

Memorandum



<i>Subject</i>	<i>Date</i>
Discovery Policy for Criminal Cases ¹	October 15, 2010
<i>To</i>	<i>From</i>
Criminal Attorneys	John W. Vaudreuil United States Attorney Western District of Wisconsin

I. INTRODUCTION

The long-standing policy of this office has been, and continues to be, to provide broad and early discovery as part of our effort to foster fair and speedy resolutions of criminal cases and to promote the truth-seeking mission of the Department of Justice. Our policy has always recognized that there are times when countervailing factors counsel against this broad and early disclosure. As set forth below, when specific, case-related considerations warrant a departure from the standard discovery practice of this office, prosecutors must obtain supervisory approval. Our discovery goals have always been, and remain: (1) to assure the defendant a fair trial; (2) to avoid burdensome litigation over the appropriate scope and timing of disclosures; (3) to limit judicial frustration and confusion with last-minute discovery litigation prior to or during trial; and (4) to allow prosecutors to focus on effective trial preparation and presentation without distracting discovery issues coming into play. Most fundamentally, the discovery policy outlined in this document will help to ensure that we continue to enjoy the reputation with the district court and the defense bar as an office that “does not hide the ball” and is interested in early and fair resolution of criminal cases. The discovery practices set out below are designed to achieve these goals.

II. LEGAL FRAMEWORK

Our disclosure obligations are set forth in (1) Rule 16, Federal Rules of Criminal Procedure; (2) Rule 26.2, Federal Rules of Criminal Procedure, and 18 U.S.C. § 3500 (the Jenks Act); (3) *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and relevant case law; and (4) the Department of Justice’s policy on the disclosure of exculpatory and impeachment information (USAM Sections 9-5.001 (“Policy Regarding Disclosure of Exculpatory and Impeachment Information”) and 9-5.100 (“Policy Regarding the Disclosure to Prosecutors of

¹ This 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 any rights, privilege, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

Potential Impeachment Information Concerning Law Enforcement Witnesses”)). Each prosecutor in this office must be familiar with and comply with each of these authorities. The first principle for the discovery policy for this office is, quite simply, “obey all rules.”

III. GATHERING THE INFORMATION

A. 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 of the criminal case against the defendant. USAM § 9-5.001.

Our duty to obtain information from the prosecution team includes not only exculpatory and impeachment information, but also all information we are required to disclose under Rules 16 and 26.2, and 18 U.S.C. § 3500. Department of Justice policy also includes in its definition of “impeachment information” any information that “might have a significant bearing on the admissibility of prosecution evidence.” USAM 9-5.001(C)(2). AUSAs will provide information relevant to both trial and pretrial suppression matters.

Prosecutors in this office should err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Because we work on so many cases with state and local officers, it is crucial that we take a broad view when defining “the prosecution team.” In addition, if the case is designated as a “parallel proceeding” within this office, it is necessary to include civil division attorneys in our prosecution team as they may have discoverable information obtained during the parallel civil proceeding. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over discovery issues and avoid surprises at trial.

We have developed a standard letter which prosecutors are encouraged to use to ensure that the prosecution team understands our discovery obligations, and their obligations to make full disclosure to us of discovery materials. (A copy of this letter is attached to this memorandum.) As set out in the standard letter, it is the practice of this office to identify one person as the “point person” for all law enforcement officers and agents on the prosecution team. Ordinarily, this point person will be the lead federal agent assigned to the case.

In addition, regarding our obligations to search for and disclose, where appropriate, law enforcement impeachment information, this office has developed a memorandum titled “Potential Impeachment Information for Law Enforcement Witnesses.” This memorandum must be provided

to all law enforcement officers who may testify at hearing or trial, or who could be the affiant for any warrant or other court process. The assigned prosecutor must note in the case file jacket when this memorandum was provided to specific agents or officers on the prosecution team. (A copy of this memorandum is attached.)

B. Materials to Review

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

1. Prosecution Team Files

Prosecutors should have access to the substantive case files and any other files or documents the prosecutor has reason to believe may contain discoverable information related to the case. The prosecutor may personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. Prosecutors are encouraged to use our standard letter to outline discovery obligations and to request production of discoverable materials from the prosecution team. If discoverable information is contained in a document that the investigating agencies deem to be an internal document, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in that document.

All emails should be preserved and reviewed for discoverable information. NOTE: The prosecution team should avoid using email to communicate substantive case-related information in criminal and parallel criminal/civil cases because emails are often hurried and not carefully drafted to ensure accuracy. If email is used to communicate such information within the prosecution team, or with victims/witnesses, or anyone else, the email must be printed and maintained in the case file. If the person sending the email eventually is a witness, the email may well be discoverable. Finally, while substantive emails must be maintained and reviewed during the discovery phase, any discoverable information may be disclosed in an alternative form (e.g., a letter or memo).

2. Confidential Information/Source Files

The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. These files must be reviewed for discoverable information and copies made of relevant portions for discovery purposes. (This subject is generally outlined in our discovery letter to the investigating agents.) The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity, and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review. It is the policy of this office that any discoverable information from the

informant/source file will be provided to the defense through a summary letter rather than producing the record in its entirety. Finally, prior to any disclosure, prosecutors must consult with the investigative agency to evaluate any security risks that may arise with respect to disclosure from confidential files, and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with our discovery obligations.

3. Evidence and Information Gathered During the Investigation

Generally, all evidence and information during the investigations should be reviewed. This information is specifically requested in our standard discovery letter to the investigative agencies.

4. Evidence Gathered in Parallel Civil Investigations

If a parallel case has been opened in this office, the prosecutor and the civil AUSA must be in constant contact regarding discoverable materials. If a regulatory agency is involved, either as a member of the prosecution team or in the parallel civil proceeding, that regulatory agency files should also be reviewed for discoverable materials.

5. Substantive Case-Related Communications

Substantive case-related communications may contain discoverable information. Those communications containing discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. These communications may be memorialized in emails, memoranda, or notes. These communications may be substantive when they are factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information contained during interviews with witnesses/victims, and factual issues relating to credibility. All close calls regarding the substantive nature of these communications should be resolved in favor of retention, with a decision on disclosure being made subsequently.

Ordinarily, 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 an interview report, our disclosure of the interview report or other documents will ordinarily satisfy our disclosure obligation.

6. Impeachment Information Regarding Law Enforcement Witnesses

Prosecutors in this office must provide our *Giglio* memorandum to each law enforcement officer who may testify or provide a sworn affidavit in the case. If the law enforcement officer

believes there may be information covered by the memorandum, the AUSA *Giglio* coordinator must be contacted and the matter discussed.

7. Impeachment Information Regarding Non-Law Enforcement Witnesses and FRE 806 Declarants

All potential impeaching information in the possession of the prosecution team relating to non-law enforcement witnesses must be gathered and reviewed. (This subject is discussed in our standard discovery letter for the investigating agencies.) A detailed list of the type of information we should be looking for is set out in the DOJ memorandum dated January 4, 2010, titled "Guidance for Prosecutors Regarding Criminal Discovery."

8. Witness Interview Reports

All witness interviews conducted for the purpose of obtaining information pertinent to the matter or the case should be set out in a written report. If an interview was audio or video recorded, further memorialization is generally not necessary. In the usual case, all witness interview reports will be produced shortly after the arraignment; in all but the most exceptional case, this disclosure will be completed no later than two weeks before trial.

(a) Witness Statement Variations

Occasionally, witnesses statements will vary during the course of an interview or investigation. For example, a witness may initially deny being involved in criminal activity and the information provided may broaden or change considerably over the course of time, especially if there are a series of interviews that occur over several days or weeks. Material variances in a witness's statement 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

Trial preparation meetings with witnesses generally need not be memorialized. The prosecutor should be attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory, or impeaching 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. This information may be provided in a report setting out the preparation meeting statements, or may be summarized in a letter to defense counsel.

New inculpatory information need not be disclosed, but, if significant, should be disclosed as it may facilitate a guilty plea. If the new inculpatory information is developed on direct examination, the defense may cross-examine with all prior reports as inconsistent. A

problem occurs if the witness provides new inculpatory information during witnesses preparation then returns during trial to the prior statement. The prosecutor must then impeach by addressing the witness prep statement or, alternatively, inform defense counsel that information had been provided during the witness prep session and the witness has now returned to a prior statement.

(c) Agent Notes

It is standard practice in the Western District of Wisconsin that the Magistrate Judge enters an order at the first appearance directing that all agent notes be preserved for possible future review and disclosure. Accordingly, our standard discovery letter to the agents directs them to preserve investigative notes in existence as of that date. Agent notes need only be reviewed if there is some reason to believe that the notes are materially different from the written memorandum, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors must pay particular attention to agent notes generated during the interview of the defendant or an individual whose statement may be attributed to a defendant. These notes must be disclosed pursuant to Rule 16.

C. Conducting the Discovery Review

The prosecutor is ultimately responsible for compliance with all discovery obligations. While it is preferable for prosecutors to review the information themselves in every case, this review will not always be feasible or necessary. Because responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor must develop a process for review of pertinent information to ensure that discoverable information is identified. The prosecutor may involve agents, legal assistants, or others in the process, and set forth criteria for identifying potentially discoverable information, but prosecutors must not delegate the disclosure decision itself.

IV. PROVIDING DISCOVERY TO THE DEFENSE

Prosecutors must be familiar with all federal rules, cases, and USAM provisions regarding discovery in criminal cases. It is the policy of this office that broad and early disclosures will be provided - in many instances broader, more comprehensive, and earlier than required by discovery obligations. It is the policy of this office to advise the court and defense counsel that we are voluntarily producing discovery earlier, and beyond what is required, but we are not committing to any discovery obligation beyond the discovery obligations set out by law.

1. Considerations Regarding Scope and Timing of Disclosures

Broad and early discovery promotes fair trials, fosters speedy resolution of most cases, and avoids time-consuming discovery litigation as we approach trial. Prosecutors must always consider, however, whether any case-specific concerns require a different approach to discovery

in the case. These considerations include things such as (1) protecting victims and witnesses from harassment and intimidation; (2) protecting the privacy interests of witnesses; (3) protecting ongoing investigations; (4) protecting national security interests; (5) enhancing the likelihood of reciprocal discovery from the defendant; and (6) other strategic considerations that might enhance the likelihood of achieving a just result in a particular case. In this district, interview reports of testifying witnesses are considered § 3500 material even though the witness may not have adopted the agent's report prior to testifying.

While this office provides expansive and early discovery, we do not have an "open" file policy. While we will inform the court and defense counsel that we are providing discovery earlier and more broadly than required by law, but this is a purely voluntary decision and we intend that discovery remain covered by all applicable rules.

2. Timing of Discovery

(a) Rule 16

Pursuant to the standard court order in this district, Rule 16 materials must be provided within seven (7) days of arraignment. Pre-indictment preparation and guidance to the prosecution team will ensure that Rule 16 materials have been collected prior to indictment and prepared for production within seven (7) days of arraignment. All Rule 16 materials generated or discovered later must be provided immediately.

(b) Witness Statements

It is the policy of this office in most cases to provide witness statements at the same time, or near to the same time, as the Rule 16 materials. We will inform the court and defense counsel that we are doing this voluntarily and that this office still stands by its rights under § 3500. In any event, we will inform the court that we will provide witness statements no later than two (2) weeks prior to the scheduled trial. If we have witness security problems we should use our form protective agreement, which controls the copying of materials provided to defense counsel. If the prosecutor believes a specific case warrants withholding witness statements for later disclosure, that variance from our standard discovery policy requires supervisor approval. After supervisory approval has been obtained, the court and defense counsel will be informed that we intend to vary from our standard policy and to follow a different process for providing witness statements in the specific case.

(c) Exculpatory/Impeachment Information

All exculpatory information must be disclosed to the defendant immediately after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, should be disclosed at a reasonable time before trial to

allow the trial to proceed efficiently. It is the policy of this office that impeaching information will be disclosed no later than two (2) weeks prior to trial. If the prosecutor believes in a specific case that later disclosure is warranted, this decision to vary from the office policy requires supervisory approval. Discovery obligations are continuing, and the prosecutor should always be alert to any development occurring up to and through trial of the case that may impact discovery obligations and require disclosure of information that was previously not disclosed.

3. Recording Disclosures

Prosecutors must make a record of when and how information is disclosed or otherwise made available to defense counsel. Discovery matters often become the subject of litigation in our criminal cases and keeping a record of the disclosure confines the litigation to substantive matters and avoids disputes over what actually was disclosed. Generally, discovery will be provided to defense counsel on a disc and memorialized by a cover letter either describing the items contained on the disc or setting out the page numbers for the items contained on the disc.

V. SPECIAL CONSIDERATIONS IN CASES INVOLVING CLASSIFIED OR SENSITIVE NATIONAL SECURITY INFORMATION

Cases involving national security, including terrorism, espionage, counterintelligence, and export enforcement, can present unique and difficult criminal discovery issues. The Department of Justice has developed special guidance for those cases, which is contained in Acting Deputy Attorney General Gary G. Grindler's September 29, 2010, memorandum, "Policy and Procedures Regarding the Government's Duty To Search for Discoverable Information in the Possession of the Intelligence Community or Military in Criminal Investigations." Prosecutors should consult that memorandum and their supervisors regarding discovery obligations relating to classified or other sensitive national security information. As a general rule, in those cases where the prosecutor, after conferring with other members of the prosecution team, has a specific reason to believe that one or more elements of the Intelligence Community (IC) possess discoverable material, he or she should consult the Department's National Security Division (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 criminal cases involving: corrupt or fraudulent practices by middle or upper officials of a foreign government; violations of the Arms Export Control Act or the International Emergency Economic Powers Act; trading with the enemy, international terrorism, or significant international narcotics

trafficking, especially if they involve foreign government or military personnel; and 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.