

SDNY Discovery and Disclosure Policy

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Table of Contents

Introduction	1
Discussions with Agents and Investigators	2
Step 1: Gathering and Reviewing Discoverable Information	3
A. Where to Search for Discoverable Material: The “Prosecution Team.”	3
1. Foreign Law Enforcement	3
B. What to Review for Discoverable Information	3
1. The Investigative Agency’s Files	4
2. Cooperating Witness Folders and Confidential Informant/Source Files	4
a. Cooperating Witness Files and Folders	4
b. CI File–Testifying CI	4
c. CI File–Non-Testifying CI	4
d. Prison Calls	4
3. Evidence and Information Gathered During the Investigation: Tracking and Filing ..	5
4. “Taint” or “Filter Teams.”	5
5. Documents Obtained in Joint, Parallel or Related Matters	5
6. Substantive Case-Related Communications, Including E-Communications	6
7. Potential <i>Giglio</i> Information Relating Specifically to Law Enforcement Witnesses ..	6
a. The <i>Giglio</i> inquiry and the agency personnel file	6
b. Covert Investigations and Adverse Credibility Findings: the Public Corruption Chief	
Check	7
c. CCRB Complaints	7
8. Potential <i>Giglio</i> Information Regarding Other Witnesses	7
a. Cooperators and Informants	8
b. Lay Witnesses	8
c. Witnesses with Immigration or Regulatory Concerns	8
d. Non-Testifying Declarants–Rule 806	9
e. Defense witnesses	9
f. Uncalled Witnesses	9
g. Impeaching the Investigation	9
h. Wiretaps, Pen Registers, and Other Investigative Orders	9
9. Information Obtained in Witness Interviews, and Attorney Proffers	10
a. Agent Original Notes	10
b. Draft Agent Reports	10
c. Notes and Memoranda of Witness Interviews and Preparation	10
d. Attorney Proffers	10
10. Presentence Reports of Co-Defendants	11
Step 2: Responsibility for Conducting the Review of Discoverable Information	11

Step 3: Making the Disclosures	<u>11</u>
A. Rule 16 Discovery	<u>11</u>
1. Timing of Discovery	<u>11</u>
2. Costs of Discovery	<u>11</u>
3. Voluminous Discovery/Materiality/Prosecution Team	<u>12</u>
4. Disclaimer	<u>12</u>
B. Exculpatory Evidence	<u>12</u>
1. Timing of Disclosure	<u>12</u>
C. Witness Statements	<u>12</u>
1. Timing of Disclosure	<u>13</u>
D. Witness Impeachment Information	<u>13</u>
1. Timing of Disclosure	<u>13</u>
E. Prior Notice Provisions	<u>13</u>
F. Form of Disclosure	<u>13</u>
G. Disclosure to Co-Defendants	<u>13</u>
H. Protective Orders	<u>14</u>
I. Privacy Protection-Personal Identifier Redaction	<u>14</u>
J. Presentence Reports	<u>14</u>
Step 4: Making a Record	<u>14</u>
A. Bates Numbering	<u>14</u>
Other Matters	<u>15</u>
A. Sentencing	<u>15</u>
B. National Security/Intelligence Information	<u>15</u>
D. Post-Trial Exculpatory and Impeachment Evidence	<u>16</u>
E. Exculpatory Evidence for Prosecution in Another Jurisdiction	<u>16</u>
F. Defense Process	<u>16</u>
1. Rule 17 Subpoenas	<u>16</u>
2. Subpoenas to Federal Agencies or Employees	<u>17</u>
G. Special Concerns Relating to Local Law Enforcement	<u>17</u>

Introduction. The SDNY Discovery and Disclosure Policy sets forth Office practice and policy under Federal Rule of Criminal Procedure 16; 18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2; *Brady/Giglio*; Department of Justice policies; and the New York Rules of Professional Conduct.¹ This Policy also discusses the prior notice provisions of Fed. R. Evid. 404(b) & 412-414 and of Title III. This Policy generally follows—and frequently goes beyond—the four-step structure of Deputy Attorney General Ogden’s Memorandum for Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010) (“DAG Guidance Memo”). Consistent with the DAG Guidance Memo, this Policy will generally use the term “discoverable information” to encompass all of our disclosure obligations under all of the above provisions. This discovery policy does not provide specific guidance with respect to terrorism, national security, and classified information issues. Guidance concerning those issues is currently being developed by the Department.

This Policy is subject to legal precedent, court orders, and local rules. In particular, the SDNY Discovery and Disclosure Policy provides supervisory legal advice and guidance that is intended to ensure compliance with our criminal disclosure obligations, ethical obligations, and Departmental policies. A failure to comply with this Policy will not necessarily mean there has been a violation of a criminal disclosure obligation, but it may result in delay, expense, and other consequences prejudicial to a prosecution. This Policy is subject to revision. Any departures from this Policy require Unit Chief approval and consultation with the SDNY Discovery Coordinator. This Policy 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). This Policy is for internal Office guidance and it should not be disclosed outside the Office and the Department of Justice.

The SDNY Discovery and Disclosure Policy encompasses wide-ranging guidance for all SDNY prosecutors. You are expected to be well-versed in it. However, despite the breadth of the SDNY Policy, it is not intended to define the endpoints of your responsibilities; instead, it discusses a core of principles and practice points to be applied in the discovery and disclosure scenarios we most frequently encounter. Important to remember is that almost every case poses unique situations or

¹The principal DOJ policies are set forth in the following documents; those in bold are required reading in conjunction with this Policy: **USAM 9-5.001, *Policy Regarding Disclosure of Exculpatory and Impeachment Information* (updated Jan. 2010)**; DAG Memorandum for Department Prosecutors, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group* (Jan. 4, 2010); **DAG Memorandum for Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010)**; DAG Memorandum for Department Prosecutors, *Requirement for Office Discovery Policies in Criminal Matters* (Jan. 4, 2010). The DAG memos may be found in electronic format at <http://blogs.usdoj.gov/blog/archives/493>. AUSAs should also be mindful of New York Rules of Professional Conduct 3.4, *Fairness to Opposing Party and Counsel*, and 3.8, *Special Responsibilities of Prosecutors and Other Government Lawyers*. Additional guidance and resources concerning discovery and disclosure obligations are contained in the Forms Library, in the latest edition of *Brady & Giglio Issues* in USABooks, and in the FEDERAL CRIMINAL DISCOVERY bluebook on USABooks.

dynamics that will not be directly addressed in this policy. For this reason—and it can never be said too often—the polestar of our policy is this: “The United States wins its point whenever justice is done its citizens in the courts.” This means that every prosecutor must subordinate strategic advantage, and even sometimes securing a conviction, to what justice requires. Generally, the prosecutor should consider broad and early disclosure, out of fairness to the defendant, but also because it may frequently lead to the just, speedy resolution of the case by a plea, thus preserving resources of the Office and protecting proof and witnesses for the pursuit of other cases. Broad, early disclosure is also in the prosecution’s interest because it will leave the prosecutor less likely to be vulnerable after the case is over to the argument that a non-disclosure that seemed immaterial early in the case was in fact material at the end of the day. But while we regularly make disclosures that well exceed our obligations, we must never lose sight of our duty to do justice to all citizens. Therefore, we must always balance erring toward disclosure to the defendant with our obligations to protect witnesses, victims, the privacy of individuals, the confidentiality of certain information, and where applicable, the security of the Nation.

In the end, discovery and disclosure decisions can be complex, and when they are, they should not be made alone. You have supervisors and colleagues to consult, and you should use them as a resource. The decisions you make can affect your reputation and the reputation of this Office—even unintentional lapses can have a damaging and lasting effect on public and judicial confidence in prosecutors and the criminal justice system. If, however, you keep your focus on ensuring that justice is done, it will be.

Discussions with Agents and Investigators. Because this Policy may be unfamiliar to agents and investigators (collectively, “investigators”), at the beginning of an investigation AUSAs should alert investigators that, pursuant to SDNY policy and practice, investigators should preserve substantive e-communications and notes and should not use e-mail or similar means of communication in a casual or careless manner.

Thereafter, when it becomes evident that the investigation will in fact result in charges, the AUSA should have a longer discovery meeting with the investigators. The AUSA will provide the investigators with a copy of the SDNY Agent Discovery Letter and, guided by this Policy: (i) discuss with investigators the scope of the “prosecution team” and how that may evolve during the course of the investigation; (ii) discuss with the investigators the nature of Rule 16 information expected to be obtained or generated during the case and how it is to be identified, preserved, prepared for disclosure, reviewed, logged, and disclosed; (iii) remind investigators of their obligation to preserve and produce to the Government, for review and likely disclosure, original surveillance and interview notes, and substantive e-communications between themselves, with the Government, and with witnesses; (iv) remind agents of the SDNY note-taking policy and that it is our Office’s practice to disclose notes of witness interviews and prep sessions; (v) explain the nature and scope of search for potentially exculpatory information that may arise in the case, as well as the nature of impeachment material and how it should be gathered; (vi) explain the Agent Giglio policy and its application to all law enforcement witnesses; and (vii) reinforce to the investigators that in all these areas the obligations are continuing ones.

STEP 1: GATHERING AND REVIEWING DISCOVERABLE INFORMATION. This Step provides guidance on the scope of the search AUSAs are required to conduct for discoverable material.

A. Where to Search for Discoverable Material: The “Prosecution Team.” The prosecutor “has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998). This principle and its countless variations in the case law have led the Department to adopt the concept of the “prosecution team” as a useful guide to the scope of the Government’s search for discoverable information. Specifically,

It is the obligation of federal prosecutors, in preparing for trial, to seek all [discoverable information] from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

DAG Guidance Memo Step 1.A, quoting USAM 9-5.001. The prosecution team will include the investigators working on the case with the AUSA as well as, in some cases, AUSAs and agents working on the case in another Unit in this Office, *e.g.*, Asset Forfeiture; attorneys and agents from another USAO; state or local law enforcement authorities; and foreign law enforcement agencies. A law enforcement *officer* from another jurisdiction will be part of the “prosecution team” if the AUSA or federal agents are directing the officer’s actions or if the officer participated in the investigation or gathered evidence underlying the charges. Considerations in determining whether an *agency* or *entity* should be considered part of the “prosecution team” include whether the AUSA or investigative agency conducted a joint investigation or shared resources with the other agency or entity; whether the other agency or entity played an active role in the AUSA’s case; the degree to which information or evidence has been shared or exchanged with the other agency or entity; and whether the AUSA has control over or has directed action by the other agency or entity. This is further discussed under Step 1.B.4 regarding parallel proceedings and joint investigations, to which you are referred. As with investigators working directly on the case, the AUSA will have an initial discussion with other members of the prosecution team as early as possible regarding criminal disclosure obligations. Determining who is on the “prosecution team” for disclosure purposes can sometimes be difficult and consultation with supervisors may be required.

1. Foreign Law Enforcement. The disclosure obligations discussed herein should be applied, to the extent practicable, to foreign law enforcement entities that are involved in our investigation. Consultation with unit chiefs and AUSAs experienced in this area is strongly recommended.

B. What to Review for Discoverable Information. Most of the points discussed below (which are not exhaustive) are pertinent to law enforcement agencies. Information in the possession of non-law-enforcement members of the prosecution team, such as regulatory agencies, will require special consideration. In all instances, keep in mind that records may be in hard copy files and/or in various agency databases or otherwise electronically stored. Because even agency personnel may have difficulty recalling all file types or systems that need to be searched, the AUSA’s perseverance in conducting a thorough inquiry is required.

1. The Investigative Agency's Files. With very limited exceptions, the agency should provide the AUSA with access to its case file and any other file or document the AUSA believes may contain discoverable information. This includes e-communications, such as FBI Electronic Communications (commonly referred to as "ECs"), e-mails, etc. The AUSA will review these files. If an agent advises that there is or should be an "exception" to showing a prosecutor a particular file or document, discuss with a supervisor. You may reassure the agent that even if a document in the agency's files contains discoverable information, it is frequently sufficient merely to disclose (via letter or otherwise) the substance of the information, rather than disclosing the specific agency document itself.

2. Cooperating Witness Folders and Confidential Informant/Source Files. *In all instances AUSAs and agents should thoroughly consider security risks attendant to the manner and timing of disclosures relating to any cooperating witnesses and CIs.* A list of common impeachment materials for testifying informants and cooperating witnesses is set forth in ¶B.7, *infra*. The following lists some of the principal places to look for discoverable materials.

a. Cooperating Witness Files and Folders. Cooperators will generally not have an agency CI file, although there may be one in the case of an informant who ends up being charged and cooperating, or a cooperator who has worked off his case and become a CI. However, the AUSA should check for the existence of an agency file on a cooperator in any event. In addition, to the extent that a Presentence Investigation Report ("PSR") has been prepared for a particular cooperating witness, the AUSA should review the PSR for discoverable information. The AUSA should obtain and update as need be the SDNY Witness Folder (including network Witness Folder) for the cooperator, and should also check the SDNY District Criminal Intelligence Database ("Rackets") for information regarding the cooperator.

b. CI File–Testifying CI. The prosecutor should review the entirety of all files relating to a testifying CI and copy what is necessary for disclosure purposes. Some of these files may be on agency databases, such as FBI's relatively new DELTA system, that the AUSA can only review at the agency with an authorized agent user to access the system. AUSAs should make sure that they are looking at the main CI file (some agencies maintain duplicate CI files, with the secondary file sometimes being out of date). AUSAs should also be alert to information, in the file or from the CI, that the CI had previously worked for another agency; AUSAs should obtain and review any earlier CI files from whatever agency maintains them.

c. CI File–Non-Testifying CI. Consult with your Unit Chief regarding the need in a given case to request access to the files of non-testifying CIs. Where circumstances would permit defense counsel to argue that the CI set up the defendant (by entrapment, or planting contraband, for instance), it may be necessary to review the CI's file(s) for other similar conduct that might support an exculpatory theory. *Cf. Roviario v. United States*, 353 U.S. 53 (1957), and its progeny regarding the circumstances under which an informant's identity must be disclosed.

d. Prison Calls. Prison Calls. There is no absolute requirement that an AUSA obtain and review all Bureau of Prisons recorded telephone conversations between Government witnesses/cooperators and third persons. Requiring the Government to automatically obtain and review recorded telephone conversations would be disruptive to the workings of the BOP and place an undue and unwarranted burden on the Government. That having been said, if an AUSA has

reason to believe or, in fact, knows that recorded inmate telephone conversations contain *Giglio*, *Brady*, or some other form of discoverable material, the AUSA is obligated to obtain such conversations and make disclosure to the defense. Similarly, even without knowledge of the presence of discoverable material, if the Government has in its possession BOP recorded conversations there is some authority indicating that the Government has an obligation to review such recordings for *Giglio* and *Brady* material. Compare *United States v. Milan*, 304 F.3d 273, 286-87 (3d Cir. 2002) (tapes reviewed after trial), with *United States v. Merlino*, 349 F.3d 144 (3d Cir. 2003) (apparently same organized crime investigation; prosecution not required to review or disclose BOP prison recordings under *Brady* or *Jencks*.)

3. Evidence and Information Gathered During the Investigation: Tracking and Filing. All evidence obtained during the investigation should be reviewed not only for evidentiary purposes, but also for disclosure purposes. Key to compliance with our disclosure obligations is proper organization, tracking and filing of evidence received. This includes hard copy and electronically stored information (“ESI”), the latter of which may be stored in a network folder under the case USAONo. **You must confer with our IT Services Department concerning format, logging, processing, storage, review, and ultimate disclosure of all ESI you expect to obtain in a case.**

Even where the investigating AUSA determines that evidence obtained is of little investigative use, that evidence must still be properly labeled and filed so that it may be reviewed for disclosure purposes. Particularly in our high-turnover office, the AUSA must file and log evidence and disclosable material obtained during the course of the case in a manner sufficient to permit a later AUSA not familiar with the case to know what has been obtained, what may still need to be obtained, and what has been and still needs to be disclosed. Among other things, all boxes and folders must be identified with the USAONo, and a coherent system for identifying and filing or indexing material within the boxes and folders must be used. AUSAs should also be mindful of the need to redact sensitive and identifying information from certain documents before producing them in discovery or, if the production is voluminous, to enter into a protective order with the defense to prevent the dissemination of this sensitive and identifying information.

4. “Taint” or “Filter Teams.” To accommodate privilege, Fifth Amendment and Sixth Amendment concerns, filter teams are occasionally established to review and litigate potentially protected material prior to its disclosure to the trial team. As part of the privilege review process, and to avoid delays in discovery, the filter team may be called upon to make discovery of materials that have not been released to the trial team. The trial team must be aware that the filter team may not easily recognize potentially exculpatory information; and particularly hard issues may arise when arguably privileged information may be exculpatory as to a co-defendant who is not otherwise entitled to view the information. The trial team must maintain careful coordination with the filter team to ensure that all disclosure obligations are being met in a timely fashion, and both the trial team and filter team must consult with supervision when faced with difficult questions—all without breaching the filter that was created to preserve the privilege.

5. Documents Obtained in Joint, Parallel or Related Matters. The terms “joint,” “parallel,” and “related” are sometimes loosely, and incorrectly, used as equivalents. The mere existence of such a matter does not necessarily mean that participants in the other matter are part of the prosecution team. Instead, the nature of the coordination between the criminal matter and the other

matter should be evaluated. Indeed, to avoid taking on the obligation to produce massive but ultimately peripheral discovery from another agency or entity, the AUSA may wish to affirmatively delimit the participation of the other entity in the federal criminal investigation. This discovery/prosecution team analysis should take place at the outset of the criminal matter, at the same time as we evaluate other aspects of the relationship between the criminal matter and the other matter under the Department's and the Office's parallel proceedings policies. *See* USAM 1-12.000, *Coordination of Parallel Criminal, Civil, and Administrative Proceedings*; USAM 5-11.112, *Parallel Proceedings*. Additional resources concerning joint and parallel proceedings are available in the Forms Library.

Of course, our evaluation is not necessarily the final word. Instead, where we are aware of related agency proceedings or civil litigation or a separate criminal investigation outside the scope of the prosecution team, we will consider alerting defense counsel to the existence of that material with a disclaimer that we are not producing it as discovery. Under those circumstances the defense can pursue its own discovery via Rule 17 subpoenas, or can litigate our discovery obligations. AUSAs should consult with supervisors in this area.

6. Substantive Case-Related Communications, Including E-Communications. E-mails, text messages, and other e-communications relating to the facts of an investigation or case, or relating to witness credibility, should be preserved to the same extent as any written communication or notes on the subject. These communications will commonly occur between AUSAs and agents; between AUSAs/agents and victims/witnesses; and between victim-witness coordinators and victims/witnesses. These communications should be obtained and filed in the case folder (hard copy or network) so they may be identified and produced (or disclosed in substance) during discovery. **Agents and other members of the prosecution team should be reminded regularly of the obligation to preserve e-mails and other e-communications for review by the prosecutor.** (Substantive voicemails—which may constitute 3500 material—should be transcribed by a paralegal or investigator.) 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 prosecutor receives during an oral conversation with an agent or a witness is no less discoverable than if that same information were contained in an e-mail. When the discoverable information contained in an e-mail 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 our Rule 16 obligation.

7. Potential *Giglio* Information Relating Specifically to Law Enforcement Witnesses.

a. The *Giglio* inquiry and the agency personnel file. The Department of Justice and this Office have had formal procedures in place since 1996 governing inquiry and disclosure of impeachment material relating to law enforcement agency witnesses. In brief, AUSAs should have a diplomatic but candid discussion with law enforcement witnesses regarding the existence of any impeachment material. This discussion should take place sufficiently in advance of testimony by the agent so that agency personnel files may be obtained if need be. A checklist of specific items will be used. If there is an indication of a potential *Giglio* issue, the AUSA will ask the SDNY *Giglio* Requesting Official to obtain the agency employee's personnel and related files to pursue the matter and to determine, with supervisory consultation, what further inquiry to make and what to disclose.

The Department's Agent *Giglio* Policy applies specifically only to the Justice and Treasury Departments, but we make the *Giglio* inquiry of all law enforcement personnel. The NYPD has been quite forthcoming with personnel files and is more familiar with our procedures than some upstate police departments, which may require more explanation. The AUSA should consult with supervisors regarding all law enforcement *Giglio* issues and disclosures.

b. Covert Investigations and Adverse Credibility Findings: the Public Corruption Chief Check. Law enforcement personnel are on occasion the subjects of investigations of which they are not aware. AUSAs should accordingly make an additional check with the Chief of Public Corruption to determine if any of their law enforcement witnesses have any such issues. Supervisory consultation will be required regarding disclosures and protective orders to be made in this area. In addition, the Public Corruption Chief keeps track of agents as to whom adverse credibility findings have been made: AUSAs have the dual obligation to report any such findings to the Public Corruption Chief, and to check as to the existence of any such findings concerning their witnesses.

c. CCRB Complaints. NYPD Police Officers are on occasion the subject of civilian complaints filed with the Civilian Complaint Review Board ("CCRB"). The CCRB is a city agency, independent of the NYPD, empowered to receive, investigate, hear, make findings and recommend action against NYPD police officers accused of the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language. AUSAs should accordingly ask testifying NYPD officers whether they have ever been the subject of such a complaint, whether such a complaint was substantiated by the CCRB, and what, if any, disciplinary action was taken against them as a result by the NYPD (substantiated CCRB complaints are forwarded to the NYPD for review and possible discipline). Depending on the nature of a substantiated complaint and the resolution of that matter, an AUSA may be required under *Giglio* to disclose this information to the defense. Supervisory consultation may be necessary to determine whether disclosure is required. Complaints that were unsubstantiated or unfounded are not discoverable. In those situations, where an NYPD officer does not know the status of a complaint filed against him or her, the AUSA should obtain from the CCRB the officer's computerized CCRB history. Where a complaint is only pending before the CCRB, AUSAs should consult with a supervisor to determine what might need to be disclosed.

8. Potential Giglio Information Regarding Other Witnesses. *Giglio* information can include, without limitation, the following (which may serve as a useful guide). You will see that much of the following is derived from the case law on witness impeachment under the Federal Rules of Evidence.

- Prior inconsistent statements. (*See* ¶B.8 *infra*).
- Benefits
 - 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 or calculation of restitution
 - Stays of deportation or other immigration status considerations

- Benefits in dealing with other regulatory agencies (tax, etc.). Where the circumstances of a case suggest, any such benefits or understandings (or misunderstandings) in this area should be inquired into
- S-Visas
- Monetary benefits
- Non-prosecution agreements
- Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- Relocation assistance/EWAP payments
- Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's 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 a prosecutor)
 - Civil lawsuits involving the witness and/or the defendant
- 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's ability to perceive and recall events
- Irresponsible (or worse) Facebook pages/web persona

With the foregoing in mind, note the following points:

a. Cooperators and Informants. Much of the foregoing will apply to cooperators and informants. As previously discussed, we have a substantial obligation to dig for and disclose this material, and we have instituted procedures to avoid mis- or non-filed information.

b. Lay Witnesses. Our obligation to obtain impeachment material from lay witnesses should be guided by the nature of the witness's involvement in the underlying facts of the case; common sense; and the existence of a good-faith basis to inquire. The witness should be advised, among other things, that they should let us know about any potential impeachment material that the defendant knows about, or that a defense investigator might find out about.

c. Witnesses with Immigration or Regulatory Concerns. We should generally pull and review for disclosure purposes a witness's A-file where the witness is a cooperator, in cases where the defendant's status is at issue, or in any other circumstances where we may have reason to believe that impeachment information may be in a witness's A-file. In some instances it may be appropriate to give an illegal immigrant witness a non-prosecution letter. In such instances (unless we are applying for a visa for the witness) it may be appropriate to add to the letter that we make no promise whatsoever regarding the witness's status or dealings with CIS action. Otherwise we will orally make clear the absence of any promise and memorialize that in interview notes.

d. Non-Testifying Declarants–Rule 806. Where statements by out-of-court declarants (*e.g.*, co-conspirators or authorized agents) are offered, the credibility of the declarant may be impeached under Fed. R. Evid. 806. Accordingly, impeachment material for such out-of-court declarants must be disclosed. This may include, for example, a co-conspirator’s criminal record; evidence of bias (for example, animosity among co-conspirators is common); substance abuse/mental health issues; and inconsistent statements (for example, post-arrest, or during a proffer that did not lead to a cooperation agreement). On the other hand, the disclosure requirements of §3500 do not apply to non-testifying declarants. *United States v. Shyne*, No. 08-0865-cr(L) (2d Cir. Aug. 5, 2010).

e. Defense witnesses. Generally speaking, information that impeaches a defense witness is not helpful to the defense and is not immediately subject to disclosure. However, an AUSA with defense witness impeachment material should consult with supervisors about the AUSA’s anticipated course of action. In addition, where the fact-finder is the court, think about whether the court might wish to know the information anyway, prior to reaching its conclusion.

f. Uncalled Witnesses. Information that impeaches the general credibility of an uncalled witness need not be disclosed. However, be alert to *Brady* masquerading as *Giglio*, and carefully review witness files for uncalled witnesses for discoverable material. This includes reviewing proffer notes for failed or unsigned cooperators, and safety valve proffers. Disclosure of such matters may, of course, raise substantial security concerns.

g. Impeaching the Investigation. What constitutes evidence that might provide a basis for impeaching the investigation is difficult to identify. *See generally Kyles v. Whitley*, 514 U.S. 419 (1995). **Exemption 5 -Attorney Work Product**

Exemption 5 - Attorney Work Product

h. Wiretaps, Pen Registers, and Other Investigative Orders.

-Search Warrant Affidavits. If we intend to use the results of a search conducted pursuant to a warrant, or any evidence derived from the results of such a search, Fed. R. Crim. P. 16(a)(1)(E)(i) requires us to produce the affidavit in support of the warrant, as well as the warrant and the inventory, so that the defense may consider whether to seek suppression of the resulting evidence. If we have good cause, we may obtain a protective order under Fed. R. Crim. P. 16(d)(1) permitting us to redact sensitive information, such as details that would identify a source of information. This holds true for any warrant sought pursuant to Fed. R. Crim. P. 41, including requests for GPS orders.

-Pen Registers & 2703(d) Orders. As a matter of Office practice, we produce applications and orders for pen registers sought pursuant to 18 U.S.C. §§ 3121-3127, and for information sought pursuant to 18 U.S.C. § 2703(d). If the facts of a particular case suggest that such materials should not be produced, the AUSA should consult with a supervisor before acting.

-Interception of Wire and Electronic Communications, a/k/a “Title IIIs.” Section 2518(9) of Title 18 requires that the affidavits in support of an order for interception of wire or electronic communications must be turned over to the defense in advance of any hearing in which the results of the wire will be disclosed. This includes bail hearings after an arrest on a complaint that is based

on wire calls (and also after indictment if you intend to seek detention based on the contents of the wire).

Exemption 5 - Attorney Work Product

Exemption 5 - Attorney Work Product

-Transcripts. Transcripts of recorded conversations are discoverable pursuant to Fed. R. Crim. P. 16(a)(1)(E)(ii) as items we intend to use in our case-in-chief. As a practical matter, however, primarily because of the expense, full transcripts are often not generated until shortly before trial. You may receive preliminary draft transcripts or, with wiretaps, line sheets from your agents containing summaries or non-verbatim representations of the recorded conversations. We often share these with defense counsel, but only after obtaining a “draft transcript stipulation” in which counsel acknowledges that the materials are rough first drafts, and agrees not to make an issue at trial about any differences between the drafts and final versions. If you have any questions about whether or to what extent to produce draft transcripts or line sheets, consult with a supervisor.

9. Information Obtained in Witness Interviews, and Attorney Proffers. The DAG Guidance Memo contains a considered discussion of factors relating to the making and disclosure of agent and attorney notes and MOIs. Our Policy and practice may be more simply stated:

a. Agent Original Notes. We obtain surveillance and interview notes from the agent and disclose them, regardless of their incorporation into a formal report. Because our practice in this area may differ from that of other offices, it should be discussed with the agents in the initial meeting.

b. Draft Agent Reports. In the rare instance where you have obtained a draft agent report, consult with supervisors over whether the draft report should be disclosed. While the multiple drafts an agent may work on in his/her office before finalizing a report are pretty clearly not “adopted or approved” by the agent, *see* §3500(e), a “draft” report circulated to outsiders may, depending on the purpose for which it was circulated, be viewed as a de facto statement by the agent, particularly (for *Giglio* purposes) if the final report contains changes.

c. Notes and Memoranda of Witness Interviews and Preparation. Either the AUSA or the agent (as determined beforehand) should take notes of any meetings with witnesses and preserve these notes. Additional guidance concerning this Office’s note-taking policies is contained in the Forms Library.

d. Attorney Proffers. Notes of proffers in which an attorney relays factual information from a client are to be evaluated in the same manner as notes of an interview of the client him or herself. Such proffers may be contrasted with defense attorney “pitches” that hypothesize about the case in a manner that does not constitute relaying factual information from the client. Defense counsel should be advised that proffers that do contain discoverable information (whether *Brady/Giglio* or § 3500) are likely to be disclosed.

10. Presentence Reports of Co-Defendants. As mentioned above, cooperator PSRs must be reviewed for discoverable information. PSRs for co-defendants, should any exist in the matter, must also be reviewed for discoverable information.

STEP 2: RESPONSIBILITY FOR CONDUCTING THE REVIEW OF DISCOVERABLE INFORMATION.

Having gathered (or while gathering) the information described above, prosecutors should ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. However, the prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.

STEP 3: MAKING THE DISCLOSURES. Our disclosures are most frequently made in the following general order:

A. Rule 16 Discovery. At the outset, the AUSA should obtain written or on-the-record confirmation by defense counsel that discovery is indeed requested, in order to trigger the Rule's reciprocal discovery obligations. Thereafter, compliance with Fed. R. Crim. P. 16 requires in every case an item-by-item review of each of the provisions of that Rule. A sample discovery letter in the Forms Library will assist in this process. In general, subject to the protective considerations set forth below, it is the practice of this Office to provide broad discovery, as early as possible, in a form that defense counsel may readily use. In this latter regard, we will generally disclose databases and indices of discoverable information that we have prepared. (Also note that under *United States v. McElroy*, 697 F.2d 459 (2d Cir. 1982), a defendant's response to a *Miranda* advice of rights—whether a statement or an invocation of the right to remain silent—is considered a discoverable statement.)

1. Timing of Discovery. There is no Local Criminal Rule on the timing of discovery. In all instances it is advisable to have a pre-Indictment plan to propose to the Court and counsel, in writing in larger cases. Avoid using words like “all,” and never use the term “open file” (which has never been the practice in this district and has no generally accepted meaning in any event).

2. Costs of Discovery. The costs of discovery are generally borne by the defense. *See, e.g.*, Fed. R. Crim. P. 16; *United States v. Tyree*, 236 F.R.D. 242 (E.D. Pa. 2006) (federal defenders); Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Chapter III, § 3.16. CJA attorneys will generally make application to the court to cover necessary expenses; as an institutional courtesy we will generally assist in making discovery available to the Federal Defenders of New York so they may copy it at less cost than commercial rates. Do not acquiesce

to the provision of free discovery other than *de minimis*; instead, consult with supervision and with the Administrative Officer.

3. Voluminous Discovery/Materiality/Prosecution Team. The catchall provision of Fed. R. Crim. P. 16(a)(1)(E)(i), “material to preparing the defense,” is the rubric under which the greatest volume of discovery is made. Where the Government has obtained voluminous evidence during the course of the investigation, it may be appropriate for the Government simply to make that information available to the defense to review. (By “voluminous” is meant an amount that cannot as a practical matter be copied.) In instances where another agency has custody of voluminous evidence, and/or where we are not conceding the “materiality” of such evidence, we should alert the defense to our position and initiate (or await, as circumstances warrant) litigation relating to the “materiality” of the information, or whether it is in the Government’s possession, custody, or control. Note that when we permit defense counsel to make copies of portions of voluminous evidence that counsel selects, it should generally be done in such a way that we do not become aware of what selections defense counsel has made to copy. Finally, in cases with voluminous discovery, where we have compiled sets of “hot” documents, it may be appropriate to provide those sets to the defense.

4. Disclaimer. It is advisable for the Government, in making discovery of this nature available, to disclaim any implicit representation that the information is in fact “material to preparing the defense.”

B. Exculpatory Evidence. This Office complies with the broad disclosure of exculpatory evidence set forth in USAM 9-5.001, *Policy Regarding Disclosure of Exculpatory and Impeachment Information*. That policy, which we will not attempt to summarize here, contains a very helpful discussion of the subject and AUSAs must without fail be familiar with it. Note that when a witness is the source of exculpatory information, it is Office practice to provide the defense with the substance of the witness’s statement (via letter, or via disclosure of the underlying report, as may be appropriate), rather than simply providing the name of the witness.

1. Timing of Disclosure. Absent circumstances dictating formal protective measures, exculpatory information, consistent with the USAM, is to be disclosed “reasonably promptly” after it is discovered.

C. Witness Statements. It has long been the policy of this Office to make broad disclosure of what is loosely referred to as “3500 material.” That material will generally consist of documents or recordings authored, adopted, made of, or approved by, the witness; the witness’s grand jury testimony; memoranda of interviews of the witness; and notes of witness interviews. It is evident that notes and even many MOI, which are commonly not shown to the witness, do *not* constitute statements “made by said witness and signed or otherwise adopted or approved by him,” in the terms of § 3500(e). Accordingly, when disclosing such material the AUSA should not simply refer to it as “3500 material,” but should include a disclaimer, to the general effect that, unless specifically indicated, notes and memoranda of witness interviews are provided pursuant to longstanding Office practice and do not necessarily constitute statements made by the witness in the sense of 18 U.S.C. § 3500 or Fed. R. Crim. P. 26.2. Grand jury testimony of a case agent who summarizes another witness’s statement should also be disclosed with the other “non-3500” material.

1. Timing of Disclosure. *See* below.

D. Witness Impeachment Information. Impeachment material, which must be disclosed sufficiently in advance of the witness's testimony for the defense to make effective use of it, *see* USAM 9-5.001, *Policy Regarding Disclosure of Exculpatory and Impeachment Information*, is generally contained in or disclosed together with the witness's 3500 material.

1. Timing of Disclosure. Absent direction from the court, it is Office practice to disclose impeachment material and 3500 material a reasonable number of days before commencement of a relatively short trial, or a reasonable number of days prior to the testimony of a given witness during a lengthy trial. Defense counsel will be advised of our intentions prior to trial; supervisory approval is required for an AUSA to delay providing this material until trial. *See* USAM 9-5.001.D.4. Note: be alert to impeachment material that needs to be disclosed earlier for the defense to make effective use of it—for example, if the defense might be able to conduct its own investigation on a questionable matter relating to the character of a witness, or if the disclosures makes reference to another potential witness that the defense may wish to contact.

E. Prior Notice Provisions. “[U]pon request of the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any [similar act] evidence it intends to introduce at trial.” Fed. R. Evid. 404(b). The courts have not established any set time by which this notice must be accomplished. However, the Government should raise this issue as early as possible (among other things, it may well induce a plea). In addition, although “request of the accused” is required by the terms of the rule, this evidence should be disclosed even without request because it will affect the conduct of the trial and may also be an appropriate subject of an *in limine* motion. In a sex offender or child molestation case, the notice provisions of Fed. R. Evid. 412-14 must be closely adhered to. Other statutes, including Title III (discussed above); 18 U.S.C. §3505 (foreign records of regularly conducted activity); 18 U.S.C §3509(b) (video testimony of child witness); and Fed. R. Evid. 807 (residual exception), may also contain specific notice and disclosure provisions.

F. 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, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant. Child pornography must be made reasonably available to the defendant but may *not* be copied for the defense. *See* 18 U.S.C. §3509(m).

G. Disclosure to Co-Defendants. In most instances the same discovery should be made available to all defendants in the same case. However, prior statements of a defendant disclosable under Rule 16(a)(1)(A) & (B), as well as a defendant's criminal history, are not necessarily disclosable to other defendants in the case. They may be disclosed; conversely, where there are investigative or safety reasons, they may be withheld from disclosure to co-defendants under Rule 16. If withheld, they must be carefully reviewed for information that must still be disclosed under the Department's *Brady/Giglio* policy. In addition, we may also have possession of information from one defendant—*e.g.*, via seizure of a hard drive—that the prosecution team is not entitled to review, for

privilege, scope-of-warrant, or other reasons, and that we are not necessarily entitled to disclose to other defendants. You must discuss with a supervisor all instances where you believe restrictions on disclosure to co-defendants may be necessary or appropriate.

H. Protective Orders. In the past we have not generally sought protective orders that would limit defense counsel from using or disclosing discovery other than as necessary to defense of the criminal case. Instead, the logistics of copying and distributing hard copy discovery served as a *de facto* limitation on wider dissemination. The digital Web has vastly changed that and as a result it is now Office policy to more generally seek a protective order as needed to protect victim and witness privacy and safety interests, law enforcement interests, and the residual secrecy interest in grand jury materials.

I. Privacy Protection-Personal Identifier Redaction. Although Fed. R. Crim. P. 49.1, *Privacy Protection for Filings Made with the Court*, does not directly apply to discovery, it is our policy to redact the personal information covered by that rule from discovery materials. In addition, discuss with agents whether there are agency identifiers or references that should be redacted from reports. Discuss with a supervisor instances where these redactions appear impracticable or other privacy interests may be at stake.

J. Presentence Reports. PSRs are traditionally viewed as confidential to the court. *See United States v. Molina*, 356 F.3d 269 (2d Cir. 2004). If discoverable information is found in a cooperator or co-defendant PSR, the AUSA should move the court for permission to make the necessary disclosures, submitting the entire PSR in question to the court under seal.

STEP 4: MAKING A RECORD. One of the most important steps in the discovery process is keeping good records regarding disclosures. That includes both records reflecting precisely what was disclosed, and when; and records reflecting the prosecutor's discovery analysis. Given our high rate of AUSA turnover and case reassignments, it is absolutely crucial that these records be sufficient for an AUSA not otherwise familiar with the case to determine and if need be to reconstruct what has and has not been disclosed, and why.

A. Bates Numbering. With the exception of voluminous discovery as discussed above, no document, and no item, should be produced for discovery without a unique identifying numbers whose range has been recorded. For paper records, that will generally be a Bates number. Storage media prepared by our Litigation Technology Support personnel will also bear an identifying number they have generated.

Note: when information is being made available generally in a physical location or database, in addition to the letter documenting the initiation of that procedure, letters documenting additions to or subtractions from the generally available information should be sent to defense counsel such that there is always a complete record of what was available in discovery at any given time.

OTHER MATTERS

A. Sentencing. Pursuant to USAM 9-5.001, “Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court’s initial presentence investigation.” Information considered for disclosure for trial purposes must be considered anew in light of the different purposes of sentencing; the detailed gradations of the Sentencing Guidelines; and the broad factors to be considered under 18 U.S.C. §3553(a) in imposing sentence. To the extent the Government is relying at sentencing on evidence adduced at trial, it is important to determine whether intervening circumstances may have created new disclosable information. For example, has a cooperator whose evidence is pertinent to a sentencing factor gone bad during the sometimes lengthy period between trial and sentencing? Do intervening PSRs of co-defendants contain any information bearing on the defendant’s sentence? Keep in mind that although evaluating *Brady/Giglio* at the trial stage is generally more time consuming, over ninety percent of federal charges are resolved by guilty plea, and accordingly anything bearing on sentencing may actually be more crucial for the defense.

B. National Security/Intelligence Information. Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler’s September 29, 2010, memorandum, “Policy and Procedures Regarding the Government’s Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations.” Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult NSD regarding whether to request a prudential search of the pertinent IC element(s). All prudential search requests and other discovery requests of the IC must be coordinated through NSD.

Although discovery issues relating to classified information are most likely to arise in national security cases, they may also arise in a variety of other criminal cases, including narcotics cases, human trafficking cases, money laundering cases, and organized crime cases. In particular, it is important to determine whether the prosecutor, or another member of the prosecution team, has specific reason to believe that one or more elements of the IC possess discoverable material in the following kinds of criminal cases:

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

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

For these cases, or for any other case in which the prosecutors, case agents, or supervisors making actual decisions on an investigation or case have a specific reason to believe that an element of the IC possesses discoverable material, the prosecutor should consult with NSD regarding whether to make through NSD a request that the pertinent IC element conduct a prudential search. If neither the prosecutor, nor any other member of the prosecution team, has a reason to believe that an element of the IC possesses discoverable material, then a prudential search generally is not necessary.

C. Disclosures During the Investigative Stage. Although *Brady* and *Giglio* are not directly applicable to investigative submissions or proceedings before the grand jury, similar principles do apply. Thus, substantial evidence that directly negates the guilt of a subject of the investigation should be presented to the grand jury, *see* USAM §9-11.233. Significant impeachment information relating to a grand jury witness should also generally be presented to the grand jury. Likewise, substantial exculpatory evidence pertinent to an affidavit in support of a search warrant, complaint, seizure warrant, or Title III application should generally be disclosed, as well as substantial impeachment information relating to a source of information relied on in such a submission. The SDNY Federal Agency Giglio Implementation Plan (Agent *Giglio* Policy) should also be considered at these stages of the investigation. In the event you are faced with substantial impeachment or exculpatory information during the investigation of a case, consult with a supervisor regarding any disclosures to be made.

D. Post-Trial Exculpatory and Impeachment Evidence. Our disclosure obligations do not end with conviction or sentencing. All issues relating to post-trial disclosure of exculpatory information or impeachment information should be discussed with your supervisor, the Professional Responsibility Officer, and/or the SDNY Discovery Coordinator. For example, contemporaneous impeachment information about a Government witness that does not surface until after trial must be evaluated for post-trial disclosure. Further, should new, material, and credible evidence that the defendant did not commit the crime become known to the prosecutor, we will reinvestigate the matter, disclose the information to the defendant, and/or obtain other appropriate relief. *See, e.g., Friedman v. Rehal*, No. 08-0297 (2d Cir. Aug. 16, 2010) (prosecutor's duty to reinvestigate); *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009) (post-conviction test of DNA).

E. Exculpatory Evidence for Prosecution in Another Jurisdiction. Should we develop exculpatory evidence, usually via a cooperator, regarding a defendant charged or convicted in another jurisdiction, we will forward that information to the relevant prosecuting office.

F. Defense Process. Beyond Rule 16, *Brady/Giglio*, and § 3500, the defense may also obtain information by issuing subpoenas.

1. Rule 17 Subpoenas. Frequently (and usually without notice to the Government), defense counsel will serve Rule 17(c) subpoenas on law enforcement agencies involved in our investigations. In many instances, those subpoenas are inappropriate and should be quashed. Guidance concerning the standards for the issuance of a Rule 17 subpoena, as well as the Government's ability to move to quash such a subpoena, is contained in the Forms Library.

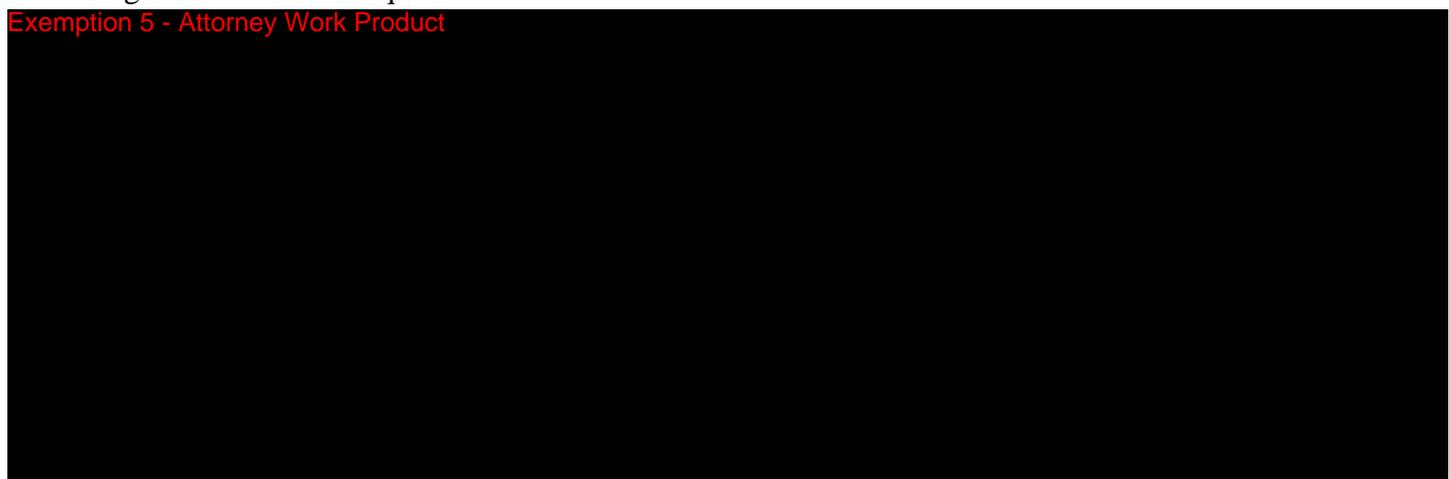
2. Subpoenas to Federal Agencies or Employees. Federal agencies are frequent targets of subpoenas in all manner of litigation. In this district a subpoenaed federal agency is generally represented by our Civil Division. However, when the subpoena emanates from one of our criminal cases, the Criminal Division AUSA assigned to the case is responsible for dealing with agency counsel and representing the interests of the United States—which include the interests of the agency— in responding to or moving to quash the subpoena. General information on what are colloquially known as “*Touhy* regulations” can be found in Chapter 8 of OLE’s Federal Civil Practice Manual, <http://10.173.2.12/usao/eousa/ole/usabook/civp/08civp.htm#8.1>, as well as in our Forms Library.

G. Special Concerns Relating to Local Law Enforcement. When collecting materials from local law enforcement offices, which may not have as sophisticated record-keeping systems as the federal agencies we deal with more frequently, AUSAs should be mindful of the fact that files at those offices can be decentralized. Asking for “the file” on a particular case will likely not be sufficient to fulfill our obligations. As an initial matter, an AUSA will want to make sure to speak to someone who understands the record-keeping practices of the particular office. That person will not necessarily be the officer/detective with whom the AUSA has been working on a particular case.

AUSAs should be aware that CI/CS files are often kept separately from the investigative materials for a particular case. Similarly, civilian complaint files, personnel files, and officer disciplinary files are often kept separately. Property vouchers might also be kept separately.

AUSAs must learn (ideally, from a person familiar with the record-keeping practices of the local law enforcement office at issue) what “key words” to use when asking for materials needed to comply with our various obligations. Certainly, aside from our obligations under Rule 16, § 3500, and *Brady/Giglio*, AUSAs will also want to understand for investigative and evidence-collection purposes the universe of materials that might be in the possession of local law enforcement. Some categories of items to request are as follows:

Exemption 5 - Attorney Work Product



With respect to the recordings noted above, AUSAs should familiarize themselves with the applicable retention periods.

AUSAs should also be mindful that at times, local law enforcement offices send materials relating to particular cases to the town attorneys and/or to local prosecutors.

AUSAs should keep in mind when requesting/reviewing materials from local law enforcement offices that the materials might contain compelled statements (for example, where Internal Affairs has conducted an investigation). An AUSA should make sure that he/she is not inadvertently exposed to such compelled statements; a taint AUSA should do the initial review of any such statements to avoid a *Garrity* problem.

AUSAs should consider going to the local law enforcement office to conduct the collection/review of documents, where appropriate.

The federal agents we deal with regularly should be accustomed to being asked *Giglio* questions and to being asked for their files. Local law enforcement officers might not be as familiar with these types of requests. AUSAs should take care to explain the purpose(s) behind the questioning and the request for materials.

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