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June 25, 2020

J Alexander

Via OPRA Machine: opra+request-14378-e0585482@requests.opramachine.com

RE: Open Public Records Act (OPRA) Request
Brady & Giglio Directive/Policy

Dear Sir/Madam:

Enclosed please find the Ocean County Prosecutor's Office Directive/Policy pursuant to your request made under the New Jersey Open Public Records Act (OPRA).

The additional request for "any officers identified to date that fall within these guidelines", is denied. The attached policy states: "All potential Giglio information obtained from a law enforcement agency or a law enforcement officer shall be carefully protected and kept confidential within a separate file maintained in the Professional Standards Unit and any disclosure shall be consistent with this Policy." The policy further states:

"Obtaining and disclosing potential Giglio material is a completely confidential process. As such, all documents requested and obtained shall be kept confidential and secured in the Professional Standards Unit and shall not be shared with or disclosed to any person except in a manner consistent with this Policy. Giglio material shall be released to the defense and the court only as provided herein. **Personnel and internal affairs files are confidential materials and will not be released except as pursuant to this Policy.**"

The request is further denied based upon the "Confidentiality" section of the Attorney General's Internal Affairs Policy & Procedures (IAPP) (Dec. 2019). This document provides that: "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information. The contents of an internal investigation case file, including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential." Id. at Section 9.6.1. Attorney General directives have the force of law for law enforcement agencies. North Jersey Media Group, Inc.

v. Township of Lyndhurst, 229 N.J. 541, 565 (2017).

To the extent that the request seeks documents consisting of personnel records, the request is also denied as personnel records are not considered government records and are exempt from public access. See N.J.S.A. 47:1A-10. Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581 (2011); McGee v. Township of East Amwell, 416 N.J. Super. 602 (App. Div. 2010).

In the event of a clarification or appeal, this office reserves the right to raise any other ground for denial not raised in this response. The failure of this office to assert an exception or privilege at this time does not act as a waiver of any grounds for denial.

Should you disagree with our decision, please contact us in writing with your concerns so that we may consider them. If I can be of further assistance, please contact me at 732-929-2027, x3135.

Yours very truly,

Dina R. Khajezadeh

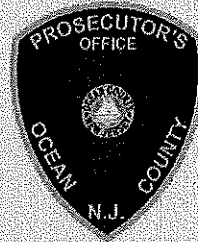
Dina R. Khajezadeh
Assistant Prosecutor

DRK/dp

Enclosures

OCEAN COUNTY PROSECUTOR'S OFFICE

Law Enforcement Directive



SUBJECT: BRADY-GIGLIO POLICY	NUMBER: LED- 2020-008	EFFECTIVE DATE: March 1, 2020
ISSUED BY: Prosecutor Bradley D. Billhimer	APPROVED BY: 	SUPERCEDES DIRECTIVE #:
DISTRIBUTION TO: All Ocean County Law Enforcement/OCPO Personnel		

DETAILS:

POLICY REGARDING DISCLOSURE OF MATERIAL PURSUANT TO BRADY AND GIGLIO

Pursuant to Attorney General Law Enforcement Directive No. 2019-6, the Ocean County Prosecutor's Office is required to implement a written policy to ensure compliance with Brady and Giglio. Pursuant thereto, the Ocean County Prosecutor hereby issues this Policy that is meant to assist Ocean County Prosecutor's Office personnel in complying with those obligations and is binding on all Assistant Ocean County Prosecutors and all law enforcement officers and all law enforcement agencies under the jurisdiction of the Ocean County Prosecutor. This Policy is effective March 1, 2020.

I. THE LAW

In Brady v. Maryland, 373 U.S. 83 (1963), the United States 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.

Thereafter, in Giglio v. United States, 405 U.S. 150 (1972), the United States 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 credibility falls within th[e] general rule [of Brady].

Ten years later, the New Jersey Supreme Court in State v. Carter, 91 N.J. 86 (1982), held:

[E]vidence impeaching testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence.

In addition, prosecutors are bound by the Rules of Professional Conduct and Rule 3.8(d) states:

The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate guilt of the accused or mitigates the offense . . .

Thus, prosecutors are obligated to disclose Brady and Giglio material whether or not defense counsel has requested the material. United States v. Bagley, 473 U.S. 667 (1985).

II. THE "PROSECUTION TEAM"

There may be cases when a law enforcement officer or another employee of a law enforcement agency knows about Brady and/or Giglio material and the prosecutor does not. In Kyles v. Whitley, 514 U.S. 419 (1995), the United States Supreme Court made clear that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Knowledge of potential Brady and/or Giglio material is imputed to the prosecutor, and therefore, it is the prosecutor's responsibility to gather and disclose such relevant material. Giglio, 405 U.S. at 154; State v. Womack, 145 N.J. 576, cert. denied, 519 U.S. 101 (1996); State v. Russo, 333 N.J. Super. 119 (App. Div. 2000).

Citing the Tenth Circuit, the New Jersey Supreme Court has held that, "the 'prosecution' for Brady purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office . . . , as well as law enforcement personnel and other arms of the state involved in the investigative aspects of a particular criminal venture." State v. Nelson, 155 N.J. 487 (1998) (quoting Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 824 (10th Cir. 1995)); State v. Mustaro, 411 N.J. Super. 91 (2009) (finding even if prosecutor was unaware of existence of impeachment material on videotape, arresting officer was aware; consequently, officer's knowledge is imputed to the State).

Therefore, for purposes of Brady and Giglio disclosure issues, the "prosecution team" consists of everyone working on the State's behalf in a case. This includes all federal, state and local government officials, prosecutors, and investigative and law enforcement personnel directly involved in the investigation or prosecution of the criminal case.

III. BRADY AND GIGLIO PROCEDURES

A. Responsibilities Under Brady

It is the assistant prosecutor handling the case who decides, based on his or her professional judgement, what evidence is covered by Brady and must, therefore be disclosed to the defendant. Further, because knowledge of Brady material is imputed to the prosecutor, it is imperative that the prosecutor be provided any Brady material in the prosecution team's possession. As such, all law enforcement officers in Ocean County (and any other individuals who are members of the "prosecution team" in any given case), have an affirmative duty to immediately turn over any and all potential Brady material to the Ocean County Prosecutor's Office. All law enforcement agencies in Ocean County must train their personnel to make sure that every law enforcement officer knows the Brady rule. If a situation arises where it is unclear or unknown if the Brady rule applies, the law enforcement officer shall consult with the Ocean County Prosecutor's Office.

Ultimately, the assistant prosecutor handling the case must decide whether to disclose or not disclose potentially exculpatory evidence. Evidence may be identified by a law enforcement officer as Brady material, and the assistant prosecutor may conclude that the evidence is not exculpatory. Once the assistant prosecutor determines evidence is exculpatory or meets the definition of Brady, it must be turned over to the defense during the normal course of discovery pursuant to Rule 3:13-3. If an assistant prosecutor is uncertain on the decision to disclose, he or she should refer the issue up his or her supervisory chain of command.

B. Examples of Brady Material

The following is a non-exhaustive list, meant to provide guidance only:

1. Evidence linking a State witness to a crime for which the defendant is being charged;
2. Evidence relating to a defendant's theory of third-party guilt;
3. Potentially exculpatory polygraph test of State's witness; and
4. Prior inconsistent and exculpatory statements made by a State's witness.

C. Responsibilities Under Giglio

As with Brady material, there is a constitutional requirement to disclose all Giglio material. "Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal

defendant's guilt or innocence." State v. Carter, 91 N.J. at 111 (citing Giglio v. United States, 405 U.S. 150 (1972)). The New Jersey Supreme Court in Carter went on to hold that "the State's obligation to disclose is not limited to evidence that affirmatively tends to establish a defendant's innocence but would include any information material and favorable to a defendant's cause even where the evidence concerns only the credibility of the State's witness." Ibid. (internal quotations omitted).

D. Civilian Witnesses and Potential Giglio Material

With respect to civilian witnesses (i.e. individuals not employed by a law enforcement agency), law enforcement officers must immediately turn over Giglio material to the Ocean County Prosecutor's Office. All law enforcement agencies in Ocean County must train their personnel to make sure that every law enforcement officer knows the Giglio rule. If a situation arises where it is unclear or unknown if the Giglio rule applies, the law enforcement officer shall consult with the Ocean County Prosecutor's Office.

Ultimately, the assistant prosecutor handling the case must decide whether to disclose or not to disclose potential impeachment evidence pertaining to a civilian witness. If an assistant prosecutor is uncertain on the decision to disclose, he or she should refer the issue up his or her supervisory chain of command. Evidence identified as Giglio material by a law enforcement officer and turned over to the Ocean County Prosecutor's Office will not necessarily be disclosed to the court or the defendant.

E. Examples of Giglio Material with Respect to Civilian Witnesses

In order to determine what evidence is covered by Giglio, it is important to look to ways in which a witness can be impeached. The following is a non-exhaustive list, meant to provide general guidance only:

1. Bias. A witness can be impeached with evidence that he or she has a bias against the defendant or in favor of the State (actual or potential exposure to criminal penalties, leniency/plea agreements, payments, immigration benefits, etc.);
2. Specific Instances of Dishonesty. A witness can be impeached with evidence of a prior act of misconduct involving dishonesty, even if it has not resulted in a criminal charge or conviction. This includes lying and falsifying records. N.J.R.E. 608;
3. Criminal Conviction. N.J.R.E. 609;
4. Prior Inconsistent Statements. N.J.R.E. 613.

F. Examples of Giglio Material with Respect to Law Enforcement Officers

Potential impeachment information relating to law enforcement officers (or other witnesses employed by a law enforcement agency) may include, but is not limited to, the following:

1. A sustained finding that a law enforcement officer has filed a false report or submitted a false certification in any criminal, administrative, employment, financial or insurance matter in his or her professional or personal life;
2. A pending criminal charge or conviction for any criminal, disorderly persons, petty disorderly persons, municipal ordinance or driving while intoxicated matter (noting that any such charges or convictions will be reviewed for disclosure under N.J.R.E. 609);
3. A sustained finding that undermines or contradicts a law enforcement officer's educational achievements or qualifications as an expert witness;
4. A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which concludes that a law enforcement officer was *intentionally* untruthful in a matter, either verbally or in writing;
5. A sustained finding that a law enforcement officer *intentionally* mishandled or destroyed evidence. Generally, law enforcement agencies and law enforcement officers must disclose findings or allegations that relate to substantive violations concerning: (1) the *intentional* failure to follow legal or departmental requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or record communications; (2) the *intentional* failure to comply with agency procedures for supervising the activities of a cooperating person; and (3) the *intentional* failure to follow mandatory protocols with regard to the forensic analysis of evidence;
6. A sustained finding, or judicial finding, that a law enforcement officer is biased against a particular-class of people (For example, based on a person's gender, gender identity, race, or ethnic group);
7. A sustained finding that a law enforcement officer was untruthful or has demonstrated a lack of candor.
8. Any allegation of misconduct bearing upon untruthfulness, bias, or integrity that is the subject of a pending investigation;

9. Information that may be used to suggest that the law enforcement officer is biased for or against a defendant. See, United States v. Abel, 469 U.S. 45 (1984). The Supreme Court has stated, "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be introduced by a witness' like, dislike, or fear of a party, or by the witness' self-interest."; and
10. Any other information or material which may in good faith be deemed to negatively reflect upon a law enforcement officer's credibility as a witness.

Pursuant to Attorney General Law Enforcement Directive No. 2019-6 (Section I.E - Definitions), a **"SUSTAINED FINDING"** refers to any finding where a preponderance of the evidence shows that a law enforcement officer violated any law; regulation; directive; guideline, policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure; rule; or training following the last supervisory review of the incident(s) during the internal affairs review process. Allegations that cannot be substantiated, are not credible, or have resulted in exoneration of a law enforcement officer, including where the previous Giglio finding has either been vacated, dismissed or overturned on the merits in any subsequent action, generally are not considered to be potential impeachment information, subject to the requirements hereof. On the other hand, if the law enforcement officer negotiates a plea or there is an administrative or civil settlement with the employer whereby a Giglio related charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the law enforcement officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law Judge, or the Superior Court.

IV. DUTY TO GATHER POTENTIAL GIGLIO MATERIAL

A. Points of Contact

Agency Giglio Liaison. Each law enforcement agency under the jurisdiction of the Ocean County Prosecutor shall immediately designate an appropriate law enforcement officer to serve as the point of contact concerning the agency's potential Giglio information. The name of the designated Agency Giglio Liaison shall be provided to the OCPO Giglio Liaison.

OCPO Giglio Liaison. The Ocean County Prosecutor's Office shall appoint an individual to serve as the point of contact for law enforcement agencies and assistant prosecutors concerning potential Giglio impeachment information. The OCPO Giglio Liaison shall also be the custodian of all investigative personnel files, internal affairs files, requests, responses, files and other related documentation received in response to Giglio requests. The OCPO Giglio Liaison will maintain all of this confidential Giglio material

pursuant to a mechanism which allows for a case-by-case identification of law enforcement officers with potential Brady and Giglio material. The OCPO Giglio Liaison may delegate duties to other members of the Professional Standards Unit as well as other Ocean County Prosecutor's Office personnel specifically assigned to effectuate this Policy.

The OCPO Giglio Liaison and the Agency Giglio Liaisons should consult periodically about relevant Supreme Court case law, New Jersey case law, court rulings, and practice governing the definition and disclosure of impeachment information.

All potential Giglio information obtained from a law enforcement agency or a law enforcement officer shall be carefully protected and kept confidential within a separate file maintained in the Professional Standards Unit and any disclosure shall be consistent with this Policy.

B. Gathering Potential Giglio Material

1. Law Enforcement Agencies' Duty to Disclose Giglio Material

- a. It is the Ocean County Prosecutor's Office's policy to establish and maintain a confidential system so that assistant prosecutors may obtain and review potential Giglio material related to law enforcement officer witnesses in a manner consistent with the applicable law. All law enforcement agencies and all law enforcement officers in Ocean County shall disclose all potential Giglio material to the Ocean County Prosecutor's Office in a manner consistent with the Policy set forth herein. Each law enforcement agency in Ocean County shall ensure that its law enforcement officers fulfill this obligation to disclose all potential Giglio material.
- b. Upon the effective date of this Policy, the Agency Giglio Liaison for each law enforcement agency under the jurisdiction of the Ocean County Prosecutor shall review their agency's records to determine if any of the law enforcement officers employed by the agency have matters that fall into one of the categories of potential Giglio material set forth above in Section III.F of this Policy.

If the Agency Giglio Liaison's review reveals that a law enforcement officer has potential Giglio material, the Agency Giglio Liaison shall notify the OCPO Giglio Liaison in this regard. If the Agency Giglio Liaison's review reveals that no law enforcement officers within the agency have potential Giglio impeachment material, the Agency Giglio Liaison shall notify the OCPO Giglio Liaison of this finding.

Every law enforcement agency under the jurisdiction of the Ocean County Prosecutor shall complete this review and notification process within 90 days of the effective date of this Policy.

- c. The duty of law enforcement agencies under the jurisdiction of the Ocean County Prosecutor to disclose Giglio material to the Ocean County Prosecutor's Office in a timely manner is an affirmative, continuing duty. After the initial review of records required herein is conducted, every Agency Giglio Liaison in Ocean County must immediately contact the OCPO Giglio Liaison should any law enforcement officer employed by the agency be involved in a matter which falls into one of the categories of potential Giglio material set forth above in Section III.F of this Policy.
- d. All law enforcement officers under the jurisdiction of the Ocean County Prosecutor have an affirmative duty to immediately disclose all potential Giglio impeachment material to the assistant prosecutor handling a matter when that officer may be a testifying witness in the matter. This requirement pertains to anything in the law enforcement officer's entire background (including personal life and any previous law enforcement employment), or any matter currently pending, that falls into one of the categories of potential Giglio material set forth above in Section III.F of this Policy. This requirement is continuous and ongoing.
- e. The Agency Giglio Liaison shall immediately comply with any request made by the OCPO Giglio Liaison for a complete copy of an agency file pertaining to any law enforcement officer regarding potential Giglio issues.
- f. It is also the duty of each Agency Giglio Liaison to disclose any potential Giglio material to the Ocean County Prosecutor's Office in a timely manner any time that a specific request is made by the Ocean County Prosecutor's Office, consistent with the procedure set forth below in Section IV.B.2 of this Policy.

2. Specific Requests for Giglio Material by an Assistant Prosecutor

- a. To make a specific request for Giglio material, the assistant prosecutor assigned to the case must send a confidential, internal email to the OCPO Giglio Liaison. The email must contain the Promis/Gavel case number, the name of the defendant(s) and the name and agency for each law enforcement officer.
- b. With respect to each law enforcement officer contained in the email from the assistant prosecutor, the OCPO Giglio Liaison shall:
 - Search relevant files within the Professional Standards Unit to determine if any law enforcement officers contained in the email have any matter which falls into one of the categories of potential Giglio material set forth above in Section III. F of this Policy.

- Provide the appropriate Agency Giglio Liaison(s) with the name of each law enforcement officer contained in the email requesting that he or she review their agency's records to determine if any of the law enforcement officers have matters which falls into one of the categories of potential Giglio material set forth above in Section III.F of this Policy.
 - With respect to any law enforcement officer contained in the email from the assistant prosecutor who works for an agency outside the jurisdiction of the Ocean County Prosecutor, make contact with the employing agency and request that they search their internal affairs/personnel records to determine if the officer(s) has any matter which falls into one of the categories of potential Giglio material set forth above in Section III. F of this Policy.
- c. With respect to a specific request for Giglio material made by the OCPO Giglio Liaison, the Agency Giglio Liaison shall:
- Review their agency's records to determine if any of the law enforcement officers named in the request have matters that fall into one of the categories of potential Giglio material set forth above in section III.F of this Policy.
 - Notify the OCPO Giglio Liaison of the results of the review within 10 days of receipt of the request.
- d. The OCPO Giglio Liaison shall, in a confidential manner, make available to the assistant prosecutor any positive results from the Giglio review that was conducted.
- e. If the assistant prosecutor determines that there is a matter pertaining to a law enforcement officer that warrants further Giglio review, he or she shall have the OCPO Giglio Liaison contact the Agency Giglio Liaison to obtain additional information regarding the Giglio issue. The Agency Giglio Liaison shall immediately comply with any such request and provide any additional information, including a copy of the entire agency file.
- f. Any files or documents containing potential Giglio material shall be confidentially maintained in the Professional Standards Unit unless and until it is determined that disclosure of material in the file is warranted.

V. DISCLOSURE OF POTENTIAL Giglio INFORMATION

A. Process

The assistant prosecutor assigned to the case must fully review any potential Giglio material and decide whether it should be disclosed. This review shall be done in accordance with all relevant case law and court rules. If an assistant prosecutor is uncertain on the decision to disclose, he or she should refer the issue up his or her supervisory chain of command. **No disclosure of Giglio material shall occur until final approval is received from the First Assistant Prosecutor or his or her designee(s).**

If it is determined that disclosure of Giglio impeachment information should occur, there are two manners in which this can occur: (1) disclosure directly to defense counsel; or (2) disclosure to the court for an *in camera*, *ex parte*, judicial review of the potential Giglio information (i.e. a question exists whether the material must be turned over to the defense).

If either of the two scenarios stated above are to occur, the OCPO Giglio Liaison shall notify the Agency Giglio Liaison before disclosure occurs. The Agency Giglio Liaison will have the opportunity to notify the Chief of Police and any affected parties at the law enforcement agency so that they can notify the OCPO Giglio Liaison if they wish to be heard on the matter. There may be some cases where the law enforcement officer is unaware that there is a pending investigation or sustained finding of alleged misconduct. In those cases, all involved must exercise caution when discussing the matter.

Assistant prosecutors must be aware that disclosure of Giglio material does **not** mean that said information is admissible impeachment evidence at trial or a testimonial hearing. The New Jersey Rules of Evidence place limits on what evidence is admissible in court and, specifically, what evidence may be used to impeach a witness' credibility. The assistant prosecutor handling the case must determine on a case-by-case basis when it is appropriate to challenge the admissibility of disclosed Giglio material. If the assistant prosecutor handling the case is uncertain on this issue, he or she should refer the issue up his or her supervisory chain of command.

B. Redactions and Protective Orders

For any disclosures made, whether to defense counsel directly, or after a court determines that disclosure is warranted, the assistant prosecutor handling the case shall seek redactions to protect the privacy interests of third-parties and investigative personnel. The assistant prosecutor handling the case also shall seek protective orders to limit the use and further dissemination of the material.

C. Copies of Court Filings and Other Information

At the earliest time possible after a disclosure to the defense or after a determination has been made by the court to disclose, the assistant prosecutor handling the matter shall notify the OCPO Giglio Liaison and provide the OCPO Giglio Liaison with any pleadings or documents that are filed with the court regarding a law enforcement officer witness' potential impeachment information. The OCPO Giglio Liaison shall provide a copy of any pleadings or documents to the Agency Giglio Liaison and the law enforcement officer witness. If this information is not captured in any documents or pleadings filed with the court, the assistant prosecutor shall send a letter informing the law enforcement officer witness and the Agency Giglio Liaison that disclosure to the defense was made and what information was disclosed. The letter shall also inform the law enforcement officer witness and the Agency Giglio Liaison whether a decision was made by the court as to the admissibility of such information at trial or testimonial hearing. If a decision has not been made by the court at the time of the initial letter, a supplemental letter shall be sent informing the law enforcement officer witness and the Agency Giglio Liaison of the admissibility of the material.

If the assistant prosecutor handling the matter or a supervisory assistant prosecutor makes the decision not to use the law enforcement officer because of Giglio concerns, or if the Giglio material substantially affected the case in any way, the OCPO Giglio Liaison shall notify the Agency Giglio Liaison of that information.

VI. CONFIDENTIALITY

Obtaining and disclosing potential Giglio material is a completely confidential process. As such, all documents requested and obtained shall be kept confidential and secured in the Professional Standards Unit and shall not be shared with or disclosed to any person except in a manner consistent with this Policy. Giglio material shall be released to the defense and the court only as provided herein. **Personnel and internal affairs files are confidential materials and will not be released except as pursuant to this Policy.**