* coordinators will keep materials that may be kept pursuant to policy and regulation and will make it available to prosecutors upon appropriate request. They will also return materials to the agency as required by policy and regulation.

Prosecutors should bear in mind that, while the *Giglio* policies address information gathering and handling, the policies do not resolve questions regarding whether the information qualifies as *Giglio* material or whether it must be disclosed.

The *Giglio* coordinator should solicit the views of the agency regarding the propriety of disclosure of potential *Giglio* information of an officer. In many cases, the information should be submitted to the court *ex parte* with a request for a ruling on whether it must be disclosed. In some cases, it will be disclosed to defense counsel with a motion in limine to exclude or limit the use of the information or protective orders to control further dissemination of the information. In clear cases, it will be disclosed immediately to the defense. The *Giglio* coordinator will provide guidance regarding these difficult and sometimes sensitive issues and has sample motions and memoranda.

If disclosure is made to the court or defense, the *Giglio* policy requires the USAO provide to the law enforcement agency a copy of the disclosed material and related pleadings and judicial rulings to the agency.

E. Trial Preparation Notes

When preparing for trial, prosecutors should meet with witnesses to prepare them for trial. During this preparation process, the prosecutor should be the one primarily taking notes unless it becomes clear the witness has disclosed new discoverable information. If the discoverable nature of the information is not recognized in time to have the agent take notes and generate a report to be disclosed in discovery, the prosecutor must still disclose the information to the defendant in some form.

Circumstances will dictate the form in which such information may be disclosed, but it is important that prosecutors recognize and review their notes from witness preparation sessions for potential discoverable information.

F. Agent Hand-Written or Rough Draft Notes

Agents typically make handwritten rough notes of witness statements during interviews, of events during a search, etc. They then convert their notes into a formal report. Depending on agency policy, some agents retain their handwritten notes but do not provide them to our office for inclusion in discovery. Other agencies routinely destroy hand-written notes after creation of the formal report. Our office will not dictate to agencies whether they retain or destroy their handwritten notes. Where, however, agencies retain handwritten notes, issues may arise about whether an agent's handwritten notes are consistent with the formal report.

Agents' handwritten notes might be inconsistent with the formal report. It is not always clear, however, whether something is an inconsistency. In order to avoid this issue, prosecutors should request agents provide copies of retained handwritten notes along with the formal report and disclose both in discovery.

G. Child Pornography

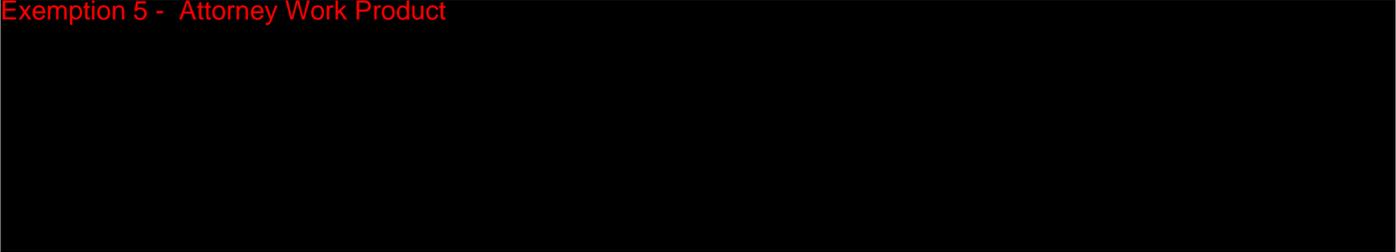
Child pornography constitutes criminal contraband. Title 18, United States Code, Section 3509(m) (part of the Adam Walsh Act) provides that a court cannot order the copying or reproduction of any child pornography, including the duplication of the hard drives of computers and electronic storage media, as long as the government provides reasonable opportunity to inspect, view, and examine the material in government offices. The statute also provides that this material is to remain in government care, custody, and control. All discovery requests or motions implicating the prohibitions of the Adam Walsh Act should be discussed with the Project Safe Childhood Coordinator.

H. Wiretap Information

The disclosure of the contents of wire, oral, or electronic communications intercepted pursuant to a Title III wiretap is governed by 18 U.S.C. § 2517. Prosecutors involved in wiretap cases should review this statute carefully upon obtaining the court authorization to intercept communication and before any such disclosure. Disclosure orders must be on file prior to submitting any information obtained from the interception to a grand jury and before indictment. If a prosecutor intends to rely on wiretap information in a detention or preliminary hearing, the prosecutor must serve the defense with a copy of the interception application and the court's authorization at least 10 days prior to the hearing. 18 U.S.C. § 2518(9). While a judge may waive this requirement if it is not possible to comply with this deadline, failure to comply with the 10-day rule

creates a significant risk the intercepted communications will not be received into the record.

Exemption 5 - Attorney Work Product



I. Suspicious Activity Reports

The Bank Secrecy Act restricts the disclosure of Suspicious Activity Reports (“SARs”). Typically, SARs may not be disclosed outside the law enforcement community. SARs should not typically be disclosed as part of the government’s discovery file. DOJ policy provides that SARs may be disclosed if they contain exculpatory or potential impeachment material or if disclosure is required under Rule 16 or the Jencks act. Even in those circumstances prosecutors should ensure that a protective order is in place and consider redacting the SAR to the extent possible.

VI. **Timing of Disclosures**

Timely disclosure of discovery to the defense is very important. Timely disclosure aids in the speedy resolution of cases, which makes the use of our time more efficient. Further, the earlier we make discovery available, the more time we have to correct any mistakes in, or supplement, discovery in a reasonably timely manner. Finally, the sooner we disclose discovery, the better position we will be in should a discovery dispute arise. In addressing discovery disputes, courts often focus on whether the government’s disclosure of discovery was made in a reasonably prompt manner.

Prosecutors should generally have discovery ready for disclosure at the time of arraignment. When new discovery is obtained, it should be added as soon as possible and defense counsel should be alerted in writing that discovery has been added to the file.

Ideally, in those cases where the prosecutor knows ahead of time who the defense counsel will be and intends to provide copies of discovery consistent with this discovery policy, the prosecutor may have the copies available to provide to defense counsel at the initial appearance.

VII. Form of Disclosures

We may disclose our discovery to defendants by providing them access to our discovery in our office and/or by providing copies of portions of our discovery to defendants. When practical, prosecutors should endeavor to provide defense counsel with discovery in electronic form.

Documents produced to defense counsel (in either paper or electronic form) should be produced in pdf format with proper watermarks. Preferably, the documents should also be Bates-stamped. Whether provided in paper or electronic form, when we provide copies of discovery to defendants, a cover letter should accompany the discovery. A form letter for this purpose is attached. (Attachment 4). The cover letter should identify with specificity the discovery being provided (preferably by reference to Bates numbers). The cover letter should also emphasize that the material is being provided as a courtesy to defense counsel and does not constitute the government's discovery. Defense counsel must understand that the discovery exists in our office. The copies of a portion of the discovery file are provided as a mere courtesy and not as a substitute for the defense attorney reviewing the actual discovery. The letter should also emphasize that all copies should be returned to the U.S. Attorney's Office after the case is over.

Whenever copies of discovery are provided to defense counsel, defense counsel should defray the costs of providing copies. That may mean defense counsel will pay for copying costs, provide paper to the office, or provide blank CDs or DVDs. The nature and extent of requiring defense counsel to defray costs will depend, of course, upon the nature, scope, and volume of discovery being copied and the form in which the copies are being provided. Prosecutors have discretion to determine what will be required by defense counsel based on these factors.

VIII. Documentation of Discovery

It is important that we carefully document what we have in our discovery. This can be accomplished by means of an index that identifies the information contained in discovery or it can be accomplished by means of Bates numbers. In either event, a record should be kept with the discovery reflecting what is contained within. When new information is added to existing discovery, a record should be made of exactly what has been added (again, preferably by reference to Bates numbers) and when the information was added. When copies of discovery are produced to defense counsel, either in paper or electronic format, a letter should accompany the disclosure. That letter should identify with specificity (preferably by reference to Bates numbers) the information being produced to defense counsel. Another means of documenting what we produce to defendants is to create and retain a copy of those materials (either in paper form or on disc) showing the date of the production.

Prosecutors should also use a cover letter, e-mail, or some other form of documentation to memorialize every instance when discovery is provided.

IX. Departures from the Discovery Policy

A. Considerations

There are a number of considerations that may merit a departure from this discovery policy. A “departure” requiring Criminal Chief approval occurs whenever the prosecutor wishes to provide, or not provide, discovery in a manner materially inconsistent with the policy or not otherwise permitted in the policy without approval of an immediate supervisor. Those considerations include, but are not limited to:

- national security-related or classified information;
- defendant’s refusal to agree to the stipulated discovery order;
- defendant’s failure to comply with reciprocal discovery obligations;
- defendant’s production of false or misleading documents or information;
- safety of witnesses, victims, and law enforcement officers;
- 1 ● volume of discovery making copying unduly burdensome;
- nature of case making disclosure inappropriate for safety or other concerns;
- abuse/misuse of discovery by defense counsel;
- unknown or untested defense counsel;
- unwarranted and unnecessary invasions of privacy;
- defendant appearing pro se;
- ongoing criminal conduct that is the subject of an ongoing investigation;
- safeguarding other investigations; and
- preserving trial strategy.

There may be other case-related considerations that are not listed above that may warrant a departure from this policy.

B. Procedures

If a prosecutor believes departure from these guidelines is appropriate in a particular case, the prosecutor is required to:

- 1) discuss the matter with the Criminal Chief;
- 2) follow the instructions given by the Criminal Chief;
- 3) draft a memorandum to the file outlining:
 - a) reasons for the departure;
 - b) supervisory consultation (date and identity of Criminal Chief);
 - c) directions provided by the Criminal Chief;
 - d) the scope and nature of the departure from the guidelines; and
 - e) actions taken.

A copy of the memorandum authorizing departure from the discovery policy should be retained in the case file.