

DISCOVERY POLICY

**United States Attorney's Office
Western District of Tennessee**

October 2010

National Security related investigations and prosecutions are **not** subject to this policy and guidance. Policy concerning these matters and cases is governed by the Memorandum dated September 29, 2010 of Gary G. Grindler, Acting Deputy Attorney.

**PROTECTED INFORMATION
ATTORNEY CLIENT PRIVILEGE/WORK PRODUCT DOCTRINE
FOIA/PRIVACY ACT PROTECTED-5 U.S.C. §552(b)**

Preamble: The guiding principle of this policy is to seek justice as representatives of the United States and as Department of Justice prosecutors. In some instances broad disclosure might lead to speedy and just resolutions, preserving limited resources. While in other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims and witnesses, obstruction of justice, or other consequences that are contrary to the Department of Justice's mission.

It is the practice of this District to provide timely and complete discovery pursuant to all applicable rules, case law and Department of Justice policy.

This office does not have an "open file" policy. The Deputy Attorney General directed in the January 4, 2010 memorandum that:

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 the production and the prosecutor will then have unintentionally misrepresented the scope of the 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."

See also *United States v. Atish*, 804 F.2d 920(6th. Cir. 1986) ("If the government agrees to maintain an 'open file' policy, ... the government is obligated to adhere to that agreement.") No AUSA or SAUSA is authorized to implement, agree to, or imply or represent that the office or any prosecutor in this district has an "open file" policy. Prosecutors should carefully and thoughtfully consider what information to provide in the course of discovery, and "open file" discovery is inconsistent with that considered decision-making. Open file discovery creates the risk that department policy, office policy, internal committee decisions, or work product could be disclosed inadvertently and risks waiver of privileges and confidentiality. Any request for this type of internal office information shall be brought to the attention of a supervisor.

This policy is not intended to be an exhaustive or comprehensive outline governing the entire discovery rules or procedures. This outline does not and could not answer every question that may arise in a particular case. This policy does not serve as a substitute for the responsibility of the prosecutor to be thoroughly familiar with the rules, statutes, case law, and Department of Justice policy regarding discovery in criminal cases.

The policy 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 rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

This policy is deliberative and pre decisional.

I. Disclosure Requirements:

A. Rule 16 of the Federal Rules of Criminal Procedure sets forth the basic discovery obligations of the United States.

1. This is a statutory obligation triggered by a defense request.
2. Local Rules of the Court require a written request for Rule 16 discovery.
3. A written response for discovery is required per the Local Rules and the prosecutor should adhere to the fourteen (14) day time limit set forth in the Local Rules.
4. The prosecutor's obligation is a continuing one, up to and during trial. Disclosures should be made in a timely manner.
5. Include in the original written response and all subsequent discovery responses a request for reciprocal discovery pursuant to Rule 16 (a)(1)(E), (documents and objects) and Rule 16(a)(1)(F)(reports of examinations and tests).
6. Frequently defense will make a request in the initial discovery request for Fed. R. Evid. 404(b) evidence and pursuant to Fed. R. Crim. P. 12(b)(4)(B). It is a good practice to respond to such requests in your discovery response.
7. Routinely defense will request in the initial discovery request evidence favorable to the defendant as well as impeachment evidence. Be guided by the guidelines in this policy, Department of Justice policy, and case law to decide disclosure and the timing of disclosure.
8. "Fed. R. Crim. P. (a)(2) provides that "discovery or inspection of reports, memoranda, or other internal documents made by an attorney for the government or other government agent in connection with investigating and prosecuting the case" are not discoverable. Statements of government witnesses are not discoverable under Rule 16.

Questions or concerns regarding whether a particular item is discoverable should be discussed with a supervisor.

Practice Tip: Pursuant to Rule 16(d), we can, with good cause, ask the Court ex parte to deny, restrict, or defer discovery or inspection, or grant other appropriate relief. All ex parte requests must be accompanied with a filed notice of ex parte submission and must have prior approval of a supervisor.

B. *Brady/Giglio* Information

1. This is a Constitutional obligation not triggered by a request.
2. Prosecutors are to be thoroughly familiar with *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny and *Giglio v. United States*, 405 U.S. 150 (1972) and its progeny and adhere to the disclosure of exculpatory evidence and impeachment evidence in accordance thereof.
3. Prosecutors are to be thoroughly familiar with DOJ Policy and adhere to the policy on the disclosure of exculpatory and impeachment evidence which states in part:

A. Purpose. Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. 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, see [USAM 9-21.000](#), 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). This policy is not a substitute for researching the legal issues

that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, see [USAM 9-11.233](#).

- B. Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).
- 1. Materiality and Admissibility.** Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before

trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

2. The prosecution team. It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment 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. *Kyles*, 514 U.S. at 437.

C. Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required. Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or

arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.
2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.
3. **Information.** Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.
4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such

an effect. If this is the case, all such items must be disclosed.

See, USAM § 9-5.000-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information

4. Prosecutors should have candid conversations with all law enforcement witnesses concerning potential *Giglio* material. Prosecutors should consult the *Brady/Giglio* coordinator, the Professional Responsibility Officer, or a supervisor regarding any issue of witness credibility relative to a law enforcement witness. If it is necessary to request potential impeachment information from a law enforcement agent covered under the Attorney General Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses such request should be made through the *Brady/Giglio* coordinator.
5. All potential *Brady/Giglio* information known by or in the possession of the prosecution team relating to all witnesses should be gathered and reviewed by the prosecutor.

Questions by the prosecutor regarding a possible *Brady/Giglio* issue should be discussed with the direct supervisor and the *Brady/Giglio* coordinator prior to any determination that a disclosure will not be made or will be delayed after being discovered by a prosecutor.

C. Jencks Act Material and Fed. R. Crim. P. 26.2

1. Title 18 U.S.C. § 3500 requires that after the direct examination of a witness and upon motion of the defense for the disclosure of a witness' statement in the possession of the United States that relates to the subject matter of the witness' testimony at trial.
 - a. What is a statement:
 - (1) A written statement that the witness makes, signs, or otherwise adopts or approves.
 - (2) A stenographic, mechanical, electrical, or other recording or transcription of a recording which is a substantially verbatim recital of an oral statement.
 - b. What is not a statement:

- (1) Generally agent's memorandum of a testifying witness' interview is not a statement of the witness if notes were not adopted and approved by the witness. *United States v. Phibbs*, 999 F.2d 1053(6th Cir.1993).

Be aware, however, that a report of an interview written by a testifying agent must be disclosed under *Jencks* if the agent testified about a matter contained in the report. Also substantive e-mail communications from/to and agent who is a potential witness or from/to any witness which relates to the agent's or witness' potential testimony must be preserved.

- c. Only the portions of a report containing statements that relate to the subject matter testified on direct examination are required to be produced. Production of all statements which relate to the subject matter of the issue in the case is not required. *United States v. Susskind*, 4 F.3d 1400,1404(6th Cir. 1993).

2. The Sixth Circuit has established that a *Jencks* statement must be presented **after** a witness has testified. See, *United States v. Presser*, 844 F.2d 1275,1283-84(6th Cir. 1988). The Sixth Circuit held in *United States v. Mullins*,22 F.3d 1365,1372(6th Cir 1994) when a statement is both *Jencks* material and *Brady* material, "the *Jencks* Act overrides *Brady* and is the sole requirement for disclosure of such evidence."

Consistent with the law of this Circuit and Title 18 U.S.C. § 3500, generally *Jencks* statements will be produced after a witness has testified. However, at the discretion of the prosecutor and adhering to DOJ policy guidelines set forth at USAM § 9-5.001 regarding the timing of disclosure of exculpatory and impeachment information, any statements subject to production may be provided to defense counsel at an earlier time to avoid unnecessary delays in the proceedings.

3. Fed. R. Crim. Proc 26.2 also governs the production of witness statements at certain pre-trial and post-trial hearings, providing disclosure after the witness has testified. This rule governs prior statements of all witnesses except the defendant. It applies to defense witnesses so prosecutors should make the request for such statements.

D. **Classified Material**

Disclosure of classified material is governed by The Classified Information Procedures Act (CIPA) or in some cases The Foreign Intelligence Surveillance Act (FISA). Occasions may arise where some source/informant information may be classified for national security reasons. If your case involves or implicates classified information or FISA information contact the office's ATAC coordinator. Such classification does not exempt prosecutors from their discovery/disclosure duties. This discovery policy does not govern disclosure in cases involving terrorism and national security. Policy concerning these cases is dependent on guidance developed by the Department of Justice.

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues with far reaching implications for national security and the nation's intelligence community. 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.

II. Gathering and Reviewing Discoverable Information

A. Where to Look

1. Seek all discoverable as well as *Brady/Giglio* information from the prosecution team.
 - a. Prosecution Team:
 - (1) AUSAs, SAUSAs and DOJ attorneys
 - (2) Case agents and all agents working on the case
 - (3) Federal, state and local law enforcement agencies assisting in the investigation
 - (4) Regulatory agencies that are usually involved in parallel proceedings such as SEC, FDIC, EPA, FTC. The prosecutor should consider whether the relationship with the other agency is close enough to make it a part of the prosecution team. Please refer to Memorandum For Department Prosecutors : Guidance for Prosecutors Regarding Criminal Discovery to determine members of the prosecution team. Prosecutor should discuss with a supervisor any questions or concerns as to whether the agency

should be considered as part of the prosecution team.

- (5) Agency files of law enforcement officers when prosecutor has reason to believe impeachment evidence is contained in agency files. Prosecutors should make inquiry of agents as to the existence of possible impeachment material. Prosecutors should be familiar with the procedures established in the office's *Giglio* plan and confer with the *Brady/Giglio* coordinator to obtain access to agency files.
- (6) Intelligence files - Please contact your supervisor or the ATAC coordinator as to the procedures to follow to obtain information relative to such files.

B. What to Review

1. Investigative Agency Files:

Review the entire case file. Make a request from all members of the prosecution team of all discoverable items within their possession and control. This request should require that the prosecution team members provide all information within their possession and not just the items deemed by the prosecution team member to be relevant. You may decide to request that a listing be prepared setting forth all the documentary discovery within the case file. You should familiarize yourself with the particular types and names of documentary material maintained by the agency on the investigation. Do not limit yourself to the common ones such as the FBI 302s. Ask to review or request a listing of everything within the files regardless of what the agency may call it. The agency's entire investigative file should be reviewed including documents such as Electronic Communications(ECs), inserts, e-mails etc. You should be granted access to the substantive case file and any other file or document you have reason to believe contains discoverable information. Should a dispute arise as to the position of the agency that internal files will not be made available for you to review, consult your supervisor.

2. Confidential Informant/Witness/Human Source Files:

Ask the agency to provide the entire file on the source and not just the portion that pertains to the case. Agencies who make use of confidential informants and cooperating individuals have their own established procedures for retaining information about those witnesses. The agencies may have multiple files containing different types of records or information. Thus, inquiries to agencies about informants should include a review of every kind of file that might contain information about the individual. The case agent should be the point of contact for obtaining access to a source file. If for any reason the prosecutor encounters difficulty in gaining appropriate access, a supervisor in the office should be consulted. Further guidance in this area on taking steps to protect non-discoverable, sensitive information contained in source files as well as security concerns is contained in Memorandum For Department Prosecutors : Guidance for Prosecutors Regarding Criminal Discovery.

If you believe that the circumstances of the case warrant review of a non-testifying source's file, you should follow the agency's procedures for requesting the review of such a file. If you encounter any difficulty in gaining access, please consult your supervisor.

3. Evidence and information gathered from all sources: such as by consent, subpoena, search warrant, and/or court order should be reviewed by the prosecutor.
4. Documents gathered by civil attorneys and/or regulatory agencies in parallel proceedings, who are not considered part of the prosecution team, involving the same subject matter of the criminal case should be reviewed by the prosecutor.
5. Substantive case-related communications/correspondence including e-mails, text messages and letters between and among prosecutors, agents, witnesses, victims, victim-witness coordinators, etc. All such communications should be maintained in the case file or preserved in a manner that associates them with a case. The office policy on electronic communications covers the need to ensure preservation of substantive case related e-mails. Review should be conducted of all other substantive case related communications, voice mail, memoranda and/or notes.
6. Potential *Brady/Giglio* information relating to law enforcement witnesses: See USAM 5-100 and consult with the office's

Brady/Giglio coordinator and/or supervisor to obtain law enforcement files in this area.

7. Potential *Brady/Giglio* information relating to non-law enforcement witnesses such as:

- (a) prior inconsistent statements as well as new or inconsistent statements made during trial preparations;
- (b) benefits provided to witnesses-- i.e. dropped or reduced charges, immunity, motions for downward departures, sentence reductions or expectations of same;
- © assistance in state and local prosecutions and letters setting forth the extent of such assistance on behalf of the witness;
- (d) deportation, visa or other immigration status considerations;
- (e) monetary benefits;
- (f) known but uncharged criminal conduct;
- (g) prior convictions;
- (h) substance abuse or mental issues; and
- (l) bias.

8. Information Obtained in Witness Interviews:

Prosecutor should conduct a review of all witness interviews, whether or not the witness is expected to testify. Substantive witness interviews should be memorialized by the case agent. A prosecutor should not conduct an interview without an agent present. If exigent circumstances make it impossible to secure an agent's presence, the prosecutor should secure the presence of another office employee at the interview.

9. Victim - Witness Coordinator Notes

10. Agent Notes

11. Prosecutor Notes

Note taking responsibilities should be discussed by the prosecutor and the agent regarding witness interviews.

C. Conducting the Review

1. The prosecutor is ultimately responsible for the discovery obligations and controls the review process.
2. If the items and materials are voluminous, the prosecutor may delegate the review to agents, paralegals, or agency counsel under the parameters established by the prosecutor to identify

all potentially discoverable material.

3. **The prosecutor must make all disclosure decisions.**

D. **Making the Disclosures**

1. Timing

- a. Prosecutor should respond to a request for discovery within the fourteen (14) days set forth by Local Rule.
- b. After the initial discovery response, the prosecutor mindful of the continuing duty to disclose, should provide continuing discovery in a timely manner in keeping with the principles of this policy. A written response is required.

2. *Brady & Giglio*

- a. DOJ policy requires prosecutors to disclose exculpatory and impeachment material to guilt or innocence in sufficient time to permit the defendant to make effective use of that information at trial. Disclosure of the information does not mean the evidence is admissible at trial.
- b. **Supervisory approval and notice to the defendant.**
A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. However, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

E. **Manner/Form of Disclosure**

1. A written request from the defense for Fed.R. Crim Pro. 16 discovery is required by Local Rule 15.1.
2. A written response is required by the prosecutor, including the following:
 - a. Identification of the date the request was received by the United States Attorney and the name of the attorney making the request.

- b. Be as specific as possible to describe the discoverable items or describe specifically by categories the discoverable items. Copies of discoverable items are to be included in the response unless the number of documents creates an unreasonable burden or expense.
 - c. Documents shall be made available for inspection and copying, at the defendant's expense if copies are not included in the response as described in paragraph (b) above. The response should indicate the time, date, and place that documents will be available. If the items are not going to be available for viewing at the United States Attorney's Office, the prosecutor should notify agents who have control of the documents of the necessity to make the documents available.
 - d. File the discovery letter only with the Court.
 - e. Keep an exact copy of everything made available and provided.
3. *Brady* Disclosure-Always Document Disclosure
- a. Prosecutors should consider whether disclosure obligations may be fully discharged while better protecting the government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.
 - b. If the information is not provided in its original form and is provided in letter format to defense counsel, please ensure that the full scope of all pertinent information is provided.

F. Make a Record of all Disclosures

- 1. Formalize disclosure by writing a letter setting forth when and how the disclosure is made.
- 2. State disclosure on the record in those instances where disclosure is made for the first time in a court proceeding.