NORTHERN DISTRICT OF INDIANA DISCOVERY POLICY

(Implemented on[ ] Supercedes Any Prior Policy on this Topic)[1]

PURPOSE:

On January 4, 2010, the Department issued guidance for prosecutors regarding criminal discovery. The NDIN's discovery policy encompasses that which the Deputy Attorney General directed each United States Attorney's Office to implement. The guidance contained in this Discovery Policy provides guidance on gathering, tracking, reviewing and producing information to criminal defendants in accordance with statutory and procedural law.

Once a defendant, individual or corporate entity, is charged by way of Indictment for a felony and/or a misdemeanor, a duty arises on the part of the AUSA to provide discovery to the defendant. The AUSA is ultimately responsible for compliance with discovery obligations. In order to meet all legal and ethical requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case, the following steps should be followed:

I. GATHERING AND REVIEWING DISCOVERABLE EVIDENCE

A. Sources to Determine What is Discoverable Evidence:

1. *Federal Rules of Criminal Procedure Rule*s 12, 16 (Discovery); and 26.2 (producing a witnesses statement);
2. 18 U.S.C. § 3500 (Jencks Act);
3. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972);
4. USAM § 9-5.001(*Disclosure of Exculpatory and Enforcement Witnesses) et seq*.;
5. *USAM 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses);* and
6. Standing orders of the district court or magistrate court.

[1] This plan provides prospective guidance only and is not intended to have the force of law or create or confer any rights, privileges, or benefits.

** AUSAs must produce all discoverable information in accordance with federal law, standing orders issued by judges and magistrates in criminal cases, and DOJ policy. For purposes of this policy, "discovery" and "discoverable information" includes all information and materials the government must produce beyond that which is called for under Rule 16 information.[2]

B. Determine Who is the Prosecution Team:

**** DOJ policy encourages AUSAs to err on the side of inclusiveness when identifying the members of the "prosecution team".**

1. In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, the team may include both AUSAs and attorneys from a litigating component of DOJ or other Department or other USAO, or those people working parallel criminal and civil proceedings. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.) or other noncriminal investigative or intelligence agencies, the AUSA should consider whether the relationship with the other agency is close enough to make it part of the "prosecution team" for discovery purposes.[3]

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[2] Part V of this discovery plan sets forth the policy and procedure in handling discoverable information in the possession of the Intelligence Community (IC).

[3] "Brady suppression occurs when the government fails to turn over even evidence that is "'known only to police investigators and not to the AUSA.'" *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (*per curiam*) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)); *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *United States v. Senn*, 129 F.3d 886, 893 (7th Cir. 1997)(AUSA charged with knowledge of criminal records found to be in possession of FBI).

2. Factors to consider whether to review potentially discoverable information from another Federal Agency.

a. Whether the AUSA and the agency conducted a joint investigation or shared resources related to investigating the case;

b. Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing a trial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;

c. Whether the AUSA knows of and has access to discoverable information held by the agency;

d. Whether the AUSA has obtained other information and/or evidence from the agency;

e. The degree to which information gathered by the AUSA has been shared with the agency;

f. Whether a member of an agency has been made a Special Assistant United States Attorney;

g. The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and

h. 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.

3. Factors to consider whether to review potentially discoverable information from Task Forces made up of State and Local law enforcement agencies.

a. Whether state or local agents are working on behalf of the AUSA or are under the AUSA's control;

b. The extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and

c. Whether the AUSA has ready access to the evidence.

II. WHAT TO REVIEW

A. The Investigative Agency's Files:

1. With respect to DOJ law enforcement agencies, with limited exceptions, the AUSA should be granted access to the substantive case file and any other file or document the AUSA has reason to believe may contain discoverable information related to the matter being prosecuted. Therefore, the AUSA can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents.

2. With respect to outside agencies, the AUSA should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communication (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. AUSAs should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

B. Confidential Human Source “CHS” Files:

1. The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Thus, CHS files should be reviewed for discoverable information and copies made of relevant portions in the event the actual documents are to be provided rather than the impeaching information disclosed in a summary letter.

2. 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 included within this review.

** The primary method of disclosing impeaching information contained within a CHS file is through a summary letter to defense counsel. In the event more detailed information is requested, AUSAs should consult with their supervisor for possible *in camera* review of the impeachment information. AUSAs must always be mindful of security issues that may arise with respect to disclosures from CHS files. Prior to disclosure, AUSAs should consult with the investigative agency to

evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

C. Evidence and Information Gathered During the Investigation:

Information includes evidence gathered during search warrants, wire taps, subpoenas or any other method. Defendants should be provided a list of items seized from the defendant through a warrant or otherwise.

D. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations:

1. If an AUSA has determined that a regulatory agency, such as the SEC, is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed.

2. If a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, AUSAs may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case.

3. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a qui tam case, the civil case files should also be reviewed.

E. Substantive Case-Related Communications (E-Mail, Memoranda or Notes):

1. "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case·related communications are most likely to occur (1) among AUSAs and/or agents, (2) between AUSAs and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims.

2. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

3. AUSAs should also remember that with few exceptions (see, e.g., Fed.R.Crim.P.16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable.

> For example, material exculpatory information that the AUSA receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

F. Potential *Giglio* Information Relating to Law Enforcement Witnesses:

1. AUSAs should have candid conversations with any law enforcement officer (whether local, state or federal) with whom the AUSA has worked regarding any potential Giglio issues and follow the procedure established in the NDIN *Giglio* and *Henthorn Policies* as well as USAM § 9-5.100 whenever necessary before calling the law enforcement employee as a witness.

2. Questions to ask law enforcement witnesses:

   a. Are you aware of any sustained findings in relation to past complaints, investigations, or disciplinary actions concerning the performance of your official duties that you understand may be considered to be exculpatory information or that may be considered to be potential impeachment information?

   b. Are you aware of any pending complaints, investigations, or disciplinary actions relating to the performance of your official duties or to any off duty conduct?

c. Are you aware whether any misconduct allegations against you relating to the performance of your official duties or any off duty conduct have received publicity?

d. Are you aware of any allegations or findings by a Judge, Magistrate Judge, or AUSA that reflect upon your truthfulness or bias, including lack of candor?

e. Have you ever been arrested, charged with, or convicted of a criminal offense?

f. Do you use social networking and if so is there something on your site that would reflect your bias or truthfulness?

**** The *Giglio* Questionnaire is an internal report and should not be given to the law enforcement witness to complete, shown to the law enforcement witness or produced in discovery**. If the answer is "no" to all questions, the form should be completed and placed in the case file in a manner to prevent disclosure either through discovery or a FOIA request, that is in a marked and sealed yellow envelope. A "yes" answer requires further inquiry. The AUSA should provide the form to the *Giglio* officer who, in consultation with the AUSA, will decide what action to take.

G. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants:

1. 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 in accordance with USAM 9-5.001.[4]

That information includes, but is not limited to:

a. Prior inconsistent statements (possibly including inconsistent attorney proffers, see *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149 (2nd Cir. 2008))

b. Statements or reports reflecting witness statement variations (see below)

[4] The information should be disclosed, "regardless of whether the information ... would itself constitute admissible evidence." USAM 9-5.001.

c. Benefits provided to witnesses including:

- Dropped or reduced charges
- Immunity
- Expectations of downward departures or motions for reduction of sentence
- Assistance in a state or local criminal proceeding
- Considerations regarding forfeiture of assets
- Stays of deportation or other immigration status considerations
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (e.g. state AUSAs, parole boards) setting forth the extent of a witness' assistance or making substantive recommendations on the witness' behalf
- Relocation assistance
- Consideration or benefits to culpable or at risk third-parties
- Personal items provided such as food, beverages, cigarettes
- Use of a telephone to call family members, allowing visitation while in USAO, Task Force Office or other location while under the supervision of law enforcement
- Other known conditions that could affect the witness' bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with an AUSA)
  - Prior acts under Fed.R.Evid. 608
  - Prior convictions under Fed.R.Evid. 609
  - Known substance abuse or mental health issues or other issues that could affect the witness' ability to perceive and recall events

H. Information Obtained in Witness Interviews:

1. Although not required by law, generally speaking, witness interviews should be memorialized by the agent. Agent and AUSA notes and original recordings should be preserved, and AUSAs should confirm with agents that substantive interviews should be memorialized. When an AUSA participates in an interview with an investigative agent, the AUSA and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the AUSA and the agent have established an understanding through prior course of dealing).

2. Whenever possible, AUSAs should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, AUSAs should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

3. Witness Statement Variations and the Duty to Disclose:

Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness' statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

4. Trial Preparation Meetings with Witnesses:

Trial preparation meetings with witnesses generally need not be memorialized. However, AUSAs should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of
USAM § 9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness' prior statements, AUSAs should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

5. Agent Notes:

Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. AUSAs should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1). *See*, e.g., *United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

III. CONDUCTING THE REVIEW

A. Preferable if review conducted by AUSA assigned.

B. May need to involve paralegals, agency counsel, and computer searches. The ultimate decision about how to conduct the review is controlled by the AUSA. If the information is voluminous, the AUSA should consult their supervisor to develop a strategy for conducting the review.

C. Although the review may be delegated, the decision to determine what is to be disclosed is not. That decision rests with the AUSA and, depending on the circumstances, with the AUSA's supervisor and the Discovery/Giglio Coordinator.

D. The AUSA is to err on the side of broad disclosure, the defense may be allowed to have access to the voluminous documents keeping in mind such broad disclosure may not be feasible in national security cases involving classified information.

IV. MAKING THE DISCLOSURES

A. DOJ's disclosure obligations are generally set forth in Fed.R.Cr.P. 26.2, 18 U.S.C. § 3500 (The Jencks Act), *Brady* and *Giglio* (collectively referred to herein as "discovery obligations")[5]. AUSAs must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. **In addition, AUSAs should be aware that Section 9-5.000 et seq. details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*.**

1. Considerations Regarding the Scope of the Disclosures:

a. Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the AUSA's good faith determination of the scope of appropriate discovery is in error.

b. Although AUSAs are encouraged to provide broad and early discovery, but when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, AUSAs should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts of obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. *See United States v. Johnson,* 200 F.3d 529, 535 (7th Cir. 2000)(any report generated by a government agency or AUSA if adoption or approval can be shown by demonstrating that the interviewer read back to the witness his statements and the witness assented to them.)

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[5] *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

c. **REDACTION**: Great care and caution must be taken not to disclose personal identifying information of any witnesses/victim when tendering discovery to defense counsel. All personal identifying information not relevant to the case, should be redacted by the AUSA. Items such as phone numbers, social security numbers, dates of birth, places of employment, home addresses, family members and all other similar information should be redacted where it does not conflict with any relevant discovery, Brady or Giglio, obligation.

- For those instances where it is necessary to disclose personal identifying information, such disclosure should occur only after the defense counsel has agreed not to disseminate this information or put such information in any public filing. Additionally, defense counsel should further agree that this personal identifying information will not be provided to the defendant in any written format.

- In those rare situations where a genuine concern for the security of the witness/victim exists, further steps may be necessary to maintain the safety of the witness/victim information. Such decisions to restrict even further the above information, or additional information, should be made in consultation with a supervisor.

2. Timing of Disclosures:

a. Pre-Charge Phase:

- Grand Jury

Exculpatory Information: Although the Supreme Court has held that there is no constitutional requirement that the government disclose exculpatory evidence to the grand jury, *see United State v. Williams*, 504 U.S. 36, 52-54 (1992), USAM 9-11.233 requires AUSAs to disclose to the grand jury "substantial evidence that directly negates the guilt of a subject investigation."

Impeachment Information: Although there is no legal duty to seek out impeachment information from the prosecution team or present impeachment information to a grand jury, if an AUSA is aware of significant impeachment information

related to a testifying witness, the AUSA should consider disclosing the information to the grand jury. The AUSA should take into account the role of the witness played and the nature of the impeachment information among other things.

- Affidavits

  Exculpatory Information: If an AUSA is aware of substantial exculpatory information at the time he or she is preparing an affidavit in support of a search warrant, complaint, seizure warrant, or TIII, the AUSA should disclose the information in the affidavit **unless the AUSA obtains supervisory approval not to do so.**

  Impeachment Information: If at the time an AUSA is preparing an affidavit in support of a search warrant, complaint, seizure warrant or TIII, the AUSA is aware of impeachment information related to the affiant, or other person relied upon in the affidavit, and that impeachment information is sufficient to undermine the court's confidence in the probable cause in the affidavit, the AUSA should disclose the information in the affidavit, **unless the AUSA obtains supervisory approval not to do so.** A prior judicial finding of a lack of credibility of an affiant or a person relied upon in the affidavit should be disclosed in the affidavit.

b. Post Charge Disclosure

Exculpatory Information: Regardless of whether the information is memorialized, such information must be disclosed to the defendant reasonably promptly after discovery. If an AUSA discovers exculpatory information after conviction, sentencing and/or appeal, the AUSA **should discuss the proper way to handle the matter with a supervisor**.

Impeachment Information: Impeachment information will typically be disclosed at a reasonable time before trial in accordance with USAM § 9·5.001 D 2. Section 9·5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks

Act. Disclosure must be made in time for the defendant to make effective use of it at the hearing/trial. *See Bielanski v. County of Kane*, 550 F.3d 632, 645 (7th Cir. 2008) ("Brady requires that the government disclose material evidence in time for the defendant to make effective use of it at trial. Even late disclosure does not constitute a Brady violation unless the defendant is unable to make effective use of the evidence. Under these cases, Brady evidence can be handed over on the eve of trial or even during trial so long as the defendant is able to use it to his or her advantage. That said, purposefully withholding exculpatory or impeaching evidence until the last moment would be a risky and ethically questionable practice for government agents to undertake, and we certainly do not condone that approach with our opinion today.")

c. Plea Hearings

Although the Constitution does not require disclosure of impeaching information prior to entering a plea agreement, *see United States v. Ruiz*, 122 S.Ct. 2450, 2457 (2002), nonetheless, if the AUSA is aware of impeachment information so significant that it undermines the AUSA's confidence in the defendant's guilt, **the AUSA should disclose the information to the defense and advise their supervisor**.

d. Sentencing

USAM 9-5.001 D 3 requires, "Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, should be disclosed no later than the court's initial presentence investigation." If additional information becomes apparent after the initial PSR, it should be disclosed as well.

e. Standing Orders by the Court

- Some District Judges have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery. The AUSA must comply with any standard rule on discovery, any applicable case law and in any event no later than 14 days.

- AUSAs should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, AUSAs should always consider security concerns and the other factors set forth in the subparagraph above.

- AUSAs should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

- Grand jury transcripts should be disclosed the Friday before trial. **Earlier disclosure should be discussed with a supervisor**.

**** Discovery obligations are continuing, and AUSAs should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.**

3. Form of Disclosure:

There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, AUSAs should take great care to ensure that the full scope of pertinent information is provided to the defendant.

V. DISCOVERABLE INFORMATION IN THE POSSESSION OF INTELLIGENCE COMMUNITY (IC)[6]

A. 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, available on the Intranet, and the earliest possible time advise the ATAC and their supervisor regarding discovery obligations relating to classified or other sensitive national security information. The USA should also be notified immediately upon the AUSA learning that a case or matter involves national security or classified 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.

B. 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:

1. Those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government;

2. Those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act;

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[6] The Intelligence Community includes the Director of National Intelligence; the CIA; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; the other offices within the Department of Defense for the collection of specialized national foreign intelligence through reconnaissance programs; and the intelligence and counterintelligence components of the Department of State, FBI, DEA, Department of Treasury, Department of Energy, Homeland Security and the respective military services.

3. Those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially if they involve foreign government or military personnel;

4. Other significant cases involving international suspects and targets; and

5. Cases in which one or more targets are, or have previously been, associated with an intelligence agency.

C. 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, in consultation with their Supervisor, the ATAC, and the USA, 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.

VI. MAKING A RECORD

AUSAs should make a record of when, what and how discovery information is disclosed or otherwise made available. Use a discovery production letter to memorialize in detail the discovery that was provided or made available by inspection or copying. Place the discovery production letter in the case file. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above.