Memorandum

Subject:	Date:
Discovery Policy of the Northern District of Oklahoma	15 October 2010

To:	From:
Criminal Division Assistant United States Attorneys	Thomas Scott Woodward United States Attorney

I. GENERAL POLICY

It is the general policy of the United States Attorney's Office for the Northern District of Oklahoma ("this Office") to provide defense counsel access to all discovery material consistent with the needs of the case at the earliest time practicable.

Each Assistant United States Attorney ("AUSA") is encouraged to provide broad and comprehensive discovery beyond what is required by federal law. The AUSA should advise defense counsel in each relevant case that this Office is electing to produce discovery beyond what is required under the particular circumstances of the case.

The discovery policy of this Office is consistent with the Memorandum of January 4, 2010, "Guidance for Prosecutors Regarding Criminal Discovery" by Deputy Attorney General David W. Ogden, which was entered in the Criminal Resource Manual at 165 and is available to the public at http://www.justice.gov/dag/discovery-guidance.html ("the Ogden Memo").

The discovery policy of this Office 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).

II. DISCOVERY OBLIGATION SOURCES

The discovery obligations of federal prosecutors are generally established by the following sources:

(1) Federal Rule of Criminal Procedure 16;

(2) Federal Rule of Criminal Procedure 26.2;

(3) The Jencks Act (18 U.S.C. § 3500);

(4) *Brady v. Maryland*, 373 U.S. 83 (1963); and

(5) *Giglio v. United States*, 405 U.S. 150 (1972).

In order to ensure full compliance with our discovery obligations, each AUSA should be thoroughly familiar with the above-listed sources and should review USAM §§ 9-5.001 ("Policy Regarding Disclosure of Exculpatory and Impeachment Information") and 9-5.100 ("Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Witnesses").

III. THE PROSECUTION TEAM

The "prosecution team" includes all federal, state and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *See* USAM § 9-5.001. In most cases, the prosecution team will include the agents of federal law enforcement agencies and other law enforcement officers from jurisdictions within the Northern District of Oklahoma.

However, in those cases involving multiple districts, or attorneys from a Department litigating component, or AUSAs from other United States Attorney's Offices, or parallel criminal and civil proceedings within this Office, the delineation of the "prosecution team" must be adjusted to fit the circumstances. Additionally, in complex cases that involve parallel proceedings with regulatory agencies, or other non-criminal investigative or intelligence agencies, the AUSA should consider whether the relationship with the other agency is so closely intertwined so as to make it part of the "prosecution team" for discovery purposes.

Every AUSA is encouraged to take an inclusive view of the "prosecution team" to avoid unnecessary litigation regarding discovery issues.

IV. THE SCOPE OF DISCOVERY

A. ALL MATERIAL FROM ALL SOURCES

In preparing to make discovery disclosures, the AUSA must seek *all* discovery material from *all* members of the "prosecution team".

In accordance with the general discovery policy of this Office, each AUSA has a duty to retrieve all discovery material. This includes, but is not limited to, material required by Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, the Jencks Act, *Brady* and *Giglio*. *See* the Ogden Memo and the policy memorandum of this Office on parallel proceedings.

B. SOURCES OF DISCOVERY MATERIAL

All potentially discoverable material within the custody and control of the "prosecution team" must be reviewed by the AUSA. This includes, but is not limited to, the following:

(1) Investigative agency substantive case files and any other file or document that the AUSA has reason to believe may contain discoverable information;

(2) Confidential Witness, Confidential Informant, Confidential Human Source and Confidential Source files;

(3) All evidence and information gathered during the investigation must be reviewed, including anything obtained during searches or by subpoenas. In cases involving a large volume of potentially discoverable information, the AUSA may discharge the government's disclosure obligations by choosing to make the voluminous information available to the defense;

(4) Evidence and information gathered by civil attorneys and regulatory agencies in parallel civil investigations. When a parallel civil proceeding is ongoing in which civil attorneys are participating, such as a *qui tam* case, the AUSA should also review the civil case file. *See* the policy memorandum of this Office on parallel proceedings; and

(5) Substantive case-related communications that contain discoverable information must 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: (a) among prosecutors and/or agents; (b) between prosecutors and/or agents and witnesses and/or victims; and (c) between victim·witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. It is important to note that while email may be an efficient means of communication, any discussions contained in emails that are neither privileged nor purely logistical, may be discoverable as substantive communications. 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 prospective strategies without more would not

ordinarily be considered discoverable, but substantive case-related communications should be carefully reviewed to determine whether all or part of a communication, or the information contained therein, must be disclosed. *See* the Ogden Memo.

C. WITNESS INTERVIEW MATERIAL

Witness interviews should be memorialized by an investigating federal law enforcement agent present during the interview.

Agent and AUSA notes and original recordings must be preserved. The AUSA should confirm with agents that substantive interviews must be memorialized. Thus, when an AUSA participates in an interview with an agent, note-taking responsibilities and memorialization should be discussed before the interview begins.

Whenever possible, to avoid the risk of becoming a witness to a statement and thereby disqualified from participating the case if the statement becomes an issue, an AUSA should not conduct an interview without the presence of an agent.

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

Agent notes should be reviewed if: (a) there is a reason to believe that the notes are materially different from a memorandum; (b) a written memorandum was not prepared; (c) the precise words used by the witness are significant; or (d) the witness disputes the agent's account of the interview. The AUSA 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 Federal Rule of Criminal Procedure 16(a)(1)(A)-(C) or may themselves be discoverable under Federal Rule of Criminal Procedure 16(a)(1)(B).

D. *GIGLIO* INFORMATION

The AUSA must conduct a candid conversation regarding possible Giglio issues with each potential law enforcement witness in every case. Furthermore, when necessary, the AUSA must follow the procedure established in USAM § 9-5.100 before calling a law enforcement officer as a witness. Disclosure questionnaires and Giglio forms are available from the *Giglio* point of contact for this Office, currently AUSA Clint Johnson, to assist AUSAs with this conversation and to obtain *Giglio* information.

All potential *Giglio* information known by or in the possession of the "prosecution team" relating to non-law enforcement witnesses must also be gathered and reviewed. That information includes, but is not limited to, the following:

(1) Prior inconsistent statements;

(2) Statements or reports reflecting witness statement variations;

(3) Benefits provided to witnesses, including:

- (a) Dropped or reduced charges;
- (b) Immunity;
- (c) Expectations of downward departures or motions for reduction of sentences;
- (d) Assistance in state or local criminal proceedings;
- (e) Considerations regarding forfeiture of assets;
- (f) Stays of deportation or other immigration status considerations;
- (g) Monetary benefits;
- (h) Non-prosecution agreements;
- (i) Letters to other law enforcement officials, *e.g.* state prosecutors and parole boards; and
- (j) Relocation assistance;

(4) Animosity toward defendant;

(5) Animosity toward a group of which the defendant is a member or with which the defendant is affiliated;

(6) Relationships with victims;

(7) Known but uncharged criminal conduct that may provide an incentive to curry favor with a prosecutor;

(8) Prior acts under Federal Rule of Evidence 608;

(9) Prior convictions under Federal Rule of Evidence 609; and

(10) Known substance abuse, mental health issues or other issues that could affect the ability of a witness to perceive and recall events.

V. TIMING OF DISCLOSURES

Consistent with the needs of the case, discovery disclosures must be made as soon as practicable. In most cases this will be immediately following a defendant's initial appearance. Moreover, the discovery obligations of the government are ongoing.

In assessing the needs of the case, the AUSA should be guided by the following factors:

(1) The physical safety and mental well-being of witnesses;

(2) The defendant's ability to improperly influence witness testimony whether by bribery, family pressure, intimidation or by other improper means;

(3) The defendant's ability to alter physical evidence;

(4) The number of witness interview memoranda;

(5) The volume of physical items to be produced;

(6) The complexity of the case;

(7) The legal issues in the case, including potential issues that must be dealt with in pretrial motions, such as search and seizure issues;

(8) The use of expert testimony by the prosecution and potential need of the defense to obtain expert testimony; and

(9) The physical proximity of witnesses and locations involved in the case to the Northern District of Oklahoma.

The above-list of factors is not meant to be exhaustive or compulsory; rather, it is suggestive of those elements involved in a case which may affect the timing of disclosures.

VI. DEPARTURES FROM DISCOVERY POLICY, NATIONAL SECURITY CASES AND CLASSIFIED INFORMATION

Specific, case-related considerations may warrant a departure from the uniform discovery practices of this Office. The AUSA must consult with and obtain written supervisory approval to depart from the uniform practices in an appropriate case.

The factors of the case may require disclosures to be made in stages. For example, it may

be appropriate to produce all physical items and most witness interview memoranda at the outset, while certain other witness interview memoranda are withheld until the weekend before trial or even later due to reasons of safety.

Supervisory approval is required to withhold discovery required by Rule 16 of the Federal Rule of Criminal Procedure later than seven (7) days before the defendant's motion deadline.

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.

VII. RECORDS OF DISCLOSURES

One of the most important steps in the discovery process is keeping good records regarding disclosures. 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. To that end, documents produced in discovery must be stamped with sequential numbers and an inventory made of all items disclosed. Defense counsel's signature should be obtained upon a copy of the inventory at the time of disclosure, and the AUSA must retain a copy of the items disclosed in order to produce any item in question to the Court should a dispute arise concerning discovery.

VIII. CONCLUSION

It is the obligation of this Office to enforce the laws of the United States in a manner that secures justice for the people of the Northern District of Oklahoma, not simply victory. Discovery is an important step in the process of assuring that the defendant in a case receives a fair trial. It is also a vital part of the ongoing relationship of the AUSA with the defense bar and the trial and appellate courts, which are especially vigilant about eliminating gamesmanship from criminal litigation. In fulfilling the duties of an AUSA according to the laws of discovery, it is imperative that the AUSA recognize the impact that his or her actions have, not only within the context of the immediate case, but upon the reputation and integrity of this Office as a whole in all its prosecutions. Remembering that the objective is to ascertain the truth in every case, and full candor in discovery is a major component of reaching that goal, the AUSA should consult with a supervisor whenever a question or doubt arises about a particular course of conduct in discovery.