Memorandum

United States Attorney
Northern District of Illinois

Subject	Date
Office Policy Regarding Discovery in Criminal Cases[1]	October 18, 2010

To All AUSAs handling criminal matters

From Patrick J. Fitzgerald
United States Attorney

Complying with our discovery obligations, including our *Brady* and *Giglio* obligations, is among our essential responsibilities as prosecutors. The fair and effective operation of the criminal justice system depends on the parties' compliance with the disclosure obligations that are established by the Constitution and laws of the United States, case law, and local court rules.

Two documents summarize the Department's policy regarding discovery: the United States Attorneys' Manual section relating to discovery (USAM § 9-5.001), and a guidance memorandum issued by the Deputy Attorney General in January 2010 to all Department attorneys handling criminal matters. You should be familiar with both of these documents. Taken together, they provide detailed guidance regarding the considerations that govern our approach to discovery. It is this Office's policy to comply fully and in a timely manner with all applicable discovery obligations, and with the principles set forth in the USAM and the Deputy Attorney General's memorandum. In addition, the Department's Federal Criminal Discovery blue book, available here, is an excellent resource on discovery issues, and additional resources are available through the USABook Criminal Discovery Page.

You should be guided by the principles and practices set out in those documents as cases move through every stage of litigation, including pretrial motions, trial, sentencing, and post-conviction proceedings. Because facts and legal issues often evolve as litigation progresses, you should periodically reassess your discovery decisions to ensure that they remain appropriate in light of current circumstances. It is important that you consult with a

[1]The guidance contained in this memorandum 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).

supervisor if you have questions about how to interpret or apply the Department's guidance in the context of your case, or if you are having difficulty in obtaining from an investigating agency the assistance you believe is necessary to comply with our discovery obligations.

Discovery in criminal cases differs fundamentally from civil discovery, and traditionally has been much less expansive, reflecting efforts by Congress and the courts to balance the complex mix of interests implicated by the criminal discovery process. Notwithstanding the limited scope of discovery required in criminal cases, the Department and this Office recognize that the interests of justice often are best served by providing discovery that goes beyond what we are obligated to provide – in terms of the scope of production, the timing of production, or both. Consequently, it is our practice to evaluate on a case-by-case basis whether to provide discovery that exceeds our obligations. This evaluation may include the following factors, among others:

- the benefits to the parties and the justice system from providing broader discovery;
- the prospect that broader discovery will induce cooperation or a prompt disposition of the case;
- whether disclosure of certain information poses a risk that witnesses will be harmed or intimidated;
- whether disclosure of certain information could compromise national security interests;
- whether disclosure of certain information could compromise an ongoing investigation, the identity of an informant, or a confidential law enforcement technique;
- whether the information in question implicates the privacy interests of victims or witnesses, or constitutes protected intellectual property or sensitive business information;
- the materiality of the information in question;
- the volume and complexity of discovery in the case, as well as of the information in question;
- the time remaining until trial;
- whether disclosure of certain information would implicate legal or evidentiary privileges;
- the extent of the defendant's compliance with his or her own discovery obligations; and
- strategic concerns which bear on the likelihood of achieving a just result in a particular case.

Our experience has been that after considering these factors we often are able to provide discovery that exceeds our obligations, and that by doing so we frequently serve the

interests of all parties and the justice system as a whole. (Even when you conclude that expansive discovery is appropriate in a particular case, you should never refer to your approach as "open file" discovery; there is no such thing, and use of this term can lead to misunderstandings.)

Recurring Issues Regarding Discovery

Although more detailed reference materials regarding discovery case law and practice are available in Crimbank and through USABook, a number of recurring discovery issues warrant a brief discussion here:

- **Timing of Disclosures.** Although many different considerations affect the timing of disclosures, it is our ordinary practice to disclose Rule 16 material as promptly as feasible after arraignment. In addition to the factors listed on page 2 above, the timing of this production also may be affected by the volume of material to be disclosed and the ability of AUSAs, agents, and support staff to assemble and account for it. It is our ordinary practice to disclose Jencks Act and *Giglio* information in advance of the trial or other proceeding for which it is relevant. How far in advance of that proceeding depends on many variables, including the factors listed above, although we must bear in mind that as to *Giglio* information, the information must be disclosed in sufficient time for the defense to make effective use of it. It is our ordinary practice to disclose *Brady* information (as opposed to information that is merely impeaching) as soon as practicable. If you believe circumstances exist which may justify delay in disclosing *Brady* information, you should consult a supervisor.

- **Scope of the Prosecution Team.** In most cases, defining the prosecution team for purposes of determining the scope of our discovery obligations is straightforward: the prosecution team consists of our office and the law enforcement agency or agencies investigating the case. Defining the scope of the prosecution team can be more difficult in cases involving task forces and parallel civil or administrative proceedings. The Deputy Attorney General's January 2010 memorandum identifies a number of factors relevant to this assessment, but in general, the more deeply involved an agency is with the investigation, the more likely it is that the agency is a member of the prosecution team. For example, the mere fact that a case is investigated by a squad in a federal agency that includes a task force officer from a local police department does not itself make that department a member of the prosecution team; if, however, the task force officer uses or draws on investigative intelligence or informants from his department to further the investigation, the

answer may well be different. You should consult a supervisor if you have questions about the scope of the prosecution team in your case.

- **Review of Agent and Witness Email.** There are three general categories of case-related email communications to consider for discovery purposes:

  - **Case-related email sent to AUSAs:** You should retain and review for discovery purposes all substantive case-related email to AUSAs from potential witnesses – including, by way of example, agents, victims, eyewitnesses, and expert witnesses. If attorneys representing witnesses send email making factual representations on behalf of witnesses, you should retain and review that email as well. (One convenient way to track case-related email is to create a mail folder in Outlook for each case, and store case-related email in that folder.) If a case has been reassigned to you from another AUSA, you should obtain access to case-related email from your predecessor; the systems staff can help you with this, if necessary.

  - **Case-related email between agents and non-law enforcement witnesses:** You should ask agents assigned to the case to provide for your review all substantive case-related email between agents working on the case and potential witnesses outside the prosecution team. This would include, for example, emails between agents and informants, victims, eyewitnesses, and other witnesses. If an agent has exchanged text messages with potential witnesses and has the capability to retain them (for example, by auto-forwarding them to an email box), those messages should be reviewed as well. It may be useful to discuss a plan for preserving emails of this nature with the case agent early in an investigation.

  - **Emails among agents and agency personnel:** Substantive case-related emails that are written by testifying agents to other agency personnel generally constitute Jencks Act material and must be produced. This category includes case status reports written to agency supervisors and headquarters, and often will include reports approved or adopted by testifying agents (for example, when a supervisory agent who is testifying formally approves reports that are placed in the case file, or sends to agency headquarters under the supervisor's name a case status report that actually was prepared by the case agent).

    With respect to email communications written by agents who are *not*

testifying, you should ask agents assigned to the case whether there are substantive case-related emails written by members of the team that contain information not otherwise documented in the case file or presented for your review during discovery.

The volume and nature of internal agency email is such that there is no practical opportunity for an item-by-item review by an AUSA; much of this email will concern non-substantive matters or information documented in investigative reports or elsewhere. As a result, agents are in the best position to perform an initial review of these materials, producing to you for review substantive case-related internal emails that (1) were *written or adopted by testifying agents*, or (2) were *written by non-testifying agents that contain information not documented elsewhere*. The case agent is responsible for ensuring that this task is performed, and you should discuss with the case agent the best way to carry out this responsibility.

- **Review of Informant Files.** The Deputy Attorney General's January 2010 memorandum directs prosecutors to review the entire agency file for each testifying informant or confidential source. There also will be times when it is necessary to review the files of non-testifying sources (for example, to assess the potential viability of an entrapment defense). In reviewing an informant file, you should be attentive not just to the substantive information provided by the informant, but to the benefits provided to the informant and the structure of those benefits (for example, some agencies pay informants a percentage of seizures that they generate). When you need to review an informant file, you should make the request through the case agent. Because of the sensitivity of these files, agencies maintain tight restrictions on them, and you may need to review them in agency offices. You should be attentive to the security issues involving informant files, and before disclosing any information from an informant file should discuss the proposed disclosure with the case agent. If there is disagreement about the proposed disclosure, you should consult a supervisor.

- **Document Tracking.** Thorough review and production of documents during discovery is impossible unless you know what documents were produced and obtained during the investigation.

    - **Agent Reports.** Most agencies maintain an electronic index of agency reports generated during an investigation. You should request and

review a copy of this index to ensure that you have paper copies of all relevant reports reflected in the file.

- **Subpoenaed Records.**

  - **Planning a Tracking System.** To prepare for discovery you will need to identify and review documents obtained by subpoena during the investigation. This process is simpler and more reliable when, beginning early in the investigation, you and the agents agree upon and follow a process for tracking incoming documents. In establishing such a process, bear in mind the tracking difficulties posed when subpoenaed materials come directly to the USAO, or when multiple investigating agencies are involved. The system that you and the agents create should be easily understood by others in the event that the case is reassigned to new agents and/or AUSAs.

  - **Subpoenas Issued By USAO.** You should maintain a subpoena log so that when it comes time to produce discovery, you have a ready record of what subpoenas have been issued and whether materials have been received in response to those subpoenas. In addition, such a log will aid you in complying with the Right to Financial Privacy Act in returning bank records to the grand jury before indictment. Sample subpoena logs are available in the Practice Materials folder on Crimbank. (For health care administrative subpoenas issued by our office, the health care paralegal maintains a log.)

  - **Subpoenas Issued by Agencies.** Most investigating agencies have administrative subpoena authority. With respect to some agencies (the FBI, for example), this authority is limited to certain categories of investigation; other agencies (many inspector general's offices, for example) have administrative subpoena authority that is essentially coextensive with their investigative authority. The case agent should be able to provide you with a record of the administrative subpoenas issued in the investigation (including before the case was presented to our office), as well as the materials received in response to those subpoenas.

- **Paralegal Assistance, Scanning, and Creating a Document Database.** When you anticipate receiving a substantial volume of materials in an investigation, you should request paralegal assistance at an early stage and discuss with your paralegal and our Automated Litigation Support staff the best way to organize information obtained during the investigation, including the possibility of scanning documents and creating a document database. Setting up a process for getting information into electronic format and into a database early in the investigation can greatly simplify discovery.

- **Discovery Planning.** In all but the simplest cases, AUSAs and case agents should meet prior to indictment to review discovery issues and plan for the production of discovery – including the allocation of discovery-related tasks between AUSAs and agents. To ensure that potentially discoverable items are not overlooked, it may be helpful to review a checklist with the case agent. Discovery checklists for different types of cases will be available in the Practice Materials folder on Crimbank.

- **Discovery Production.** It is essential to maintain an accurate record of what is produced in discovery. There are a variety of ways to do this, including detailed transmittal letters, using Bates numbers in discovery productions, and maintaining copies of what was produced. In addition, it is important to remember to redact sensitive personal and law enforcement information from materials produced in discovery, when it is permissible to do so. Guidelines and procedures for performing redactions will be available in the Practice Materials folder on Crimbank. The Practice Materials folder also will contain guidance concerning the discovery of certain types of specialized materials, such as various wiretap-related documents, Suspicious Activity Reports, and child pornography and other contraband.

- **Protective Orders.** It is our practice to seek a protective order limiting the dissemination of discovery materials whenever we produce materials of a potentially sensitive nature. An automated protective order is available in HotDocs format (you are encouraged to use this version), and copies of protective orders are available in the Practice Materials folder on Crimbank.

- **Giglio Inquiries of Witnesses.** *Giglio* inquiries should be a routine part of witness preparation.

- **Law Enforcement Witnesses.** You should have a direct conversation with each law enforcement witness about the existence of *Giglio* material. If the witness's response indicates that relevant material may exist in agency files, or you are aware of allegations about the witness from other sources, you are encouraged to make a formal *Giglio* inquiry using the letters generated by the HotDocs *Giglio* request letter template. (When you may not have direct contact with an agency witness until shortly before trial – as is sometimes the case with lab personnel – it may be prudent to submit a written *Giglio* request in advance.) In addition, you are free to make formal *Giglio* inquiries regarding law enforcement witnesses as part of your routine practice.

- **Non-Law Enforcement Witnesses.** You should have a direct conversation with non-law enforcement witnesses about the existence of *Giglio* material. Additionally, the case agent should perform a criminal history check and an agency records check for non-law enforcement witnesses; these checks should be done prior to the production of § 3500 materials, and should be updated if more than 30 days pass before the witness testifies or if there is any reason to suspect that additional information may have developed regarding the witness. (For truly minor witnesses, such as records custodians, criminal records checks and detailed *Giglio* conversations may not be necessary.)

The Practice Materials folder on Crimbank will contain suggestions for standard *Giglio* questions to be posed to law enforcement and lay witnesses.

- **Terrorism and 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." (This guidance is available here and in the discovery folder on Crimbank.) 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.

- **Reciprocal Discovery.** While the bulk of the discovery production burden falls on the prosecution, the defense also has certain discovery obligations, and we should consistently seek to hold defendants to those obligations, including bringing non-compliance by defendants to the attention of the court. Click

here for a link to the DOJ Discovery Manual section on a criminal defendant's discovery obligations.

- **Adverse Judicial Findings.** Notify your section chief (who in turn will notify the front office) if a judge finds that the government has failed to satisfy its discovery obligation in a particular case.

Resources for Addressing Discovery Issues

Rather than creating an elaborate discovery manual that attempts to comprehensively address discovery issues in a single document, we believe that a more helpful and flexible approach is to provide AUSAs with an array of resources falling into three categories: (1) a collection of reference materials addressing legal standards and issues relating to discovery; (2) standard forms and automated documents dealing with various matters relating to discovery; and (3) practices and resource materials that may assist in carrying out your discovery obligations. We expect these materials to evolve and expand over time. Below is a brief description of the materials falling into each category:

Reference Materials: Updated reference materials relating to criminal discovery can be found on crimbank at V:\Crimbank\General Litigation and Policies\Discovery, as well as at the USABook page dedicated to criminal discovery.

Standard Forms and Automated Documents: HotDocs has templates for use in generating draft *Giglio* request letters to law enforcement agencies, the standard office discovery letter, and the standard protective order. You should use those templates as starting points in generating these materials, but circumstances of individual cases may at times require you to vary certain language.

Practices and Resources that May Assist in Carrying Out Discovery Obligations: A collection of practice tips, procedural guides, and related documents concerning discovery is available on crimbank at V:\Crimbank\General Litigation and Policies\Discovery.