

Memorandum



United States Attorney
Southern District of Ohio

Subject	Date
Criminal Discovery Policy	October 15, 2010

To:
All Criminal Division and National Security Section
AUSAs

From:
Carter M. Stewart,
United States Attorney

On January 4, 2010, the Deputy Attorney General, David W. Ogden, disseminated guidance concerning criminal discovery, which was developed by a working group made up of attorneys experienced in criminal discovery matters from the Office of the Deputy Attorney General, United States Attorneys' Offices, DOJ Criminal Division, and DOJ National Security Division, with comment and input from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, the Office of Professional Responsibility, information technology support personnel, and law enforcement agencies. *See* Ogden, D., *Guidance for Prosecutors Regarding Criminal Discovery*, January 4, 2010 ("Guidance"). The Guidance established "minimum considerations that prosecutors should undertake in every case." Ogden, D., *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*, January 4, 2010, p. 3. It was "intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid

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lapses that can result in consequences adverse to the Department's pursuit of justice." *Guidance*, p. 1. The Guidance is not intended to establish new disclosure obligations, which are already established through Federal Rules of Criminal Procedure 12(b)(4)(B), 12(h), 12.1, 12.2, 12.3, 16 and 26.2, 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), Sixth Circuit precedent (*see, e.g., United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988); *United States v. Susskind*, 4 F.3d 1400 (6th Cir. 1993) (en banc); *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008) (en banc)), and existing Department policy as set forth in the United States Attorneys' Manual §§ 9-5.001 (*Brady*) and 9-5.100 (*Giglio*). The DAG reminds us that "[p]rosecutors in every district and component must comply with legal requirements and with Department policy." Ogden, D., *Requirement for Office Discovery Policies in Criminal Matters*, January 4, 2010, p. 1.

On September 29, 2010, Acting Deputy Attorney General Gary G. Grindler disseminated specific guidance concerning discovery of information in the possession of the Intelligence Community or Military in criminal investigations. *See Grindler, G., Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations*, September 29, 2010. ("National Security Discovery Guidance").

Concurrent with issuance of the Guidance, the DAG directed all United States Attorney's Offices (and each DOJ litigation component handling criminal cases) to develop a discovery policy with which prosecutors in each respective office must comply, and that reflects circuit and district court precedent and local rules and practices. We have developed such a policy, and so as

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to maintain consistency, we have done so by hereby adopting both the Guidance (as annotated by our District) and the National Security Discovery Guidance. The Annotated Guidance and the National Security Discovery Guidance are attached to this Memorandum and may also be found on our Office's Intranet site under "Office Policies and Procedures" and at the Criminal Division Discovery Topic Page of our Intranet site. The Annotated Guidance and National Security Discovery Guidance, which collectively serve as our District's new criminal discovery policy with which prosecutors in our Office must comply (in addition to the existing sources of discovery obligations described above), replaces our previous criminal discovery policy entitled "Discovery in Criminal Cases."

Please take this opportunity to familiarize yourself with the Annotated Guidance, the National Security Discovery Guidance, as well as the other material referenced above governing our discovery obligations. Deviation from either the Annotated Guidance or National Security Discovery Guidance requires written approval from the immediate supervisor on the pertinent case, which must be maintained in the case file.

Neither this memorandum, the Guidance, the Annotated Guidance, the National Security Discovery Guidance, nor any of the other memoranda mentioned therein, is 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).

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U. S. Department of Justice

Office of the Deputy Attorney General

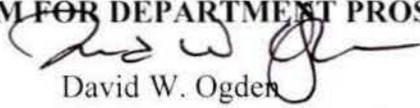
The Deputy Attorney General

Washington, D.C. 20530

January 4, 2010

MEMORANDUM FOR DEPARTMENT PROSECUTORS

FROM:


David W. Ogden
Deputy Attorney General

SUBJECT:

Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. See USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information¹

A. Where to look—The Prosecution Team

Department policy states:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all 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.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

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, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney’s Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

¹ For the purposes of this memorandum, “discovery” or “discoverable information” includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM §9-5.001.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges.

This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.² The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,³ the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.⁴ Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor 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 Communications (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. Prosecutors 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.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation

² How to conduct the review is discussed below.

³ Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

⁴ Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors 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.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor 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. Of course, 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, prosecutors 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. 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.

5. Substantive Case-Related Communications: "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 prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes.

“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.

Prosecutors 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 prosecutor 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.

6. Potential Giglio Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- 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 prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
- Relocation assistance
- 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)
- 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

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews⁵ should be memorialized by the agent.⁶ Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors 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, prosecutors 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.

⁵ "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

⁶ In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

a. 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's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors 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's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. 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. Prosecutors 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)(B). *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).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must 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. 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. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: 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 prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors 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 at 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. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something

will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the “file” is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the “file.”

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor’s decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. 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. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts 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, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors 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, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors 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).

Discovery obligations are continuing, and prosecutors 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.

C. 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.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. 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, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.



U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 29, 2010

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL AND
THE ASSISTANT ATTORNEYS GENERAL FOR THE
CRIMINAL DIVISION
NATIONAL SECURITY DIVISION
CIVIL RIGHTS DIVISION
ANTITRUST DIVISION
ENVIRONMENTAL AND NATIONAL RESOURCES DIVISION
TAX DIVISION

ALL UNITED STATES ATTORNEYS

FROM: Gary G. Grindler 
Acting Deputy Attorney General

SUBJECT: Policy and Procedures Regarding Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations

National security and other cases¹ that may rely on or relate to classified information in the possession of the intelligence community (IC)² or other information in the possession of the military³ pose unique discovery challenges. The Department must handle these cases properly in

¹ 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 drug cases, human trafficking cases, money laundering cases, and organized crime cases. In appropriate cases, prosecutors are encouraged to make a general practice of discussing with the agents on the prosecution team whether they have a specific reason to believe that the IC may be in possession of information that relates to their case. If any member of the prosecution team—including a supervisor involved in decision-making in the case—has specific reason to believe that the IC is in possession of information that relates to their case, regardless of the type of case, the prosecutors should follow the procedures set forth in this Policy.

² The IC includes the Office of the Director of National Intelligence; the Central Intelligence Agency; 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 (DoD) for the collection of specialized national foreign intelligence through reconnaissance programs; and the intelligence and counterintelligence components of the Department of State, Federal Bureau of Investigation, Drug Enforcement Administration, Department of Treasury, Department of Energy, Department of Homeland Security, and the respective military services. Exec. Order No. 12333 § 3.5(h) (2008).

³ National security cases may also require collaboration with or assistance from DoD's non-IC and non-law enforcement components. For instance, DoD's non-IC, non-law enforcement components may have arrested or detained the defendant, or conducted a raid that produced evidence or other information relied on in the criminal case.

order to prosecute defendants accused of criminal conduct, safeguard defendants' rights, protect classified and other national security information, and avoid imposing an undue burden on the IC and military. This policy provides guidance to ensure that the Department effectively meets these important obligations.⁴

Due to the risks associated with the disclosure of national security information, prosecutors often will not be able to follow the policy presumptions that the Department has adopted in other contexts in favor of disclosing more information than the law requires or disclosing it earlier than the law requires.⁵ Prosecutors should in all cases, of course, disclose in discovery information to which the defense is entitled by law, but national security interests will often militate against disclosing more than the law requires or disclosing it earlier than the law requires in national security cases. The Classified Information Procedures Act, 18 U.S.C. Appendix 3 (CIPA) sets forth procedures for protecting national security information, and prosecutors who handle national security cases should be fully familiar with CIPA. Moreover, disclosure of classified information, by definition, poses a risk to national security.⁶ Disclosure of *unclassified* information relating to a national security investigation may also pose a risk to national security if, for instance, the information reveals investigative steps taken, investigative techniques or tradecraft used, or the identities of witnesses interviewed during a national security investigation.

Accordingly, decisions regarding the scope, timing, and form of discovery disclosures in national security cases must be made with these risks in mind, in consultation with the National Security Division, the Intelligence Community, and law enforcement agencies, taking full account of the need to protect against unnecessary disclosure of classified or unclassified information relating to national security investigations. Consistent with this Policy, the United States Attorney's Offices and Department of Justice litigating components should specifically state in their office-wide discovery policies that discovery in national security cases or cases involving

⁴ The guidance set forth herein is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding, *see United States v. Caceres*, 440 U.S. 741 (1979), and does not have the force of law or a Department of Justice directive.

⁵ The Department has adopted a general policy preference in non-national security cases in favor of "broad disclosure," beyond what may be required by the Constitution and the law, but it has also recognized that adhering to this policy may not be feasible or advisable in national security cases where "special complexities" arise. *See* Memorandum for Department Prosecutors from Deputy Attorney General David W. Ogden, "Guidance for Prosecutors Regarding Criminal Discovery," at 9 (Jan. 4, 2010) ("[W]hen considering providing discovery beyond that required by the discovery obligations . . . , prosecutors should always consider any appropriate countervailing concerns in the particular case, including . . . protecting national security interests."); *id.* ("[s]uch broad disclosure may not be feasible in national security cases."). *See also* USAM § 9-5.001 ("The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important . . . , and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (e.g. pursuant to the Classified Information Procedures Act)").

⁶ *See* Exec. Order No. 12,958 at § 1.2 (2009) (information may be classified only if its disclosure reasonably could be expected to cause damage to the national security).

classified information must account for the special considerations that apply to those cases. Discovery policies should specify that prosecutors handling such cases may need to deviate from the component's general discovery policies in certain circumstances, based on an individualized assessment of the specific factors in the case and in a manner that is consistent with the law.

A. Duty To Search and Disclose in National Security Cases

Under the Supreme Court holding in *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have a duty to disclose any information that is favorable to the defense and material either to guilt or punishment. *Id.* at 88. Information favorable to the defense includes evidence which “would tend to exculpate [the defendant] or reduce the penalty,” *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), and evidence regarding the reliability or credibility of a witness, *see Giglio v. United States*, 405 U.S. 150, 154-55 (1972). In addition, prosecutors have an obligation to search for and disclose any written or recorded statements of the defendant within the government's possession, custody, or control, upon the defendant's request, *see Fed. R. Crim. P. 16*, and any written or recorded statement of a witness called by the government to testify at a criminal proceeding, *see 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2*. The information described in this paragraph that the government has a duty to disclose is referred to collectively herein as “discoverable information.”

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that in order to satisfy the disclosure obligation, prosecutors have a “duty to learn” of information favorable to the defense known to others “acting on the government's behalf in the case.” *Id.* at 437.⁷ To apply *Kyles* in particular cases, lower courts have had to determine the circumstances under which government personnel or agencies are deemed to be acting on the government's behalf and thereby fall within the scope of the government's duty to search. The analysis they have developed is fact-specific, depending on factors such as the actions taken by investigators, prosecutors, and the other agencies and departments that have played a role in the case.

Evaluating the duty to search⁸ may be particularly complicated in cases that involve national security.⁹ National security cases often arise out of, or are concurrent with, the IC's efforts to collect intelligence on threats to national security. In such situations, the resources of both the IC and law enforcement may be focused on the same individuals with varying degrees of coordination: the IC may work closely with law enforcement to develop the case; it may respond to specific requests from law enforcement for relevant information; or it may simply provide a tip or lead to law enforcement but remain otherwise uninvolved in the development of the criminal case. In addition, different IC components may be involved in the investigation to

⁷ *See also Strickler v. Greene*, 527 U.S. 263 (1999) (holding that the prosecution has a duty to disclose to the defense any exculpatory evidence known to a police investigator, even if it had not been shared with the prosecutor).

⁸ The government's “duty to search” is intended to protect the due process right recognized by *Brady* and its progeny to receive any exculpatory, material information in the possession of the prosecution. We are aware of no case in which a court has found that failure to conduct a search violates due process even if the search would have uncovered no discoverable information.

⁹ *But see n.1 supra.*

varying degrees. The government may decide to use some intelligence in support of the criminal case, but it may also decide that other intelligence is too sensitive to use without risking the disclosure of important sources or methods of intelligence collection. The government must consider the unique facts and competing interests of each national security case in order to determine whether it has a duty to search and, if it does, the scope of such a search.

There is a dearth of published case law regarding the contours of the government's duty to search in national security cases. Prosecutors must therefore attempt to apply the duty to search case law developed in ordinary criminal cases to national security cases, drawing principled distinctions where necessary to address the unique challenges and interests involved in the national security context. Moreover, the case law regarding discovery obligations in ordinary criminal cases is itself far from uniform; there are substantial variations from circuit to circuit, and prosecutors are encouraged to discuss the law or practice in their particular district or circuit with NSD. Applying the existing case law provides some *general* guidance to prosecutors handling national security cases regarding when there clearly is – and clearly is not – a duty to search.

Duty To Search

Case law indicates that the government has a duty to search the relevant files of an IC or military component that has taken steps that significantly assist the prosecution. For example, if an IC or military component actively participates in the overseas aspects of a criminal investigation; captures the suspect; detains or interviews the suspect or a witness that the prosecution uses in its criminal case; or provides criminal investigators with inculpatory information that establishes the factual basis for a warrant or charging instrument, the prosecution will likely have a duty to search the files of that IC or military component.

In addition, case law indicates that the government has a duty to search when the prosecution knows or has a specific reason to know¹⁰ of discoverable information in the possession of the IC or military; has or reasonably should have searched a database accessible to the prosecution team that is maintained by the IC or military; or is responding to a specific and reasonable request for information from a defendant. For instance, the government may have a duty to search:

- *Database Searches*: when the prosecution team has searched Intelink or another IC database for background or inculpatory information that may be relevant to its case. The search of a database for inculpatory material will generally trigger an obligation to search

¹⁰ Case law provides little guidance regarding how specific the government's belief must be in order to trigger a duty to search. Prosecutors should not assume that their knowledge of IC activities or collections is not sufficiently specific to trigger a duty to search; rather, prosecutors are encouraged to raise any questions they have in this regard with NSD.

that same database for discoverable information.¹¹ Moreover, if the documents reviewed create a specific reason to believe that the IC or military is in possession of additional discoverable material, there likely will be a duty to search the underlying files of the relevant component of the IC or military.

- Close Cooperation with an IC Component: when an IC component shares the results of interviews of the suspect with the prosecution team or actively participates in the criminal investigators' interviews of the suspect while the suspect is in the custody of a foreign government.¹²
- DOD Custodian: when DoD captures the suspect in a zone of active conflict (or during the course of repelling or responding to an act of piracy) and detains and interrogates the suspect before transferring him to the United States for prosecution.¹³ However, the fact that some components of DoD were involved in the capture, detention, and interrogation of the defendant does not require the prosecution to search all of DoD for potentially discoverable material.¹⁴
- Joint Terrorism Task Force (JTTF): when the suspect is investigated by a JTTF. For instance, if the JTTF in Seattle investigated the suspect, the government must search for

¹¹ Cf. *United States v. Lujan*, 530 F.Supp.2d 1224, 1259 (D.N.M. 2008) (concluding that “the United States has a duty to seek out *Brady* information in FBI and other readily accessible databases.”); *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (“[N]on-disclosure is inexcusable where the prosecution has not sought out information readily available to it.”). It is also possible that a duty to search a particular database will arise even if the prosecution team has not used it during the course of its investigation if the database is deemed to be a readily available resource that the prosecution would be expected to search in such a case. See, e.g., *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (“That the prosecutor, because of the shortness of time, chose not to run an FBI or NCIC check on the witness, does not change ‘known’ information into ‘unknown’ information within the context of the disclosure requirements.”).

¹² Cf., e.g., *United States v. Risha*, 445 F.2d 298, 306 (3d Cir. 2006) (holding that a “*Brady* violation may be found despite a prosecutor’s ignorance of impeachment evidence . . . when the withheld evidence is under control of a state instrumentality closely aligned with the prosecution . . .”) (citation omitted); *In re Sealed Case*, 185 F.3d 887, 896 (D.C. Cir. 1999) (“[P]rosecutors in this circuit are responsible for disclosing *Brady* information contained in [Metropolitan Police Department] files, given the close working relationship between the Washington metropolitan police and the U.S. Attorney for the District of Columbia.”) (citation omitted).

¹³ See, e.g., *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001) (imputing U.S. Marshall Service’s knowledge regarding a witness in the WitSec program to the prosecution team; “it is impossible to say in good conscience that the U.S. Marshal’s Service was not ‘part of the team’ that was participating in the prosecution, even if the role of the Marshal’s Service was to keep the defendants in custody rather than to go out on the streets and collect evidence”).

¹⁴ See, e.g., *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (finding no duty to search a division of the Department of Labor (DOL) not involved with the prosecution; the fact “that other agents in the DOL participated in this investigation does not mean that the entire DOL is properly considered part of the prosecution team”); *United States v. Upton*, 856 F. Supp. 727, 750 (E.D.N.Y. 1994) (finding no duty to search the entire Federal Aviation Administration (FAA); “although the FAA provided two inspectors to assist in the investigation, the agency itself did not participate in the criminal investigation or prosecution”).

discoverable information in the possession of the Seattle JTTF.¹⁵ The prosecution has no obligation, however, to search each agency participating in the JTTF or to search other JTTFs unless there is a specific reason to believe that a particular agency or JTTF possesses discoverable information or assisted in the investigation of the case.¹⁶

- Participation of Main Justice Supervisors: when Department of Justice officials who advise on or are involved in decision-making regarding the defendant's capture, detention (including pre-trial law of war detention), or prosecution, they may be considered part of the prosecution team, thereby triggering a duty to search for discoverable information in their possession or control.¹⁷ Accordingly, when an NSD attorney is assigned to work with a United States Attorney's Office on a case, that attorney and his or her supervisors involved in decision-making in the case will be part of the prosecution team.

No Duty To Search

The government does not have a duty to search an IC or military component that was not involved in the investigation or prosecution unless there is a specific reason to believe that the IC or military possesses discoverable material. The government does not have a duty to search in response to an overbroad request by the defendant that amounts to a "fishing expedition," *i.e.*, a speculative, unsubstantiated assertion by the defendant that an IC or military component may have discoverable information. The government generally will not have a duty to search:

- General Knowledge of Collection Program: when the prosecution team is generally aware of intelligence collection programs, but has no specific reason to believe that the IC possesses information on the suspect or any of the witnesses the government intends to use at trial. For instance, a suspect is stopped crossing the border from Canada by customs officials. A search of his car reveals precursor chemicals and bomb components along with jihadist literature. Under questioning, the suspect admits that he has been inspired by al Qaeda and that he planned to detonate the explosives at the Los Angeles International Airport. The fact that prosecutors are generally aware that the Central

¹⁵ See, e.g., *United States v. Burnside*, 824 F. Supp. 1215, 1253 (N.D. Ill. 1993) ("[T]he fact that the ATF agents and the Chicago police officers who [worked on the cases] were aware of the *Brady* material makes knowledge of the *Brady* material attributable to the government for *Brady* purposes.").

¹⁶ See, e.g., *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993) (finding that there was no obligation to disclose impeachment evidence in a report prepared by FBI agents who were not part of the prosecution team but were investigating other criminal activity involving the same witness; "[e]ven assuming the reports' materiality, there is no evidence that the prosecution team in the instant case was aware of the reports that have subsequently come to light.").

¹⁷ See, e.g., *United States v. Ghailani*, 687 F. Supp. 2d 365 (S.D.N.Y. 2010). In evaluating the defendant's Rule 16 request, the court concluded that Department of Justice officials who "participated in advising on or making the decisions" to hold Ghailani in a CIA detention center, transfer him to Guantanamo Bay, prosecute him in a military commission, and subsequently transfer him to the Southern District of New York for prosecution in an Article III court were part of the "the government" for Rule 16 purposes and were obligated to produce and disclose relevant documents, even if they were not otherwise involved in prosecuting the criminal case. *Id.* at 372.

Intelligence Agency (CIA) collects intelligence regarding al Qaeda members and affiliates does not give rise to a duty to search the CIA's files unless the CIA has provided the prosecution team with information relevant to the case or the prosecution team has a specific reason to believe that the CIA possesses information on the suspect or the statements of a government witness. The fact that the suspect *might* be an al Qaeda affiliate and that the CIA *might* have relevant information does not create an obligation to search when the information has not been relied on or used in any way in the government's investigation or case.¹⁸ (That said, on these facts, prosecutors will undoubtedly wish to do a search to look for inculpatory material; such a search will then trigger an obligation to also look for discoverable information among the material that is searched.)

- Foreign Government Custody: when the defendant is held and interrogated by a foreign government before being transferred to United States custody and U.S. officers did not actively participate in the interrogations.¹⁹ If, however, a foreign government has provided the prosecution team with information relevant to the case, prosecutors have an obligation to search the material provided to them for potentially discoverable documents or information.
- Tips or Leads: when the IC or the military provides to law enforcement simple lead information with respect to which law enforcement then undertakes independent investigative steps, is otherwise uninvolved in the case, and the prosecution team has no specific reason to believe that the entity that provided the information is in possession of additional discoverable information.²⁰ For instance, if the IC notifies law enforcement

¹⁸ See, e.g., *United States v. McDavid*, No. CR S-06-35 MCE, 2007 WL 926664, at *3 (E.D. Cal. Mar. 27, 2007) ("Although defendant discusses the NSA's activities at length, he has failed to link them to this prosecution or to make any sort of showing that the prosecutor has knowledge of and access to any results of the NSA's surveillance."); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) ("*Brady* did not require the government here to seek out allegedly exculpatory information in the hands of the Office of Thrift Supervision ('OTS'), the Securities Exchange Commission ('SEC'), or the Internal Revenue Service ('IRS') when it had been unaware of the existence of that information [and] none of those agencies were part of the team that investigated this case or participated in its prosecution . . ."). But see *United States v. McVeigh*, 854 F.Supp. 1441, 1450 (D.Colo. 1997) ("The lawyers, appearing on behalf of the United States, speaking for the entire government, must inform themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial.") The *McVeigh* court, however, ultimately rejected defendant's request to require that the prosecution forward broad-based discovery requests to intelligence agencies based in part on the conclusion that the defendant's discovery requests were not sufficiently specific so as to demonstrate what was being sought and how it was material to the defense.

¹⁹ *United States v. Reyeros*, 537 F.3d 270, 283 (3d Cir. 2008) (finding that there was no duty to search for or disclose documents in the possession of the Colombian government merely because Colombian officials permitted U.S. agents to interview the defendant while he was in Colombian custody and participated in a judicial proceeding that resulted in the defendant's extradition); *id.* (emphasizing as a key fact that there "was no joint investigation by the United States and Colombian governments regarding the events alleged in the Indictment").

²⁰ See, e.g., *United States v. Ferguson*, 478 F. Supp. 2d 220, 239-40 (D. Conn. 2007) (finding no duty to search the New York Attorney General's files: "The 'mere fact that the Government may have requested and received

that they may want to watch the corner of Fifth and Main Streets at 5:00 p.m., and officers observe a drug deal at that location and time, there is no obligation to search the IC agency that provided that simple lead for discoverable information. The prosecution team is, however, obliged to review for potential disclosure any discoverable information included in the material that it has received.²¹

Hybrid Departments and Agencies

A number of federal departments and agencies include both intelligence and law enforcement components. The duty to search the files of such departments and agencies extends only to those components that participated in or provided advice regarding the criminal investigation or that the prosecution team has a specific reason to believe possess discoverable information. If the intelligence component of such an agency has not been involved in the case and there is no specific reason to believe it possesses discoverable information, there is no duty to search that component merely because another part of the same agency assisted in the case.²²

* * *

As the above discussion suggests, the determination whether there is a duty to search an IC or military component for discoverable information relating to a national security case is complex and fact-specific. Moreover, even where there is a clear duty to search, determining the scope of that obligation – whether it extends to an entire department or agency, or just to certain components of a department or agency – depends on the unique facts of the case.

In light of these complexities, prosecutors should seek guidance from the National Security Division (NSD) whenever there is the possibility that they have a duty to search an IC or military component in a national security case. Early coordination with NSD will ensure that the Department takes consistent litigation positions across various federal districts and will facilitate coordination with relevant IC components.

B. Prudential Searches

A “prudential search” is a search of the files of an IC agency, usually prior to indictment, undertaken because the prosecution team has a specific reason to believe that the agency’s files may contain classified information that could affect the government’s charging decisions. A

documents from [another agency] in the course of its investigation does not convert the investigation into a joint one.”) (citation omitted); *United States v. Chalmers*, 410 F. Supp. 2d 278, 290 (S.D.N.Y. 2006) (holding that federal entities do not become part of the prosecution team – thereby triggering the attendant duty to search and disclose – merely because they “made documents available to the prosecution”).

²¹See *Poindexter*, 727 F. Supp. at 1478 (“[A] prosecutor who has had access to documents in other agencies in the course of his investigation cannot avoid his discovery obligations by selectively leaving the materials with the agency once he has reviewed them.”). Questions about whether an agency may be in possession of additional discoverable material that triggers an obligation to search should be directed to the relevant component at NSD.

²² See, *supra*, n.16.

prosecutor should contact NSD to coordinate a prudential search for potentially discoverable information prior to indictment if he or she has a specific reason to believe that:

- the agency or department likely possesses information that could affect the decision whether, against whom, or for what offenses to charge;
- the IC or military likely possesses documents that will fall within the scope of the prosecutor's affirmative discovery obligations. In such cases, pre-indictment discussions about how to handle the documents and information could avoid conflicts, surprises, and disclose-or-dismiss dilemmas; or
- the case may raise other questions regarding classified evidence that should be resolved pre-indictment.²³

While not legally required, prudential searches assist the prosecution team in identifying and managing potential classified information concerns before indictment and trial. They may also permit the prosecution team to tailor an indictment in a way that will reduce or eliminate the relevance of any classified information, and thereby reduce or eliminate the likelihood of facing a disclose-or-dismiss dilemma after the indictment is returned when the Classified Information Procedures Act (CIPA) and other protective measures do not provide sufficient protection. Prosecutors are strongly encouraged to contact NSD about the possibility of conducting a prudential search as soon as it becomes evident that information in the possession of the IC or military may be relied on, or may be discoverable, in a criminal case.

C. Coordination of Search Requests

To ensure a consistent approach, avoid undue burdens on the IC and military, and best ensure a timely response, all search requests to a component of the IC or military by any Department of Justice (DOJ) prosecutor handling an investigation or prosecution that involves an identifiable link to national security or to information within the possession of the IC should be made through NSD, except as otherwise agreed by the Assistant Attorney General for NSD and the Assistant Attorney General for the Criminal Division, as follows:

- The Counterterrorism Section (CTS) should be contacted regarding search requests for investigations and prosecutions involving offenses that CTS is responsible for coordinating pursuant to the U.S. Attorney's Manual (USAM).²⁴

²³ As noted above, *see* note 1, *supra*, the IC may possess discoverable information not only in national security cases, but in traditional criminal cases as well. Prosecutors should conduct a prudential search in any case in which they or the other members of the prosecution team have specific reason to believe the IC possesses discoverable information.

²⁴ Pursuant to the USAM, all investigations, including criminal cases, that have an identified link to international terrorism; domestic terrorism; torture, war crimes, and genocide matters (in coordination with the Criminal Division); and weapons of mass destruction must be coordinated through CTS. USAM §§ 9-2.136—9-2.139.

- The Counterespionage Section (CES) should be contacted regarding search requests for investigations and prosecutions involving offenses that CES is responsible for coordinating pursuant to the USAM.²⁵
- All other requests should be directed to NSD's Office of Law and Policy (L&P).

Requests should be made at the earliest opportunity and before any contact by the prosecutor with the IC. *See* USAM § 9-90.210. NSD will coordinate between the relevant DOJ prosecutors and the IC and military to ensure that potentially discoverable classified material is provided to the prosecution team for review. NSD, in close consultation with the relevant DOJ prosecutors, also will coordinate with the appropriate elements of the IC and the military to ensure that use authority or other approvals are received in a timely manner; declassification requests are promptly reviewed; and required disclosures are made pursuant to mutually agreed upon and appropriate mechanisms to protect the information.

Prosecutors should also consult with the relevant component of NSD if they are unsure as to whether or not a prudential search is warranted.

D. Content of Search Requests

Search requests should be focused, carefully reasoned, and based on case-specific facts, and should include the following information:

- the nature of the charges or likely charges (if pre-indictment), and potential defenses;
- all available identity information with respect to each known defendant/suspect and potential witness – *e.g.*, name (including full name, nicknames and aliases and any spelling variations the prosecutor wants searched), date of birth, citizenship, and any government identification numbers;
- the type of information sought;
- the time period to be covered (which will generally coincide with the time period covered by the criminal activity charged or to be charged);
- the components of the IC and/or military that have been involved in the case and a discussion of the nature of the involvement; and
- the grounds for the search request.

²⁵ Pursuant to the USAM, all economic espionage investigations where there is an intent to benefit a foreign government and other national security offenses listed in the USAM must be coordinated through CES. USAM §§ 9-90.020; 9-59.100.

E. Reviewing Responsive Information

Once an IC or military component has identified documents responsive to the search request, the prosecution team or other attorneys from that office will review the documents, provided that each member has the necessary security clearances. In the rare event that the requisite security clearances cannot be obtained in a timely manner, NSD attorneys may review the responsive files.

DOJ prosecutors should review the responsive material to ensure the production is complete. If it appears that the response does not include all of the material that would be expected given the particular facts of the case, the prosecutors should coordinate with NSD prior to making any follow-up requests to the IC or military component involved. The materials also should be reviewed for information that suggests additional discoverable information may exist in the agency's files or elsewhere within the possession, custody, or control of the United States government.

F. Discovery Determinations

If the prosecutors conclude that any of the classified information is relevant and arguably discoverable,²⁶ they should coordinate with the appropriate element of NSD to determine how to proceed. NSD will facilitate communication between the prosecutors and the IC or military component regarding declassification requests. Only the IC or military component that originally classified the material can declassify it, and its decision to do so must be based upon specific findings that use or disclosure will not result in harm to national security.

NSD also will facilitate discussions between prosecutors and the appropriate IC or military component regarding how to pursue measures to protect information that is used or disclosed in a prosecution. The Classified Information Procedures Act (CIPA) permits the government, in appropriate circumstances, to: (1) delete classified material from discovery with prior approval of the court; (2) disclose classified information to cleared defense counsel pursuant to a protective order; (3) declassify and disclose information pursuant to a protective order; (4) redact classified information in documents to be used or disclosed; (5) substitute an unclassified statement of the facts contained in a classified document; or (6) submit an unclassified summary of the information that protects sources and methods.²⁷ NSD can advise prosecutors and negotiate with the IC regarding how appropriately to use CIPA's protective measures to protect classified information that is used or disclosed in a prosecution.

If the relevant IC or military component does not approve use or disclosure of the information even under such protective measures, NSD can also assist prosecutors in tailoring the charges to avoid or to minimize reliance on classified information.

²⁶ Classified information may still be discoverable as *Brady*, *Giglio*, Rule 16, or Jencks material even if the government does not intend to offer it into evidence.

²⁷ See generally the Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 1-16.

G. Foreign Intelligence Surveillance Act (FISA) Material

As with other classified evidence, potentially discoverable information obtained pursuant to FISA must be reviewed and disclosed in accordance with applicable law and Department policies. Like CIPA, FISA provides specific procedures designed to facilitate the use of intelligence information in criminal proceedings while at the same time protecting sources and methods of intelligence collection. *See generally* 50 U.S.C. §§ 1806; 1825; 1845. Internal DOJ policy also requires that prosecutors obtain advance authorization before using FISA information in criminal proceedings.²⁸ The granting of FISA use authority is a related, but distinct, question from discovery and declassification questions. Use, discovery, and declassification determinations are time consuming, so early consultation with the appropriate components within NSD is advisable whenever a case involves FISA materials.

H. Contacting NSD

Prosecutors submitting their search requests or making other inquiries regarding their discovery obligations should call the relevant component of NSD:

- CTS: 202-514-0849
- CES: 202-514-1187
- L&P: 202-514-1057

²⁸ *See* Memorandum to All Federal Prosecutors from Michael B. Mukasey, "Revised Policy on the Use or Disclosure of FISA Information," Jan. 10, 2008.