Memorandum

Subject	Date
Discovery Policy for Eastern District of Washington	October 14, 2010

To	From
All Staff United States Attorney Office	James A. McDevitt United States Attorney

I. INTRODUCTION

On January 4, 2010, Deputy Attorney General Ogden issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery" ("DAG Ogden Criminal Discovery Guidance." That same date, he issued a memorandum directing that USAOs promulgate discovery policies governing several enumerated issues. This comprehensive discovery policy implements the directives of the Deputy Attorney General.

This memorandum sets forth the discovery policy for the Eastern District of Washington subject to legal precedent, court orders, and local rules. It provides a prospective policy only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits to any defendant. *See United States v. Caceres*, 440 U.S. 741 (1979).

This memorandum is intended to provide guidance with respect to discovery obligations in the Eastern District of Washington as those obligations relate to the gathering, tracking, reviewing and producing of discoverable information in criminal cases. All such obligations are, at a minimum, intended to comport with statutory and procedural rules, case law, the Constitution, Department of Justice policies, and local court rules. These obligations are defined by:

(1) Rules 16 and 12 of the Federal Rules of Criminal Procedure;
(2) Rule 26.2 of the Federal Rules of Criminal Procedure and the *Jencks Act*, 18 U.S.C. 3500, et seq.;
(3) *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny;
(4) USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information) and 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses); and

(5) Local rules and standing orders of the district and magistrate courts.

In some respects, the guidance contained in this memorandum may suggest broader disclosure than the law mandates. Generally, AUSAs[1] should provide broad, early discovery of information and materials to the extent that such discovery disclosure promotes the just resolution of a case while not jeopardizing witness safety, national security, or any ongoing criminal investigation.

II. GENERAL OVERVIEW

In the vast majority of criminal cases, early and broad discovery avoids wasteful litigation on discovery disputes; equips defense counsel with the ability to provide informed advice to clients about their options, promotes meaningful negotiations for disposition and resolution of cases; induces timely plea agreements (thereby avoiding the expenditure of limited prosecutorial resources), encourages timely and beneficial cooperation from a defendant in some instances; and projects the appearance to the judges and the defense bar that the office is fair, reasonable, and committed to resolving cases based on the facts rather than on tactical maneuvers.

Although the default position in the Eastern District of Washington favors early and broad disclosure of all material information through the discovery process,[2] there will always be some cases in which discovery disclosure must be very selective or delayed. For example,[3] discovery disclosure must be selective when there are credible security, intimidation, retaliation, or vulnerability concerns and may be delayed when there is a need to protect the integrity of an active spin-off investigation or to prevent a defendant who wants to cooperate by way of a "free talk" from

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1 As used in this memorandum, "AUSA" includes Special Assistant United States Attorneys and DOJ attorneys working on a case in the EDWA.

2 AUSAs should be mindful that the discovery process includes a continuing obligation to disclose discovery material during the pre-trial and trial phase of a case, as well as during any post-trial / post-conviction proceeding. AUSA's should also be aware of local bar rules regarding post-trial discovery obligations pertaining to newly discovered evidence.

3 These examples are not meant to be all-inclusive, but instead are illustrative of the type of case-specific reasons that would justify limitations on the scope or on the timing of the disclosure of information.

tailoring his or her comments to the information that the Government already possesses. Moreover, unless specific identifying information is directly material to the criminal case, AUSAs should withhold or redact personal identification information about victims, minors, confidential informants, and civilian witnesses as envisioned by Fed. R. Crim. P., Rule 49.1, such as, specific information about, for example, dates of birth, places of birth, social security numbers, home telephone numbers, driver's license numbers, minors' and victims' names, and bank account numbers.

III. DISCOVERY GUIDANCE

The following is intended to provide guidance to AUSAs with respect to discovery obligations in the Eastern District of Washington. In conjunction with this guidance AUSAs must also be mindful of:

Personal Review of Discovery Material. AUSAs are expected to personally review discovery material, rather than relying solely on case agents or support staff, to ensure compliance with the discovery policy in this District.[4] Such review may include case agent rough notes relating to important and/or significant witnesses involved in the underlying investigation, as well as confidential informant files. AUSAs may, however, rely on any agency's review of a law enforcement agent's/officer's personnel file as that review relates to *Giglio* and *Henthorn* material.[5]

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4 AUSAs should be mindful that such review not only includes discovery material generated by Federal agents acting on the government's behalf, but also state, local, and tribal law personnel involved in the investigation or prosecution of the federal criminal case.

5 If defense counsel makes a specific request for an agent's/officer's personnel files, or the court orders the United States to review such files (or if an AUSA request such files reviewed), a request is submitted to the Senior Litigation Counsel (SLC) and, in some circumstances the Criminal Chief. The SLC and/or the Criminal Chief are the only authorized persons to request personnel file information and to advise the AUSA about any potential impeachment information contained therein. This District has a standing Giglio Implementation Plan.

Creating a Record of Discovery Material. AUSAs must maintain a written record of material that has been provided to the defense, normally by numbering the discovery material with a Bates stamp and keeping a copy of that numbered discovery, or by generating an itemized letter or other log of the contents of the discovery.

Redaction of Personal Information. Unless specific identifying information is directly material to the criminal case, AUSAs should take reasonable steps to protect the confidentiality of personal identification information of witnesses, victims, and informants by redacting from the defense copy of discovery material personal identification information about victims, minors, confidential informants, and civilian witnesses as envisioned by Fed. R. Crim. P., Rule 49.1, such as specific information about, for example, dates of birth, places of birth, social security numbers, home telephone numbers, driver's license numbers, minors' and victims' names, and bank account numbers.[6]

Minors. AUSAs should be mindful that special precautions must be taken with respect to discovery disclosure obligations concerning minors and particularly minor witnesses and/or victims.[7] Disclosure of information relating to a minor may be made only to individuals who need access to the information because of their participation in a proceedings and any documents containing such information must be maintained in a manner that restricts access to only those individuals. *See* 18 U.S.C. § 3509(d)(1).[8] AUSAs should be mindful that pleadings (or other material containing

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6 AUSAs should be mindful of the provisions of the Crime Victims Rights Act, 18 U.S.C. § 3771, and the rights and obligations provided thereunder.

7 In the context of child pornography and other child exploitation cases, and in light of the sensitivity of the information and the legal limitations on disclosure, AUSAs must be mindful to exercise due caution in the manner and means by which discoverable material is disclosed and ensure any re-dissemination of such material is appropriately restricted. *See e.g.* 18 U.S.C. § 3509(m).

8 When discovery obligations require disclosure of information concerning minor witnesses, AUSAs should seek a protective order to ensure proper handling of the information by all parties. *See* 18 U.S.C. §§ 3509(d)(3)(A) and 3509(d)(3)(B)(ii).

such information) that are filed with the court should be done so under seal, without the necessity for a Court Order. *See* 18 U.S.C. § 3509(d)(2).

Re-Dissemination of Discovery Material. AUSAs must condition early production of discovery upon a written commitment by defense counsel that all of the discovery, or some designated portion of the discovery, will not be left in the possession of the defendant and will not be copied or otherwise re-disseminated beyond defense counsel. This may be accomplished by way of a letter or, in certain circumstances, Court Order.

The Use of the Term "Open File." Notwithstanding the fact that in the vast majority of criminal cases AUSAs will provide early and broad discovery, AUSAs should not represent to defense counsel or to the Court that the AUSA has taken an "open file" approach to the case or has provided to the defense everything in the Government's possession. Not only can such a statement be easily misinterpreted (particularly with respect to work product), but invariably a case agent or the AUSA will have some documents of no or limited relevance that have not been produced.

Informal Resolution of Discovery Disputes. AUSAs should attempt to resolve discovery disputes informally in order to avoid the unnecessary expenditure of prosecution and judicial resources associated with litigating discovery issues. AUSAs are encouraged to resolve disputes by obtaining stipulations from defense counsel on the reciprocal production of defense discovery or on restrictions on the dissemination of the substance of the information by defense counsel.

Cases Involving National Security and/ or Classified Information. AUSAs must be aware and are expected to know that 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." AUSAs 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 AUSA, 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 AUSA, 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 AUSA, 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 AUSA, 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.

A. Federal Rules of Criminal Procedure

AUSAs will comply with the requirements of Rules 16 and 12 of the Federal Rules of Criminal Procedure.

1. Rule 16

AUSAs must be familiar with the mutual disclosure obligations of the United States and the defense under Rule 16. These obligations, which are triggered upon request and are continuing in nature up to and though trial, include disclosure by the United States of: defendant's oral statements (16(a)(1)(A)); defendant's written or recorded statements (16(a)(1)(B)); defendant's prior criminal record (Rule 16(a)(1)(D)); documents and objects (Rule 16(a)(1)(E)); reports of examinations and tests (Rule 16(a)(1)(F)); Expert Witness summary (Rule 16(a)(1)(G)); and Grand Jury testimony as applicable (Rule 16(a)(3))

AUSAs must also be familiar with the process by which discovery disclosure may be regulated, including protective and modifying court orders (Rule 16(d)(1)) and the potential sanctions for failure to comply with Rule 16 disclosure obligations (Rule 16(d)(2)).

2. Rule 12

AUSAs must be familiar with the mutual disclosure obligations of the United States and the defense under Rule 12. These obligations, which are triggered upon request and are continuing in nature up to and though trial, include: disclosure by the United States (generally within 14 days) of the name of each witness upon whom the United States intends to rely to counter a defendant's alibi defense, including in appropriate circumstances, the address and telephone number of any such witness (Rule 12.1 (b)). AUSAs must be familiar with the procedural requirements under Rule 12.2 concerning notice of an insanity defense and Rule 12.3 concerning notice of a public-authority defense.

AUSAs must also be familiar with the process by which discovery disclosure may be regulated, including protective and modifying court orders (Rule 12.1(d)) and the potential sanctions for failure to comply with Rule 12 disclosure obligations (Rule 12.1(e)).

B. Witness Statements (*Jencks Act*, 18 U.S.C. 3500, *et seq*. and Rule 26.2)

In the absence of a specific, legitimate reason to withhold discoverable information,[9]

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9 A legitimate reason for withholding all information in this category, or specific items of information in this category, should be determined in light of the

an AUSA should disclose investigative reports, memoranda of interviews, summaries or analysis of financial records or telephone activity, and statements within the meaning of the *Jencks Act*, 18 U.S.C. § 3500 and the strictures of Rule 26.2 at the earliest available time following arraignment. However, AUSAs have discretion to determine how far in advance of a witness's testimony investigative and interview reports will be disclosed based upon the particular circumstances of a case and any reciprocal discovery agreement(s) reached with defense counsel. Production of witness interview reports is required regardless of whether the reports qualify as statements as defined by the *Jencks Act*, contains *Brady* or *Giglio* information, or is discoverable under any other law, rule, or policy. The EDWA discovery policy envisions earlier and broader production than is required by the *Jencks Act.*[10]

1. Jencks Act

Although The EDWA discovery policy envisions broad and early production of reports of witness interviews, AUSAs should nonetheless be familiar with the law's requirements and be prepared to object, if necessary, to the improper use or treatment of such reports as "witness statements" to the extent that they do not qualify as statements under the *Jencks Act*.

The *Jencks Act* defines "witness statements" as "(1) a written statement made by [a] witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [the] witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by [a] witness to a grand jury." 18 U.S.C. § 3500 (e). AUSAs should understand that reports of witness interviews such as DEA-6's, FBI 302's, etc, may not be substantially verbatim and may not have not been reviewed and adopted by the witness and therefore may not technically be *Jencks Act* material and, therefore, not required by law to be produced

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circumstances of the particular case as identified earlier by way of non-inclusive examples.

10 The *Jencks Act* and Federal Rule of Criminal Procedure 26.2 do not require disclosure of witness statements until after the witness has testified on direct examination in a hearing or trial.

as such.[11] However, AUSAs should be mindful that it has been, and will continue to be, the custom and practice in the EDWA to routinely disclose such reports nonetheless.

2. Fed. R. Crim. P., Rule 26.2

AUSA's must be familiar with Rule 26.2 of the Federal Rules of Criminal Procedure. Rule 26.2 is similar to the *Jencks Act* except it applies to the United States **and** the defendant (*Jencks Act* inapplicable to defendant). The Rule defines the term "statement" similarly and requires the disclosure of witness statements that relate to the subject matter of a witness's testimony. The Rule provides for in camera inspection if either party claims privilege or information that does not relate to the subject matter of the testimony. AUSAs must be familiar with the potential sanctions for failure to comply with the Rule (Rule 26.2(e)).

Again, AUSAs should be mindful that it has been the custom and practice in the EDWA to routinely disclose reports such as DEA-6's, FBI 302, etc. even if such reports contain information that does not technically meet the definition of a "statement" under the Rule.

C. Exculpatory and Impeachment Information

AUSAs representing the U.S. Attorney's Office for the Eastern District of Washington will comply with the obligations pronounced by Department of Justice

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11 AUSAs should be careful not to characterize a witness interview as a Jencks Act statement in discovery letters or court pleadings if the interview does not fit the Jencks Act definition of a witness statement. Because witness interview reports are not Jencks material unless the witness has adopted the memorandum as his statement, AUSAs should continue to object to use of such reports in cross examination as if it were the witness' statement.

Jencks Act material includes, for example, statements or reports in United States' possession that are: written statement made by witness and signed or otherwise adopted or approved by him/her; a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantial verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

policy and those set forth in the line of cases that require production of material exculpatory information in sufficient time for the defense to make effective use of that information, based on a defendant's right to due process. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

1. Summary overview of Brady and Giglio

AUSAs must be familiar with these cases and their progeny. In *Brady* the Supreme Court announced:

> We now hold that the suppression by the prosecution of ***evidence favorable to an accused*** * * * violates due process where the evidence is ***material either to guilt or to punishment***, irrespective of the good faith or bad faith of the prosecution.

Id. at 87. Nine years later, in *Giglio*, the Supreme Court held that *Brady* material includes material that might be used to impeach key government witnesses, stating:

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of ***evidence affecting [the witness's] credibility*** falls within th[e] general rule [of *Brady*].

Id. at 154. The Supreme Court has explained that *Brady* material and *Giglio* material are not two distinct kinds of evidence under the Constitution, but rather, *Giglio* material is merely one form of *Brady* material:

> In *Brady* * * * , the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. *See Giglio*[]. Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is "evidence favorable to an accused," so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

United States v. Bagley, 473 U.S. 667, 676 (1985).

Nevertheless, it is often useful to keep *Brady* and *Giglio* analytically distinct: the term "*Brady* material" refers to evidence or information — other than *Giglio* material — that could be used by a defendant to make his conviction less likely or a lower sentence more likely, and the term "*Giglio* material" refers to evidence or information that could be used by a defendant to impeach a key government witness.

2. DOJ Policy

AUSAs must be mindful that the Department of Justice's policy on the disclosure of exculpatory and impeaching information and evidence is broader than what is constitutionally required. 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. *See* USAM 9-5.001 (Disclosure of Exculpatory and Impeachment Information) and 9-5.100 (Potential Impeachment Information on Law Enforcement Witnesses).

An AUSA must also be mindful that, although there is no specific time by which the United States must disclose *Brady* and *Giglio* material to the defendant, due process requires that such disclosure of exculpatory and impeachment material be made in sufficient time to permit the defendant to make effective use of that material at trial. Department of Justice policy as set forth under USAM 9-5.001 **directs disclosure of exculpatory information "reasonably promptly after it is discovered,"** and that the disclosure of impeachment information be made before trial.

3. The "Prosecution Team" concept

AUSAs must be aware that, in some instances, *Brady* or *Giglio* material may exist that an agent knows about but the AUSA does not. In 1995, the U.S. Supreme Court made clear that a defendant is entitled to the disclosure of **all** *Brady* and *Giglio* material known to **any member of the prosecution team**. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Thus, if any member of the prosecution team knows of any *Brady* or *Giglio* material, the AUSA will be held legally responsible for disclosing that evidence to the defendant, whether or not he/she actually knows about the evidence.[12]

The prosecution team includes all "others acting on the government's behalf in the case." *Kyles,* 514 U.S. at 437. At a minimum, this includes all federal, state, and local law enforcement personnel directly involved in the investigation or prosecution of the federal criminal case. The primary responsibility for getting *Brady* material to the AUSA lies with the case agent, which in turn means that the case agent must

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12 An AUSA's ignorance of such evidence will not prevent a court from penalizing the government by suppressing evidence, vacating a sentence, reversing a conviction, or recommending that the AUSA be professionally sanctioned.

make sure that *every* member of the prosecution team knows the *Brady* rule and obligations.[13]

4. AUSAs' responsibility under Brady and Giglio

Ultimately, in any given case, it is the AUSA who decides, based on his/her professional judgment, what evidence is covered by *Brady* or *Giglio* and must, therefore, be disclosed to the defendant. Plainly, the AUSA is responsible for disclosing any such material of which he/she is aware.

An AUSA must ask the case agent if he/she or any other member of the prosecution team knows of any *Brady / Giglio* material in an effort to fulfill the "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles*, 514 U.S. at 437. AUSAs must be mindful that potential *Brady/Gigilio* material that *is* disclosed to the defendant will not necessarily be admissible at trial.[14] The AUSA should make sure that the case agent understands this fact.

Brady material include s any evidence favorable to an accused that is material to the question of either guilt or punishment. Such material includes, for example, information that: tends to show that someone else committed the criminal act; tends to show that the defendant did not have the requisite knowledge or intent; tends to show the absence of any element of the offense, or which is inconsistent with any element of the offense; either casts a substantive doubt upon the accuracy of evidence including but not limited to witness testimony the AUSA intends to rely on to prove

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13 This responsibility is similar to the case agent's responsibility to inform all federal, state, local and tribal government employees to whom grand jury materials are disclosed of the rule of grand jury secrecy. *See* Fed. R. Crim. P. 6(e)(3)(A)(ii), (B).

14 For example, the evidence might be excluded because it is irrelevant, *see* Fed. R. Evid. 402, because its probative force is outweighed by the risk of unfair prejudice or other negative factors *(see* Fed. R. Evid. 403), or because it is hearsay (*see* Fed. R. Evid. 802). Therefore, when the AUSA does disclose *Brady* material to the defendant, he/she should consider whether grounds exist for filing a motion *in limine* to exclude or limit the evidence. (Keep in mind, though, that "the judge may always change his mind [about an *in limine* ruling] during the course of a trial." *Ohler v. United States*, 120 S. Ct. 1851, 1854 n.3 (2000).)

an element of any crime charged, or which may have a significant bearing on the admissibility of prosecution's evidence (*see* USAM 9-5.001(c)); tends to show the existence of an affirmative defense, such as entrapment or duress; and/or tends to show the existence of past or present circumstances that might reduce the defendant's guideline range under the federal Sentencing Guidelines, support a request for a sentence at the low end of the guideline range or for a downward departure, or make inapplicable to the defendant a mandatory minimum sentence.

Giglio material includes "evidence affecting [the] credibility" of key government witnesses." *Giglio v. United States*, 405 U.S. 150, 154 (1972). **Under DOJ Policy, *Giglio* materials must be disclosed whether or not the defendant has made a request for such materials.** This duty exists with respect to key government witnesses at suppression hearings, trials, and sentencing hearings. *Giglio* material includes, for example, information that tends to show a witnesses bias, prior dishonesty, criminal convictions, prior inconsistent statements; untruthful character; and incapacity. The United States is required only to disclose the *Giglio* material that the prosecution team knows about. The prosecution team is not generally required to look for unknown *Giglio* material, with the exception of law enforcement officers/agents.

AUSAs must be mindful that, with respect to law enforcement agents/officers, this United States Attorney's Office has established a Giglio Implementation Plan in accordance with DOJ policy. If defense counsel makes a specific request for an agent's/officer's personnel files, or the court orders the United States to review such files (or if an AUSA request such files reviewed), a request must be submitted to the Senior Litigation Counsel (SLC) and, in some circumstances the Criminal Chief. The SLC and/or the Criminal Chief are the only authorized persons to request personnel file information and to advise the AUSA about any potential impeachment information contained therein.

D. Local Rules and Standing Orders

AUSAs must be mindful that in the EDWA, the courts have entered a standing discovery order which provides for discretionary early, reciprocal discovery. That order also provides that, on a case by case basis, the United States may file a notice of non-disclosure if an AUSA intends to opt out of the mutual obligations set forth in the order.

In appropriate cases AUSAs may file a notice of non-disclosure, where for example, the discoverable material cannot be disclosed by the date imposed by the order, where witness security concerns exist, where disclosure will negatively impact an on-going investigation, etc.