



Homeland
Security

March 29, 2016

Policy Statement 047-04

MEMORANDUM FOR: Department Component Heads

FROM: Alejandro N. Mayorkas
Deputy Secretary

A handwritten signature in blue ink, reading "AN Mayorkas", written over the printed name of the Deputy Secretary.

SUBJECT: **Department Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Department of Homeland Security Witnesses ("Giglio Policy")**

1. The policy set forth herein pertains to the disclosure to prosecutors of potential impeachment information concerning DHS employees who may serve as a witness or affiant for the Government in a federal criminal proceeding. This policy is intended to set a uniform standard for assuring that all appropriate information is provided to prosecutors in a timely manner. The provisions of this policy apply to all DHS employees. For purposes of this policy, DHS Components that employ agents or officers who may be a witness or affiant in a federal criminal proceeding are referred to as "employing Components," and the individuals who may be providing a sworn statement or testifying as a witness for the Government in a federal criminal proceeding are referred to as "employees."

2. Preface

a. The following policy is established for all individuals employed by DHS who may serve as a witness or affiant for the Government in a federal criminal proceeding.¹ The policy addresses the disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purpose of this policy is to ensure that prosecutors receive sufficient information to meet obligations under *Giglio v.*

¹ Employees providing a sworn statement or testifying as a witness for the Government in a state criminal proceeding will consult with their employing Component legal counsel to determine if there are similar requirements or practices at the state level, and if so, how the employee can comply with state requirements. The employing Component Official will coordinate with the appropriate state official on this matter, as needed.

United States, 405 U.S. 150 (1972), while protecting the legitimate privacy rights of Government employees.²

b. The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeachment information that is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including 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 may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

c. This policy is not intended to replace the obligation of employees to inform prosecutors with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case.

d. This policy is intended to provide guidance to DHS employing Components and employees regarding what potential impeachment information must be produced to Department of Justice prosecuting offices. This policy does not address the issue of what information Department of Justice prosecuting offices must produce to the defense, or to the court for *ex parte*, *in camera* review.

e. This policy is intended to be consistent with Section 9-5.100 of the United States Attorneys' Manual (the "DOJ *Giglio* Policy"), as amended, including all portions of the DOJ *Giglio* Policy that are internal to the Department of Justice and not reflected in this policy.

3. Disclosing Potential Impeachment Information Relating to DHS Employees.

a. **Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will obtain all potential impeachment information directly from potential Component witnesses and/or affiants during the normal course of investigations and/or preparation for hearings or trials. Pursuant to Department of Justice guidance, prosecutors should have a candid conversation with each potential witness and/or affiant regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public, but that should not in fact be the basis for impeachment in a federal criminal proceeding, so that prosecutors can take appropriate action, be it

² This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

producing the material or taking steps to preclude its improper introduction into evidence. Likewise, each employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case, and to consult with Component leadership and counsel to determine whether information constitutes potential impeachment information. DHS employing Components and employees should make broad disclosures of potential impeachment information to the prosecutor so that the prosecutor can assess the information in light of the role of the Component witness, the facts of the case, and known or anticipated defenses, among other variables. Paragraphs 5 and 6 of the DOJ *Giglio* policy describe the potential impeachment information that federal prosecutors need to receive. Each Component should ensure that its employees fulfill this obligation. The DOJ *Giglio* Policy encourages prosecutors to carefully consider requesting potential impeachment information from the agency in all cases. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.

b. **Component Officials.** Each of the employing Components shall designate an appropriate official(s) to serve as the point(s) of contact concerning DHS employees' potential impeachment information ("the Component Official"). Each Component Official shall consult periodically with the relevant Requesting Official (see immediately below) about Supreme Court case law, circuit case law, and District Court rulings and practice governing the definition and disclosure of impeachment information.

c. **Requesting Officials.** The Department of Justice has required each of the Department of Justice prosecuting offices to designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official is required to inform the relevant Component Officials about Supreme Court case law, circuit case law, and District Court rulings and practice governing the definition and disclosure of impeachment information.

d. **Request to Component Officials.** When a prosecutor determines that it is necessary to request potential impeachment information from a Component Official(s) relating to a Component employee identified as a potential witness or affiant in a specific criminal case or investigation, the prosecutor is required to notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the relevant Component Official.

e. **Component Review and Disclosure.** Upon receiving the request described in paragraph 3.d., the Official shall conduct a review, in accordance with its Component plan, for potential impeachment information regarding the identified employee. The Component Official shall advise the Requesting Official of any potential impeachment information, which includes, but is not limited to:

i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;

ii) any past or pending criminal charge brought against the employee;

iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;

iv) prior findings by a judge that a Component employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;

v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, Components and employees should disclose findings or allegations that relate to substantive violations concerning:

(1) failure to follow legal or Component requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;

(2) failure to comply with Component procedures for supervising the activities of a cooperating person;

(3) failure to follow mandatory protocols with regard to the forensic analysis of evidence;

vi) information that may be used to suggest that the Component employee is biased for or against a defendant; and

vii) information that reflects that the Component employee's ability to perceive and recall truth is impaired.

f. **Employee Notification of Disclosure.** Component Officials shall provide constructive notice to employees, on at least an annual basis, regarding Component obligations to provide *Giglio* information to prosecutors and the application of this policy. Such notification can occur via multiple avenues, including training provided to law enforcement officers, annual personnel reminders delivered during performance discussions, or other similar mechanisms.

g. **Treatment of Allegations which are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the Component, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Component Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Component Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the Component witness; or (d) when disclosure is otherwise deemed appropriate by the Component. The Component is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

h. **Prosecuting Office Records.** Pursuant to Department of Justice guidance, whenever potential impeachment information has been disclosed to the court or defense, or when a decision has been made that a Component employee should not testify or serve as an affiant because of potential impeachment information, Department of Justice prosecuting offices may retain the following types of information in a *Giglio* system of records that can be accessed by the identity of the disclosing Component's employee:

- i) the potential impeachment information;
- ii) any written analysis or substantive communications, including legal advice, relating to that disclosure or decision; and
- iii) any related pleadings or court orders.

In all other circumstances, prosecuting offices may keep any written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information in the *Giglio* system of records. The complete description of the potential impeachment

information received from the Component Official may be maintained in the criminal case file, but it may not be maintained in the *Giglio* system of records.

i. **Copies to Components.** When potential impeachment information received from a Component Official has been disclosed to the court or defense, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Component Official that provided the information. The Component shall maintain judicial rulings and related pleadings on information that was disclosed to the court or defense in a manner that allows expeditious access upon the request of the Requesting Official.

j. **Updating Records.** The Department of Justice has required that, before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Component Official to determine the status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.

k. **Continuing Duty to Disclose.** Each Component plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information is required by the Attorney General to promptly notify the relevant Component when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the Component's duty to disclose shall cease.

l. **Employee Transfers and Departures.** When a Component employee is transferred to a new office or district, each Component shall ensure that appropriate procedures are in place to transfer all potential impeachment information to the head of the new, receiving office. Component procedures shall also ensure that a Requesting Official in the new district is advised of any potential impeachment material known to that Component when the employee first begins meaningful work on a case or matter within the prosecuting district. The head of the new, receiving office should also consult with the appropriate Requesting Official prior to assigning the transferred employee to a case where it is likely that the employee may serve as a potential witness or affiant in the matter.³ Additionally, when a Component employee retires or is reassigned to a position in which the employee will neither be an affiant nor witness, each Component shall notify the Requesting Official so that the Requesting Official may remove any associated records from the prosecuting office's system of records in accordance with the DOJ *Giglio* Policy.

³ This consultation requirement applies when a Component supervisor makes an advance decision on assigning a particular employee to an existing case; it does not apply to day-to-day operations in which employees may, by virtue of performing their daily tasks, be required to serve as a potential witness or affiant as a result of those tasks.

m. **Employing Component Plans to Implement Policy.** Within 120 days of the date of this Order, each of the employing Components shall develop a plan to effectuate this policy.