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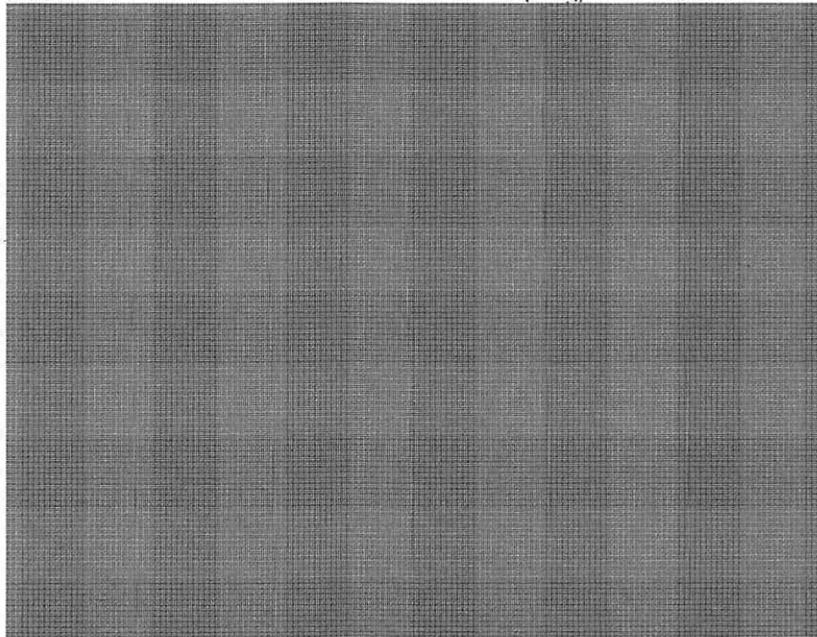
From: Machen Jr., Ronald C. (USADO)
Sent: Tuesday, July 26, 2011 3:09 PM
To: USADO-All Employees
Subject: Revised Office Policy on Law Disclosures

Dear Colleagues: Please take a moment to review the attached memo, which details the practices our Office should follow when dealing with allegations of law enforcement officer/agent misconduct. This memo replaces the "1996 Holder memo," which was the previous guidance provided by our Office on this subject. If you have any questions about this policy, please do not hesitate to consult your supervisor.

Best, Ron



Allegations of
Misconduct Inv...



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Memorandum

Ronald C. Machen Jr.
United States Attorney
District of Columbia

Subject:

Date:

Allegations of Misconduct Involving Members of Law
Enforcement Agencies¹

August 20, 2014

To:

From:

All Employees

Ronald C. Machen Jr.
United States Attorney

On May 22, 1996, then-U.S. Attorney Eric H. Holder, Jr. issued a memorandum (the "Holder memo") setting forth the practices we should follow when we receive allegations of misconduct involving members of law enforcement agencies. The Holder memo has served our Office well over the past 15 years, but certain policies and procedures set forth in the memo are no longer applicable.² Therefore, we are issuing this memorandum to update the practices we should follow when we receive allegations of misconduct involving members of law enforcement agencies.

I. Overview

The Holder memo created a committee, known as the Lewis Committee, to address allegations of misconduct involving members of law enforcement agencies. This committee currently consists of the chiefs of the litigating divisions in our Office and/or their designees, as

¹ This memorandum contains confidential and law enforcement sensitive material and may not be distributed outside the United States Attorney's Office for the District of Columbia without permission. This memorandum does not purport to contain complete policies and procedures utilized when we receive allegations of misconduct involving members of law enforcement agencies, as each case is subject to individualized review for appropriate discovery and disclosure decisions. The policies and procedures articulated in this memorandum may be changed at any time without prior notice. No part of this memorandum creates any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal. See United States v. Caseres, 440 U.S. 741 (1979). Nor does any part of this memorandum place any limitations whatsoever on the otherwise lawful exercise of the prerogatives of the United States Attorney's Office for the District of Columbia.

² For example, the Holder memo assigned record-keeping functions to the Chief of the Grand Jury Section, a section that no longer exists in our Office.

well as additional supervisory and line AUSAs, and Brad Weinsheimer presently the Chief of the Superior Court Division serves as the chair of the committee (that function has rotated over the years). The committee collects allegations of misconduct involving law enforcement officers and analyzes these allegations to determine whether the allegations should be included in our Office's Lewis database. Information contained in the Lewis database is for the most part presumptively disclosable, with the question of admissibility to be argued before the court on a case-by-case basis. AUSAs wishing not to disclose information contained in the Lewis database, or to make an ex parte proffer to the court, must obtain supervisory approval before doing so.

The responsibilities and operation of the Lewis Committee, and our pre-trial and post-conviction disclosure obligations, are set forth below in greater detail.

II. The Lewis Committee and Lewis Checks

A. Composition and Responsibilities of the Committee

In 1996, the Holder memo established the Lewis Committee, which is charged with collecting, analyzing, and determining how best to handle allegations of police misconduct or veracity issues as they relate to disclosure to defendants in criminal cases. To standardize the membership of the Lewis Committee, we have decided that it should consist of the chiefs of each division and/or their designees, our Criminal Discovery Coordinator, and one of our civil rights prosecutors. The Lewis Committee will report to the Principal Assistant U.S. Attorney. Given that the overwhelming majority of disclosure issues relating to potential police misconduct and veracity issues arise in cases handled by the Superior Court Division, we have determined that the Lewis Committee should be chaired by the Chief of the Superior Court Division.

The responsibilities of the Lewis Committee include the following:

- collecting allegations of police misconduct or allegations that bear on veracity and general credibility of officers;
- analyzing these allegations and determining the extent to which they are disclosable;
- maintaining a database of disclosable information for the Metropolitan Police Department ("MPD"), Capitol Police, Park Police, and Secret Service, or for any other law enforcement agencies not included in the Department of Justice's Giglio policy; and
- reviewing on a semi-annual basis entries in the database to ensure that the information contained in the database remains current and accurate. -- the chair, with an admin person and the civil rights person. Much of the entries will be self-explanatory. The administrative investigation notations are going to be a problem, though

B. Operation of the Committee

The Lewis Committee will convene at least twice each year to evaluate new information and to make assessments about possible disclosure obligations as to particular officers. As has been the practice, when the Lewis Committee determines that disclosure of information potentially is required, the disclosable information will be included in the Lewis database. The Lewis Committee also may include in the Lewis database information that, while not disclosable, would be helpful to AUSAs in investigation and prosecution of cases (such as to note the retirement of an officer or the existence of information that, while not disclosable, may be known to the defense and therefore may be subject to a pretrial motion to exclude).

In general, all known MPD officers are included in the Lewis database. The database contains a field advising AUSAs that there is "no record found," when we are unaware of any disclosable information, or to "see supervisor," when there exists potentially disclosable information. When there is potentially disclosable information concerning an officer, the officer is flagged as "see supervisor," with the relevant disclosable information listed in the comments field of the database. While AUSAs have limited access to the database such that they only know that there is potentially disclosable information, supervisors and the Lewis Committee have full access such that they may see the potentially disclosable information contained in the database. As noted below, AUSAs need to consult with supervisors to learn the extent of the potentially disclosable information and to decide, based upon the facts and circumstances of a particular case, how to handle disclosure issues.

The Lewis Committee will flag as "see supervisor" an officer about whom the Committee is aware of information in the following categories.

- Any prior convictions, which never will be removed from the database. The Lewis Committee shall ensure that criminal records will be run for those officers in the database at least every 60 days from the time of any previous Lewis request for the officer [how will this be done?].
- Any pending criminal matter or prior arrest in any jurisdiction. When an officer is charged with a crime and the matter later is dismissed, the officer should remain flagged as "see supervisor" until the statute of limitations has run for the offense or the Committee receives information demonstrating that there is no reasonable possibility that the charge will be re-brought or new charges filed within the limitations period.
- Pending criminal and administrative investigations relating to an officer. Absent veracity issues, an officer need not continue to be flagged as "see supervisor" if the matter is resolved in the officer's favor.
- Pending administrative investigations relating to an officer. Absent veracity issues, an officer need not continue to be flagged as "see supervisor": if the matter is resolved in the officer's favor.

- Any information that reasonably may be used in any case to cast serious doubt upon the general credibility of the officer. Examples of such information include adverse administrative findings relating to veracity, adverse judicial findings relating to veracity, and prior determinations by our Office or another prosecutor's office that an officer intentionally provided false information. If the Lewis Committee later determines that the information no longer reasonably may be used in any case to cast serious doubt upon the credibility of the officer, then the "see supervisor" flag may be removed for the officer.

The Lewis database will be modified to contain an additional field so that each of these categories of disclosable information can be identified. For example, a separate "disclosure type" field will be created, and all officers with prior convictions will be marked with a "C" in this field. That way, a search of the database could be run such that we can know at a glance the universe of officers with prior convictions. This will assist in the regular review of the database to be sure it contains accurate information.

When the Lewis Committee receives potentially disclosable information, the Lewis Committee Chair may conclude that the information obviously should, or should not, be included as "see supervisor" in the Lewis database. If there is any serious question about how to handle information, then the Lewis Committee will meet to resolve the issue. The Lewis Committee may conduct whatever investigation it deems appropriate in making its determination and shall decide the issue upon agreement of a majority of Lewis Committee members voting. Once included, if the Lewis Committee later determines that the information no longer is disclosable, then the entry for "see supervisor" should be returned to "no record found." Likewise, in obvious cases, the Lewis Committee Chair alone may make this determination, such as when a routine USAO excessive force investigation concludes in the officer's favor and there remain no veracity issues. The information contained in the comment field concerning the potentially disclosable information should remain, however, and the comment field should note the dates upon which the information first was entered and when the determination was made that the information no longer is disclosable.

These guidelines notwithstanding, a determination to include, or exclude, information in the Lewis database or to flag, or not flag, an officer as "see supervisor" may be made by the Principal Assistant U.S. Attorney in consultation with the Lewis Committee Chair. In the case of a sensitive covert operation of which the targets are unaware, for example, the Principal Assistant U.S. Attorney may conclude that the most prudent course is not to flag a target officer as "see supervisor," but instead to take other steps to ensure compliance with our disclosure obligations.

Because information in the Lewis database is highly dynamic, the Lewis Committee will not generally notify the MPD when officers are flagged in the database as "see supervisor," unless the Committee also determines that, because of the impact of the potentially disclosable information, there exists a likelihood of significant impeachment relating to this information.

such that it would be difficult for the government to effectively utilize the officer as a witness at trial or pretrial hearings. If the Lewis Committee concludes that there exists a likelihood of significant impeachment of an officer relating to disclosable information such that it would be difficult for the government to effectively utilize the officer as a witness at trial or pretrial hearings, that determination also should be noted in the Lewis database. Consistent with the limitations of the Privacy Act, the Lewis Committee may nonetheless discuss potentially disclosable information with the MPD and subject officers in any case.

If an officer or the MPD wishes to contest the Lewis Committee's determination that potentially disclosable information exists with respect to an officer, the Lewis Committee may conduct informal meetings with the officer or MPD officials, consistent with the Privacy Act. If the matter cannot then be resolved, the officer or the MPD may make a written request of the Lewis Committee to reconsider its determination, providing the detailed basis for reconsideration. If the written submission creates serious doubt as to the Lewis Committee's prior determination, then it may decide to have one or more of its members meet with the officers, MPD officials, or other witnesses and may conduct further investigation to resolve the matter.

Although there is a presumption that impeachment information contained in the Lewis database should be disclosed, this does not mean that such information must be disclosed in a particular case. The Lewis Committee will apply its standards liberally with an eye toward including all information that reasonably would need to be disclosed in any case. Whether information is disclosable in any particular case is a matter that is left to AUSAs in close consultation with supervisors, based upon the facts and circumstances of the case. In close cases, AUSAs and supervisors are strongly encouraged to consult with their division chief, as well as with the Appellate and Special Proceedings Chiefs, as appropriate, when making disclosure determinations.

C. Conducting Lewis Checks

In order to fulfill our disclosure obligations, it is imperative that AUSAs conduct Lewis checks prior to calling officers at hearings or at trial, and to the extent practicable, prior to approving arrest warrants. For Department of Justice law enforcement officers and witnesses, AUSAs instead should comply with the Office's Giglio procedures for learning about the existence of possible impeachment material ([Click here for the Office Giglio and Lewis policy](#)). Because the information contained in the Lewis database is dynamic, you should conduct Lewis checks approximately one week prior to a hearing or trial, although conducting additional Lewis checks earlier will assist you in identifying and resolving problems created by Lewis issues. As noted above, when conducting a Lewis check, AUSAs only learn whether there is "no record found," in which case the system does not contain potentially disclosable information, or whether the officer is flagged as "see supervisor." In that instance, you must immediately consult with a supervisor to learn the potentially disclosable information and to decide how to handle the information in the context of your case.

To reiterate, although there is a presumption that impeachment information in the Lewis database should be disclosed, that determination needs to be made on a case-by-case basis applying the applicable law to the facts of your case. Furthermore, the subject officer will not necessarily know that s/he currently is flagged as "see supervisor." It is a common occurrence, for example, that an officer is flagged for an excessive force investigation in which we are participating, yet the investigation is promptly resolved in the officer's favor. We often will not inform the officer about these circumstances either to protect the integrity of the investigation or because we do not want to create a bias and motive to curry favor with the government when none otherwise might exist. For the same reason, under no circumstance should an AUSA tell an officer that he or she is flagged as "see supervisor" on the Lewis list or that the officer otherwise is "on" the Lewis list, without first obtaining supervisory approval before making such a disclosure. To the extent an officer has a question concerning his or her Lewis status, you should refer the officer to a supervisor.

Having conducted a Lewis check, you are not yet finished with your due diligence in fulfilling your disclosure obligations. In addition, you must utilize the Giglio form to ask the officer additional questions designed to determine whether there exists additional disclosable information. ([Click here for the Giglio Form](#)). To the extent you receive any affirmative response to the Giglio questions, you should consult with a supervisor, and in turn with your division chief and the Lewis Committee Chair to determine how to handle the information. You should consult similarly with supervisors should you learn from an officer that he or she is on "no contact" status or otherwise is under investigation by a law enforcement agency for any reason, including purely administrative reasons. Supervisors will consult with the Lewis Committee Chair to ensure that this information is included in the Lewis database as necessary.

At any time, should you receive or hear of any information that you believe raises disclosure issues as to the veracity or general credibility of an officer, you should report that immediately to your supervisor and division chief, who will consult with the Lewis Committee Chair as necessary. Likewise, any allegations of false statements by an officer or any adverse credibility findings by judicial officers immediately should be reported to your supervisor, division chief, and the Lewis Committee Chair.

III. Handling of Cases Involving Officers Implicated in Misconduct

A. General Policies

1. In situations involving strong evidence of particularly grave misconduct, members of the Lewis Committee, and other appropriate supervisors, should consult to determine whether immediate steps need to be taken office-wide with respect to cases involving the officer in question.

2. In other situations, the question of how to handle a case involving an officer implicated in criminal misconduct will be determined on a case-by-case basis by line attorneys consulting with their supervisors. In some cases, it will be appropriate to simply avoid calling the officer in question. In others, dismissal of the case may be appropriate. Sometimes we may choose to disclose information about the incident at issue,³ but to litigate questions relating to the admissibility of evidence about that incident.⁴ Finally, in some cases we may decide that it is in the public interest to call the officer in question even though evidence of the officer's criminal misconduct properly will be admissible at trial. In general, however, the decision to call an officer as to whom information of this kind exists should not be made without careful thought and consultation with a supervisor. In addition, line attorneys obviously should consult with their supervisors before dismissing a case.

B. Pretrial disclosure⁵ and admissibility at trial

1. Prior convictions. We will disclose all prior convictions of law enforcement witnesses that may be used to impeach under Fed. R. Evid. 609 and D.C. Code § 14-305.

³ If we are planning to call an officer as to whom there is impeachment information in the Lewis database, the general assumption should be that we will disclose the information. There may be unusual cases, however, where disclosure is neither required nor appropriate. Or there may be cases in which disclosure to the judge *in camera* would be appropriate.

⁴ The principles governing the admissibility of such evidence are discussed briefly *infra*.

⁵ With regard to the disclosure of Lewis information before a plea proceeding, the Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." United States v. Ruiz, 536 U.S. 622, 633 (2002). This Office's criminal discovery policies govern the timing for disclosure of potentially exculpatory impeachment information, and AUSAs should follow those policies and consult with a supervisor when determining the need to disclose such information prior to a plea. AUSAs also should disclose other known exculpatory information before entering into plea agreements. AUSAs should consult with a supervisor in cases where there may be reasons that the information should not be disclosed.

2. Pending criminal cases or investigations. With the possible exception of highly sensitive or covert investigations,⁶ we will make a disclosure as to all such pending cases or investigations, without regard to the jurisdiction in which they arise or the prosecuting entity conducting the investigation.⁷ With respect to admissibility, the fact that an officer is under criminal investigation, if known by the officer, likely will be admissible to impeach the involved officer on a bias theory. This is the case even where the investigation is not being conducted by this Office or another DOJ component, as, for example, when the investigation is being conducted administratively by MPD, or is being conducted in another jurisdiction. Leaving aside bias, evidence of the underlying criminal act, when no conviction has been obtained, would be admissible only if (a) there was sufficient reason to believe the underlying criminal act in fact occurred, and (b) the underlying act went directly to veracity or to some other issue in the case. Acts relating to veracity might include perjury or false statements; an example of a criminal act arguably admissible as relevant to a specific issue in the case might be an instance of excessive force in a case where the defense version of events involved an allegation of such conduct. Obviously, the admissibility of evidence on such a theory would have to be litigated on a case-by-case basis. When no such basis for admissibility exists, and we reasonably can conclude that the officer is unaware of the pendency of an investigation (such as is the case in many routine excessive force investigations, for example), we should argue to the court that there is no basis for admissibility as there is no foundation for bias cross examination (the officer being unaware of the investigation). In these circumstances, we should disclose to the court ex parte the information and seek a ruling that it is not disclosable. To the extent the court will not permit an ex parte determination, we should seek a protective order limiting release of the information that we have provided for the court's determination.

3. Past criminal acts as to which there is no pending investigation or case, and which did not result in a conviction. We will disclose in all cases in which (a) there was an arrest, indictment, other finding of probable cause or its equivalent, or determination by this Office that there was reason to believe that misconduct relating to veracity occurred; and (b) a colorable argument can be made that evidence of the past criminal act would be admissible as going directly to veracity or some other issue in the case. Here, too, the ultimate admissibility of evidence on such a theory would have to be litigated on a case-by-case basis.

4. Pending administrative investigations. With respect to administrative investigations of which we are made aware, we will make disclosures when an officer knows of

⁶ The Principal Assistant United States Attorney will make a determination about the proper way to handle cases in such circumstances.

⁷ Questions obviously will arise with respect to the degree of detail to be disclosed, as well as the timing of disclosure. These issues must be resolved on a case-by-case basis by line attorneys acting in consultation with their supervisors, and in accordance with Office policy.

In making disclosures which might involve grand jury materials, attorneys should be sensitive to the requirements of Super. Ct. Crim. R. 6(e) and Fed. R. Crim. P. 6(e).

or suspects the investigation or when we are unable to reasonably determine whether the officer knows of or suspects the investigation. This information may be likely admissible as well on a bias theory. (Cite See Martinez v. United States, 982 A.2d 789 (D.C. 2009)). When we reasonably can conclude that the officer is unaware of the pendency of an investigation, we should argue to the court that there is no basis for admissibility as there is no foundation for bias cross examination (the officer being unaware of the investigation). In these circumstances, we should disclose to the court ex parte the information and seek a ruling that it is not disclosable. To the extent the court will not permit an ex parte determination, we should seek a protective order limiting release of the information that we have provided for the court's determination.

C. Post-conviction disclosure

1. Substantive issues. Where a defendant has been convicted, whether by guilty plea or trial verdict, we need to disclose information that a law enforcement officer has been involved in misconduct if: (a) the prosecution team was in possession of the information prior to the guilty plea or verdict, and should have disclosed it pursuant to Brady v. Maryland, 373 U.S. 83 (1963), but failed to do so; (b) the information at issue creates a reasonable probability that a motion for a new trial or to withdraw a guilty plea would be granted under the applicable standards; or (c) the information raises a substantial question about the innocence of the defendant, despite the plea or verdict.⁸ In most cases, disclosures will be made on a case-by-case basis, but in some cases, such as those involving serious misconduct by a large group of officers, or by a particular officer who was involved in a large number of cases, it may be more efficient to adopt a blanket approach to disclosure.

2. Procedural issues. If information about police misconduct is arguably of such a nature as to require post-conviction disclosure, the matter should be referred to the Chief of the Special Proceedings Division, who will consult with the relevant division chiefs before making a determination whether post-conviction disclosure is required, and, if so, how such disclosure should be accomplished. If such a disclosure is made, and a motion to withdraw the plea or for a new trial is filed, the Office will decide on a case-by-case basis what position to take with respect to the motion. In all such cases, whether the motion is filed prior to sentencing or after sentencing, the AUSA handling the matter should consult with the Chief of the Special Proceedings Division, unless the matter also is pending appeal, in which case the AUSA handling the matter also should consult with the Chief of the Appellate Division.

⁸ It should be noted that the Holder memo required disclosure if we had "good reason to believe that the defendant is innocent notwithstanding his plea of guilty." Holder Memo at 6. We have modified this language, in part, to align ourselves with a new Rule of Professional Conduct that has been proposed by the D.C. Bar's Rules of Professional Conduct Review Committee. This proposal would require all attorneys, not just prosecutors, to disclose information that raises a substantial question about the innocence of a convicted person, whether the defendant pled guilty or was convicted at trial.

Memorandum

Ronald C. Machen Jr.
United States Attorney
District of Columbia

Subject:

Date:

Allegations of Misconduct Involving Members of Law
Enforcement Agencies¹

~~November 4, 2016~~

To:

From:

All Employees

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United States Attorney

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Although there is a presumption that impeachment information contained in the Lewis database should be disclosed, this does not mean that such information must be disclosed in a particular case. The Lewis Committee will apply its standards liberally with an eye toward including all information that reasonably would need to be disclosed in any case. Whether information is disclosable in any particular case is a matter that is left to AUSAs in close consultation with supervisors, based upon the facts and circumstances of the case. In close cases, AUSAs and supervisors are strongly encouraged to consult with their division chief, as well as with the Appellate and Special Proceedings Chiefs, as appropriate, when making disclosure determinations.

C. Conducting Lewis Checks

In order to fulfill our disclosure obligations, it is imperative that AUSAs conduct Lewis checks prior to calling officers at hearings or at trial, and to the extent practicable, prior to approving arrest warrants. For Department of Justice law enforcement officers and witnesses, AUSAs instead should comply with the Office's Giglio procedures for learning about the existence of possible impeachment material ([Click here for the Office Giglio and Lewis policy](#)). Because the information contained in the Lewis database is dynamic, you should conduct Lewis checks approximately one week prior to a hearing or trial, although conducting additional Lewis checks earlier will assist you in identifying and resolving problems created by Lewis issues. As noted above, when conducting a Lewis check, AUSAs only learn whether there is "no record found," in which case the system does not contain potentially disclosable information, or whether the officer is flagged as "see supervisor." In that instance, you must immediately consult with a supervisor to learn the potentially disclosable information and to decide how to handle the information in the context of your case.

To reiterate, although there is a presumption that impeachment information in the Lewis database should be disclosed, that determination needs to be made on a case-by-case basis applying the applicable law to the facts of your case. Furthermore, the subject officer will not necessarily know that s/he currently is flagged as "see supervisor." It is a common occurrence, for example, that an officer is flagged for an excessive force investigation in which we are participating, yet the investigation is promptly resolved in the officer's favor. We often will not

inform the officer about these circumstances either to protect the integrity of the investigation or because we do not want to create a bias and motive to curry favor with the government when none otherwise might exist. For the same reason, under no circumstance should an AUSA tell an officer that he or she is flagged as "see supervisor" on the Lewis list or that the officer otherwise is "on" the Lewis list, without first obtaining supervisory approval before making such a disclosure. To the extent an officer has a question concerning his or her Lewis status, you should refer the officer to a supervisor.

Having conducted a Lewis check, you are not yet finished with your due diligence in fulfilling your disclosure obligations. In addition, you must utilize the Giglio form to ask the officer additional questions designed to determine whether there exists additional disclosable information. ([Click here for the Giglio Form](#)). To the extent you receive any affirmative response to the Giglio questions, you should consult with a supervisor, and in turn with your division chief and the Lewis Committee Chair to determine how to handle the information. You should consult similarly with supervisors should you learn from an officer that he or she is on "no contact" status or otherwise is under investigation by a law enforcement agency for any reason, including purely administrative reasons. Supervisors will consult with the Lewis Committee Chair to ensure that this information is included in the Lewis database as necessary.

At any time, should you receive or hear of any information that you believe raises disclosure issues as to the veracity or general credibility of an officer, you should report that immediately to your supervisor and division chief, who will consult with the Lewis Committee Chair as necessary. Likewise, any allegations of false statements by an officer or any adverse credibility findings by judicial officers immediately should be reported to your supervisor, division chief, and the Lewis Committee Chair.

III. Handling of Cases Involving Officers Implicated in Misconduct

A. General Policies

1. In situations involving strong evidence of particularly grave misconduct, members of the Lewis Committee, and other appropriate supervisors, should consult to determine whether immediate steps need to be taken office-wide with respect to cases involving the officer in question.

2. In other situations, the question of how to handle a case involving an officer implicated in criminal misconduct will be determined on a case-by-case basis by line attorneys consulting with their supervisors. In some cases, it will be appropriate to simply avoid calling the officer in question. In others, dismissal of the case may be appropriate. Sometimes we may choose to disclose information about the incident at issue,³ but to litigate questions relating to the

³ If we are planning to call an officer as to whom there is impeachment information in the Lewis database, the general assumption should be that we will disclose the information. There may be unusual cases, however, where disclosure is neither required nor appropriate. Or there may be cases in which disclosure to the judge *in camera* would be appropriate.

admissibility of evidence about that incident.⁴ Finally, in some cases we may decide that it is in the public interest to call the officer in question even though evidence of the officer's criminal misconduct properly will be admissible at trial. In general, however, the decision to call an officer as to whom information of this kind exists should not be made without careful thought and consultation with a supervisor. In addition, line attorneys obviously should consult with their supervisors before dismissing a case.

B. Pretrial disclosure⁵ and admissibility at trial

1. Prior convictions. We will disclose all prior convictions of law enforcement witnesses that may be used to impeach under Fed. R. Evid. 609 and D.C. Code § 14-305.

⁴ The principles governing the admissibility of such evidence are discussed briefly *infra*.

⁵ With regard to the disclosure of Lewis information before a plea proceeding, the Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." United States v. Ruiz, 536 U.S. 622, 633 (2002). This Office's criminal discovery policies govern the timing for disclosure of potentially exculpatory impeachment information, and AUSAs should follow those policies and consult with a supervisor when determining the need to disclose such information prior to a plea. AUSAs also should disclose other known exculpatory information before entering into plea agreements. AUSAs should consult with a supervisor in cases where there may be reasons that the information should not be disclosed.

2. Pending criminal cases or investigations. With the possible exception of highly sensitive or covert investigations,⁶ we will make a disclosure as to all such pending cases or investigations, without regard to the jurisdiction in which they arise or the prosecuting entity conducting the investigation.⁷ With respect to admissibility, the fact that an officer is under criminal investigation, if known by the officer, likely will be admissible to impeach the involved officer on a bias theory. This is the case even where the investigation is not being conducted by this Office or another DOJ component, as, for example, when the investigation is being conducted administratively by MPD, or is being conducted in another jurisdiction. Leaving aside bias, evidence of the underlying criminal act, when no conviction has been obtained, would be admissible only if (a) there was sufficient reason to believe the underlying criminal act in fact occurred, and (b) the underlying act went directly to veracity or to some other issue in the case. Acts relating to veracity might include perjury or false statements; an example of a criminal act arguably admissible as relevant to a specific issue in the case might be an instance of excessive force in a case where the defense version of events involved an allegation of such conduct. Obviously, the admissibility of evidence on such a theory would have to be litigated on a case-by-case basis. When no such basis for admissibility exists, and we reasonably can conclude that the officer is unaware of the pendency of an investigation (such as is the case in many routine excessive force investigations, for example), we should argue to the court that there is no basis for admissibility as there is no foundation for bias cross examination (the officer being unaware of the investigation). In these circumstances, we should disclose to the court ex parte the information and seek a ruling that it is not disclosable. To the extent the court will not permit an ex parte determination, we should seek a protective order limiting release of the information that we have provided for the court's determination.

3. Past criminal acts as to which there is no pending investigation or case, and which did not result in a conviction. We will disclose in all cases in which (a) there was an arrest, indictment, other finding of probable cause or its equivalent, or determination by this Office that there was reason to believe that misconduct relating to veracity occurred; and (b) a colorable argument can be made that evidence of the past criminal act would be admissible as going directly to veracity or some other issue in the case. Here, too, the ultimate admissibility of evidence on such a theory would have to be litigated on a case-by-case basis.

4. Pending administrative investigations. With respect to administrative investigations of which we are made aware, we will make disclosures when an officer knows of or suspects the investigation or when we are unable to reasonably determine whether the officer

⁶ The Principal Assistant United States Attorney will make a determination about the proper way to handle cases in such circumstances.

⁷ Questions obviously will arise with respect to the degree of detail to be disclosed, as well as the timing of disclosure. These issues must be resolved on a case-by-case basis by line attorneys acting in consultation with their supervisors, and in accordance with Office policy. In making disclosures which might involve grand jury materials, attorneys should be sensitive to the requirements of Super. Ct. Crim. R. 6(e) and Fed. R. Crim. P. 6(e).

knows of or suspects the investigation. This information may be likely admissible as well on a bias theory. (Cite See Martinez v. United States, 982 A.2d 789 (D.C. 2009)). When we reasonably can conclude that the officer is unaware of the pendency of an investigation, we should argue to the court that there is no basis for admissibility as there is no foundation for bias cross examination (the officer being unaware of the investigation). In these circumstances, we should disclose to the court ex parte the information and seek a ruling that it is not disclosable. To the extent the court will not permit an ex parte determination, we should seek a protective order limiting release of the information that we have provided for the court's determination.

C. Post-conviction disclosure

1. Substantive issues. Where a defendant has been convicted, whether by guilty plea or trial verdict, we need to disclose information that a law enforcement officer has been involved in misconduct if: (a) the prosecution team was in possession of the information prior to the guilty plea or verdict, and should have disclosed it pursuant to Brady v. Maryland, 373 U.S. 83 (1963), but failed to do so; (b) the information at issue creates a reasonable probability that a motion for a new trial or to withdraw a guilty plea would be granted under the applicable standards; or (c) the information raises a substantial question about the innocence of the defendant, despite the plea or verdict.⁸ In most cases, disclosures will be made on a case-by-case basis, but in some cases, such as those involving serious misconduct by a large group of officers, or by a particular officer who was involved in a large number of cases, it may be more efficient to adopt a blanket approach to disclosure.

2. Procedural issues. If information about police misconduct is arguably of such a nature as to require post-conviction disclosure, the matter should be referred to the Chief of the Special Proceedings Division, who will consult with the relevant division chiefs before making a determination whether post-conviction disclosure is required, and, if so, how such disclosure should be accomplished. If such a disclosure is made, and a motion to withdraw the plea or for a new trial is filed, the Office will decide on a case-by-case basis what position to take with respect to the motion. In all such cases, whether the motion is filed prior to sentencing or after sentencing, the AUSA handling the matter should consult with the Chief of the Special Proceedings Division, unless the matter also is pending appeal, in which case the AUSA handling the matter also should consult with the Chief of the Appellate Division.

⁸ It should be noted that the Holder memo required disclosure if we had "good reason to believe that the defendant is innocent notwithstanding his plea of guilty." Holder Memo at 6. We have modified this language, in part, to align ourselves with a new Rule of Professional Conduct that has been proposed by the D.C. Bar's Rules of Professional Conduct Review Committee. This proposal would require all attorneys, not just prosecutors, to disclose information that raises a substantial question about the innocence of a convicted person, whether the defendant pled guilty or was convicted at trial.

Memorandum

Channing D. Phillips
United States Attorney
District of Columbia



| | |
|--|--------------|
| Subject: | Date: |
| Allegations of Misconduct Involving Members of Law Enforcement Agencies ¹ | May 25, 2016 |

| | |
|---------------|--|
| To: | From: |
| All Employees | Channing D. Phillips United States Attorney |

On May 22, 1996, then-U.S. Attorney Eric H. Holder, Jr., issued a memorandum (the "Holder memo") setting forth the practices we should follow when we receive allegations of misconduct involving members of law enforcement agencies. We are issuing this memorandum to update the practices we should follow when we receive such allegations.

I. Committee Composition

The *Lewis* Committee ("the Committee") is charged with addressing allegations of misconduct involving members of law enforcement. The Committee's seven voting members are the Chiefs of the Appellate, Criminal, Special Proceedings, and Superior Court Divisions, the Chiefs of the Homicide and Violent Crimes and Narcotics Trafficking Sections, and the Discovery Coordinator. The Committee is aided by a non-voting member of the Civil Division. The Chief of the Superior Court Division serves as the chair of the Committee. The Committee reports to the Principal Assistant United States Attorney. At least five of the seven voting members of the Committee must be present, either in person or electronically, before the Committee votes on any matter then pending before the Committee. Any action requiring a vote by the Committee must receive at least four votes to be considered a binding decision of the Committee.

¹ This memorandum contains confidential and law enforcement sensitive material and may not be distributed outside the United States Attorney's Office for the District of Columbia without permission. This memorandum does not purport to contain complete policies and procedures utilized when we receive allegations of misconduct involving members of law enforcement agencies, as each case is subject to individualized review for appropriate discovery and disclosure decisions. The policies and procedures articulated in this memorandum may be changed at any time without prior notice. No part of this memorandum creates any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal. See *United States v. Carey*, 443 U.S. 741 (1979). Nor does any part of this memorandum place any limitations whatsoever on the otherwise lawful exercise of the prerogatives of the United States Attorney's Office for the District of Columbia.

II. The Lewis Committee and Lewis Database

The Committee collects allegations of misconduct involving members of law enforcement and analyzes these allegations to determine whether the allegations should be included in our Office's *Lewis* database. Information contained in the *Lewis* database is presumptively disclosable, with the question of admissibility to be argued before the court on a case-by-case basis. AUSAs wishing not to disclose information contained in the *Lewis* database, or to make an *ex parte* proffer to the court, must obtain supervisory approval before doing so.

The *Lewis* database contains potentially disclosable information regarding all Metropolitan Police Department ("MPD") officers. The database also contains limited information about non-MPD personnel. Simply put, "non-MPD" includes any officer or agent who is not a sworn member of MPD, including but not limited to Department of Corrections Officers, D.C. Housing Police Officers, Special Police Officers, P.G. County Police Officers, U.S. Park Police Officers, U.S. Capitol Police Officers, Federal Bureau of Investigation Special Agents, and Bureau of Alcohol, Tobacco and Firearms Agents. For non-MPD officers or agents, the *Lewis* database will only contain information about a particular officer or agent if this office previously investigated the officer or agent, or this office previously developed or received potentially impeaching information regarding the non-MPD officer or agent. *However, as discussed in section II(B), in all cases involving non-MPD officers or agents, an AUSA must submit a Giglio request form, even if the Lewis database contains information regarding that non-MPD officer or agent.*

A. Responsibilities of the Committee

- 1) Collecting allegations of police misconduct or allegations that bear on veracity and the general credibility of officers and agents;
- 2) Analyzing these allegations and determining the extent to which they are disclosable;
- 3) Maintaining the *Lewis* database which contains potentially disclosable information for MPD officers;
- 4) Maintaining as part of the *Lewis* database any impeachment information regarding non-MPD officers or agents that:
 - a) Was or will be disclosed to the court or the defense, or;
 - b) Resulted in a decision not to call the officer or agent as a witness, or not to use the officer or agent as an affiant, see USAM § 9-5.100(7)(a); or
 - c) A summary of any investigation that was completed by this office regarding the non-MPD officer or agent.²

B. Operation of the Committee

² Upon notification that a non-MPD officer or agent has been transferred or reassigned, or has retired, the Committee will remove the non-MPD officer or agent's disclosable information from the *Lewis* database at the conclusion of any direct or collateral appeals involving the officer or agent, or within one year of the non-MPD officer or agent's retirement, transfer, or reassignment, whichever is later. USAM § 9-5.100(12).

The Committee will convene monthly to evaluate new information and to make assessments about potential disclosure obligations regarding individual officers. When the Committee identifies disclosable information, the information will be included in the *Lewis* database. The Committee also may include in the *Lewis* database information that, while not disclosable, would be helpful to AUSAs in the investigation and prosecution of cases (such as to note the retirement of an officer or the existence of information that, while not disclosable, may be known to the defense and therefore may be subject to a pretrial motion to exclude).

In general, all known MPD officers are included in the *Lewis* database. The database contains a field advising AUSAs that there is "no record found," when the Committee is unaware of any disclosable information.

For non-MPD officers and agents, the *Lewis* database only contains information regarding prior investigations conducted by this office, or information that must be disclosed or that resulted in a decision not to use the officer or agent as a witness or affiant. ***In all cases involving non-MPD personnel, the assigned AUSA must conduct an independent Giglio check with the officer's agency to determine if there is additional disclosable information.*** To make this two-step process clear, non-MPD personnel will be flagged in the *Lewis* database as "Supervisor and Giglio."

When there is disclosable information concerning an officer or agent, the officer or agent is flagged as "See Supervisor" or "Supervisor and Giglio," with the relevant disclosable information listed in the comments field of the database. While AUSAs have limited access to the database, supervisors and the Committee have full access such that they may see the potentially disclosable information contained in the database. As noted below, AUSAs need to consult with supervisors to learn the extent of the potentially disclosable information and to decide, based upon the facts and circumstances of a particular case, how to handle potential disclosure issues.

The Committee will flag as "See Supervisor" or "Supervisor and Giglio" an officer or agent about whom the Committee is aware of information in the following categories:

- 1) Any prior convictions, which never will be removed from the database. The *Lewis* Committee shall ensure that criminal records will be run for those MPD officers in the *Lewis* database at least every 60 days from the time of any previous *Lewis* request for the officer.
- 2) Any pending criminal matter or prior arrest in any jurisdiction. When an officer or agent is charged with a crime and the matter later is dismissed, the officer or agent should remain flagged as "See Supervisor" or "Supervisor and Giglio" until the statute of limitations has run for the offense or the Committee receives information demonstrating that there is no reasonable possibility that the charge will be re-brought or new charges filed within the limitations period.
- 3) Pending criminal and administrative investigations with the potential for criminal prosecution relating to an officer. Absent veracity issues, an officer need not continue to be flagged as "See Supervisor" if the matter is resolved in the officer's favor. The *Lewis* database will not track

routine administrative investigations unless they involve potential criminal conduct (i.e. use of force, time and attendance fraud).

- 4) Routine non-criminal investigations of officers and agents. When routine, non-criminal administrative investigation material is received from a non-MPD agency, that information will be stored in the *Lewis* database if it meets the criteria of USAM 9-5.100(7)(a). Information regarding routine, non-criminal administrative investigations of MPD officers will be obtained from MPD's PPMS system and will not be kept in the *Lewis* database unless the information fits within another enumerated category.
- 5) Any information that reasonably may be used in any case to cast doubt upon the general credibility of the officer or agent. Examples of such information include adverse administrative findings relating to veracity, adverse judicial findings relating to veracity, and prior determinations by our Office or another prosecutor's office that an officer or agent intentionally provided false information. For non-MPD personnel, this information will also include sustained administrative findings that become known to the Committee if those findings were, or would be, disclosed to the court or the defense, or resulted in a decision not to sponsor that officer or agent. If the Committee later determines that the information is no longer disclosable, then the "See Supervisor" or "Supervisor and Giglio" flag may be removed for the officer or agent.

When the Committee receives potentially disclosable information, the Committee Chair may conclude that the information obviously should, or should not, be included as "See Supervisor" in the *Lewis* database pending the next Committee meeting. The Committee may conduct whatever investigation it deems appropriate before making a final determination and shall decide the issue upon agreement of at least four Committee members. Once included, if the Committee later determines that the information no longer is disclosable, then the entry for "See Supervisor" should be returned to "no record found." Likewise, in obvious cases, the Chairman or his designee may make this determination, such as when a routine USAO excessive force investigation concludes in the officer's favor and there remain no veracity issues. The information contained in the comment field concerning the potentially disclosable information should remain, however, and the comment field should note the dates upon which the information first was entered and when the determination was made that the information was no longer disclosable.

These guidelines notwithstanding, a determination to include, or exclude, information in the *Lewis* database, or to flag, or not flag, an officer as "See Supervisor" may be made by the Principal Assistant U.S. Attorney in consultation with the Committee Chair. In the case of a sensitive covert operation of which the targets are unaware, for example, the Principal Assistant U.S. Attorney may conclude that the most prudent course is not to flag a target officer or agent as "See Supervisor," but instead to take other steps to ensure compliance with our disclosure obligations.

C. Determination, Notification, and Reconsideration Procedures

Because information in the *Lewis* database is highly dynamic, the Committee will not generally notify MPD when officers are flagged in the database as "See Supervisor." However, consistent with the limitations of the Privacy Act, the Committee may discuss potentially disclosable information with MPD and subject officers in any case. For non-MPD officers and agents, consistent with USAM 9-5.100(8), the Chairman or his designee shall notify the officer's agency when the officer or agent is flagged in the *Lewis* database and shall provide a brief explanation for the Committee's decision.

If after examining all available evidence and information, the Committee determines by clear and convincing evidence that an officer or agent has engaged in misconduct, and the impact of that misconduct would make it difficult for the government to effectively utilize the officer or agent as an affiant, a witness at a pretrial hearing, or at trial, the Committee may designate the officer or agent in the *Lewis* database as "Do Not Sponsor." Before designating an officer as "Do not Sponsor" the Committee shall consider:

- 1) The seriousness of the disclosable misconduct;
- 2) The age of the misconduct;
- 3) The officer or agent's disciplinary history;
- 4) Whether the misconduct involved criminal activity, veracity, corruption, or bias;
- 5) The strength of the government's future litigating position at trial following disclosure;
- 6) Whether the misconduct was established in an administrative procedure where the officer had an opportunity to challenge the misconduct allegation;
- 7) Whether the misconduct was the result of a judicial finding. A clear judicial finding presumptively shall be considered clear and convincing evidence of misconduct unless the Committee finds, based on all available evidence and circumstances, including information that may not have been in the record before the court, that the trial judge clearly erred in his or her finding of misconduct.
- 8) Any other factors identified by the Committee, including whether sponsorship of the witness will adversely reflect upon the reputation of the Office of the United States Attorney for the District of Columbia.

The Chairman will notify the Chief of Police in writing regarding any *final* decision to designate an MPD officer as "Do Not Sponsor."¹ The Chief of the Criminal Division will likewise notify the head of any federal agency when the Committee makes a final decision not to sponsor a federal officer or agent. However, if the "Do Not Sponsor" designation is based on an ongoing covert investigation, to protect such an investigation, the Principal Assistant United States Attorney may delay such notification. An officer or agent listed as "Do Not Sponsor" may not be called as a witness or used as an affiant without the authorization of the Principal United States Attorney.

¹ The Committee may designate an officer as "Do Not Sponsor pending further review" in cases where the allegation of misconduct warrants further investigation or discussion. This shall not be considered as a final decision not to sponsor an officer.

If an individual officer or agent, or the MPD or other department or agency, wishes to contest the Committee's determination that potentially disclosable information exists with respect to an officer or agent, the Committee may conduct informal meetings with the officer or agent or relevant officials, consistent with the Privacy Act. If the matter cannot then be resolved, the officer or agent, or the MPD or other department or agency may make a written request of the Committee to reconsider its determination, providing the detailed basis for reconsideration. If the written submission creates serious doubt as to the *Lewis* Committee's prior determination, then it may decide to have one or more of its members meet with the officer, agent, officials, or other witnesses and may conduct further investigation to resolve the matter.

Although there is a presumption that impeachment information contained in the *Lewis* database should be disclosed, this does not mean that such information must be disclosed in a particular case. The *Lewis* Committee will apply its standards liberally with an eye toward including all information that reasonably would need to be disclosed in any case.

In closed post-conviction matters, AUSAs and supervisors are strongly encouraged to consult with their division chief, as well as with the Appellate and Special Proceedings Chiefs, as appropriate, when making disclosure determinations.

Memorandum



| | |
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| Subject Allegations of Misconduct Involving Members of Law Enforcement Agencies | Date MAY 22 1986 |
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To: All Personnel

From: Eric H. Helder, Jr.
 United States Attorney

For many months, a group of supervisors and line Assistants¹ has been very hard at work developing comprehensive recommendations for how our Office should investigate, report and keep track of allegations of misconduct involving law enforcement officers whom we may wish to call as witnesses in criminal cases, so that we might discharge our ethical and legal obligations under Brady.

In essence, these policies and procedures include the following key points:

*** All information pertaining to allegations of police misconduct must be reported to the Chief of the Grand Jury Section who will enter all such information, when appropriate, in the Lewis data base.

*** So that our Office has the capability of analyzing and adjudicating how best to handle each such allegation, I have established a Lewis Committee, chaired by [redacted] and including [redacted].

(B)(6)
 (B)(7)(c)

*** There is a built in presumption of disclosure of all derogatory information contained in the Lewis data base, with the question of admissibility to be argued before the court on a case-by-case basis. Assistants wishing not to disclose, or in appropriate instances to make an ex parte proffer to the Court, must obtain the approval of their supervisor.

*** Assistants must also obtain the approval of a supervisor to call a law enforcement officer as a witness when the Court has ruled the derogatory information admissible.

¹ The group was chaired by [redacted] and included [redacted]

(B)(6)
 (B)(7)(c)

Particular mention should be made of the contributions of [redacted] which were both substantial and invaluable.

(B)(6)
 (B)(7)(c)

On a more general note, there is perhaps no more critical ethical obligation we all share than to ensure full compliance with all the requirements of the Brady case and its progeny and I expect all of you to do so faithfully.

I. Centralization of Information

A. The Chief of the Grand Jury Section should be promptly advised whenever any Assistant U.S. Attorney ("AUSA") in this Office becomes aware of any credible information that a Metropolitan Police Department ("MPD") officer (or other law enforcement officer whom the Office has called or may call as a witness in a criminal case) has been involved in criminal misconduct, whether in the District of Columbia or elsewhere. Such information includes arrests, convictions, pending criminal investigations by this Office or any other prosecuting entity, or administrative findings of criminal misconduct relating directly to veracity (e.g., perjury or false statements). The only possible exception to this reporting requirement would be in highly sensitive or covert investigations, in which case the pertinent information should be communicated to the Principal Assistant United States Attorney for a determination about how that information should be handled.

B. If an AUSA comes to have reason to believe that a law enforcement witness may have intentionally testified falsely or made false statements, the AUSA should bring that matter to the attention of a supervisor for a determination about whether the matter should be referred to the Chief of the Grand Jury Section for further investigation.

II. Record-Keeping

The Chief of the Grand Jury Section will continue to maintain records concerning alleged criminal misconduct by police officers, and will make an appropriate entry into the present Lewis data base whenever the Office learns of any of the following types of credible information suggesting that a law enforcement officer whom the Office calls or may call as a witness has been or is involved in criminal misconduct, whether in the District of Columbia or elsewhere:

- (1) prior arrests, complaints, informations, indictments, administrative findings of criminal misconduct relating directly to veracity, or convictions;
- (2) pending criminal cases in this or any other jurisdiction;
- (3) pending criminal investigations conducted by this Office or any other prosecutive entity;²

² As has already been noted, there is a possible exception for highly sensitive or covert investigations, as to which the Principal Assistant United States Attorney will make the

(4) pending or anticipated investigations by this Office or any other component of the Department of Justice ("DOJ") into fatal police shootings; or

(5) matters as to which the Office has determined that there is credible information to support a reasonable belief that an officer has engaged in criminal conduct relating directly to veracity.

The fact that MPD (or other law enforcement agency) is on its own conducting an investigation into alleged misconduct by an officer need not necessarily be entered into the Lewis data base. Such investigations are numerous, can involve alleged misconduct ranging from the trivial to the grave, and can arise from allegations that are not particularly credible. Moreover, when such investigations are conducted without the involvement of our Office or any other component of DOJ, it is our position that no bias motive arises, see infra. There may well be, however, unusual cases in which it would be appropriate for an entry to be made, i.e., in cases in which the alleged misconduct bears directly on veracity and we have good reason to believe that the misconduct in fact occurred.

When questions arise about whether it is appropriate to include a given incident in the Lewis data base, they may be referred to the Lewis Committee, which has recently been formed and which is headed by the Chief of the Grand Jury Section.

Once an entry is made in the data base, it shall remain there, notwithstanding the subsequent disposition of that matter, with the following exception: completed investigations in which there never was (1) an arrest, (2) an indictment or ignoramus, (3) some other finding of probable cause or its equivalent, or (4) a determination by this Office that there was reason to believe that misconduct relating to veracity occurred.

III. Handling of Cases Involving Officers Implicated in Misconduct

A. General policies

(1) In situations involving strong evidence of

.....
determination about how to proceed.

With respect to the point at which an investigation should be viewed as pending, any matter which this Office is actively considering for potential investigation or prosecution will be deemed to be under investigation by this Office. Matters which are referred to this Office and promptly declined without further inquiry will not be deemed to have been under investigation by this Office. Matters which this Office has simply passed along to MPD (or other appropriate law enforcement agency) for whatever action MPD deems appropriate will not thereafter be deemed to be under investigation by this Office.

particularly grave misconduct, the Chief of the Grand Jury Section should consult with the Lewis Committee, and other appropriate supervisors, to determine whether immediate steps need to be taken office-wide with respect to cases involving the officer in question.

(2) In other situations, the question of how to handle a case involving an officer implicated in criminal misconduct will be determined on a case-by-case basis by line attorneys consulting with their supervisors. In some cases, it will be appropriate to simply avoid calling the officer in question. In others, dismissal of the case may be appropriate. Sometimes we may choose to disclose information about the incident at issue,³ but to litigate questions relating to the admissibility of evidence about that incident.⁴ Finally, in some cases we may decide that it is in the public interest to call the officer in question even though evidence of the officer's criminal misconduct would properly be admissible at trial. In general, however, the decision to call an officer as to whom information of this kind exists should not be made without careful thought and consultation with a supervisor. In addition, line attorneys obviously should consult with their supervisors before dismissing a case.

B. Pretrial disclosure⁵ and admissibility at trial

(1) Prior convictions. We will disclose all prior convictions of law enforcement witnesses. The admissibility of prior convictions to impeach a witness is governed by Fed. R. Evid. 609 and D.C. Code § 14-305.

(2) Pending criminal cases or investigations. With the

³ If we are going to call an officer as to whom there is information in the Lewis data base, the general assumption should be that we will make a disclosure with respect to the information. There may be unusual cases, however, where disclosure is neither required nor appropriate. Or there may be cases in which disclosure to the judge in camera would be appropriate.

⁴ The principles governing the admissibility of such evidence are discussed briefly infra.

⁵ Courts are divided about whether the government has a Brady obligation with respect to defendants who have indicated an intent to plead guilty, and, if so, what the extent and nature of that obligation might be. This Office is presently in the process of formulating its policies with respect to these questions; in the interim, AUSAs should be aware of the issue, and should consult with supervisors if questions arise with respect to it. In any event, AUSAs should obviously take appropriate measures if they receive information raising a serious question about a defendant's guilt.

possible exception of highly sensitive or covert investigations,⁶ we will make a disclosure as to all such pending cases or investigations, without regard to the jurisdiction in which they arise or the prosecuting entity conducting the investigation.⁷ With respect to admissibility, the fact that this Office or any other component of DOJ is involved in a pending case or investigation would be admissible to impeach the involved officer on a bias theory if the officer becomes aware of the investigation. We have taken the position, however, that the fact that there are pending cases or investigations in which neither this Office nor any other DOJ component is involved would not be admissible on a bias theory. Leaving aside bias, evidence of the underlying criminal act, when no conviction has been obtained, would be admissible only if (a) there was sufficient reason to believe that the underlying criminal act in fact occurred, and (b) the underlying act went directly to veracity or to some other issue in the case. Acts relating to veracity might include perjury or false statements; an example of a criminal act arguably admissible as relevant to a specific issue in the case might be an instance of stealing from drug arrestees in a case where the defense version of events involved an allegation of such conduct. Obviously, the admissibility of evidence on such a theory would have to be litigated on a case-by-case basis.

(3) Past criminal acts as to which there is no pending investigation or case, and which did not result in a conviction. We will disclose in all cases in which (a) there was an arrest, indictment, other finding of probable cause or its equivalent, or determination by this Office that there was reason to believe that misconduct relating to veracity occurred; and (b) a colorable argument can be made that evidence of the past criminal act would be admissible as going directly to veracity or some other issue in the case. Here too, the ultimate admissibility of evidence on such a theory would have to be litigated on a case-by-case basis.

C. Post-trial disclosure

(1) Plea of Guilty. Where the defendant has pled guilty, we will almost never have any obligation of post-trial disclosure regarding information that a potential law-enforcement witness had been involved in criminal misconduct. We need to disclose such information only if (a) the Office was in possession of the pertinent information prior to the plea, and should have disclosed it pursuant

⁶ As has already been noted, the Principal Assistant United States Attorney will make a determination about the proper way to handle cases in such circumstances.

⁷ Questions obviously will arise with respect to the degree of detail to be disclosed, as well as the timing of disclosure. These issues must be resolved on a case-by-case basis by line attorneys acting in consultation with their supervisors. In making disclosures which might involve grand jury materials, attorneys should be sensitive to the requirements of Super. Ct. Crim. R. 6(e) and Fed. R. Crim. P. 6(e).

to Brady v. Maryland,⁸ but failed to do so; or (b) the information provides good reason to believe that the defendant is innocent notwithstanding his plea of guilty (this of course would be the extremely rare case). If such disclosure is made and a motion to withdraw filed, the Office will decide on a case-by-case basis what position to take with respect to the motion.

(2) Post-verdict. We would rarely be obliged to disclose information about police misconduct to defendants who had already been convicted at trial. We need to disclose such information only if (a) the Office was in possession of the pertinent information prior to trial, and should have disclosed it pursuant to Brady, but failed to do so; (b) the period within which to file a new-trial motion has not yet passed, and the information at issue gives rise to a reasonable probability that a new-trial motion would be granted under the applicable new-trial standard; or (c) notwithstanding the running of the period within which new-trial motions may be filed, the evidence provides good reason to believe that the defendant is actually innocent of the offense or offenses of conviction. If a disclosure is made in such cases, and motions for post-conviction relief are filed, the Office will decide on a case-by-case basis what position to take with respect to the motions.

(3) Procedural issues. If information about police misconduct is arguably of a nature as to require post-conviction disclosure, the matter should be referred to the Principal Assistant United States Attorney for a determination as to whether post-conviction disclosure is required, and, if so, how such disclosure should be accomplished. In some cases, such as those involving serious misconduct by a large group of officers, or by a particular officer who was involved in a large number of cases, it may be more efficient to adopt a blanket approach to disclosure.

⁸ In other words, the information was of a nature as to give rise to a reasonable probability that the defendant would not be convicted at trial.

[REDACTED] (USADC) (B)(6) (B)(7)(c) (B)(6)

From: [REDACTED] (B)(7)(c)
Sent: Wednesday, March 24, 2004 3:30 PM
To: [REDACTED] (B)(6)
Subject: Lewis Letter (B)(7)(c)

Is this what you had in mind?



Lewis4.ftr.wpd

We are writing in response to your request for information concerning entries maintained in the so-called "Lewis list."¹ The system is maintained under authority currently described in the Department of Justice system of records called JUSTICE/USA-018 ("United States Attorney's Office, Giglio Information Files."² Although the Privacy Act often permits a person the ability to access or challenge the information that is maintained in a system of records, the JUSTICE/USA-018 system has been exempted from those and other provisions of the Privacy Act. See 5 U.S.C. 552a(j)(2) and (k)(2); 65 Fed. Reg. 75308, 75310 (December 1, 2000).

Please understand that the mere inclusion of a police officer in the system does not necessarily indicate the belief by this office that the officer will never be sponsored as a witness. Instead, it is a recognition of the continuing responsibility that this office has to satisfy the discovery obligations placed on us by the Courts, and to allow the office appropriately to assess the strengths and weaknesses of our cases. As recently as this month, the courts reiterated the significance that such information can have in a criminal trial. See United States v. Whitmore, 359 F.3d 609 (D.C. Cir. 2004).³

This office as well as the law enforcement community must recognize the need for the prosecution to satisfy its obligations under Giglio, Lewis, Whitmore and similar authorities.

¹ See Lewis v. United States, 408 A.2d 303, 306 (D.C. 1979).

² See Giglio v. United States, 405 U.S. 150 (1972).

³ In Whitmore, the Court concluded that a defense counsel should have been allowed to examine a police officer about such things as 1) a 1999 incident in which a judge in another case found the officer to have "intentionally g[iven] false testimony"; 2) the 1998 suspension of the officer's Maryland driver's license; and 3) the officer's failure to make child-support payments.

(USADC) (B)(6)
(B)(7)(c) (B)(6)
From: (USADC) (B)(7)(c)
Sent: Wednesday, September 12, 2007 7:23 AM
To: (USADC); (USADC); (USADC); (B)(6)
(USADC); (USADC); (USADC); (B)(7)(c)
Subject: (B)(6) (USADC); (USADC); (USADC)
(B)(7)(c) RE: Lewis Comm. Meeting

Works for me.

(B)(6)
From: (USADC) On Behalf Of (USADC) (B)(7)(c)
Sent: Tuesday, September 11, 2007 3:51 PM
To: (USADC); (USADC); (USADC); (USADC); (B)(6)
(USADC); (USADC); (USADC); (USADC) (B)(7)(c)
Subject: Lewis Comm. Meeting
When: Monday, September 24, 2007 10:30 AM-11:30 AM (GMT-05:00) Eastern Time (US & Canada).
Where: 5019

(USADC) (B)(6)
(B)(7)(c)
From: (USADC) (B)(6)
Sent: Tuesday, September 11, 2007 2:41 PM (B)(7)(c)
To: (USADC); (USADC); (USADC); (USADC); (B)(6)
(USADC); (USADC); (USADC); (USADC); (B)(7)(c)
Cc: (B)(6) (USADC)
(B)(7)(c) (USADC); (USADC)
Subject: RE: Lewis Meeting

That's good for me.

(B)(6)
(B)(7)(c)

(B)(6)
From: (USADC) (B)(7)(c)
Sent: Tuesday, September 11, 2007 2:31 PM
To: (USADC); (USADC); (USADC); (USADC); (USADC); (USADC); (B)(6)
(USADC); (USADC); (USADC); (USADC) (B)(7)(c)
Cc: (USADC); (USADC)
Subject: RE: Lewis Meeting

We're not having a whole lot of fuck with this! Is everyone available on Monday, the 24th?

From: (USADC) (B)(6)
Sent: Monday, September 10, 2007 3:46 PM
To: (USADC); (USADC); (USADC); (USADC); (USADC); (USADC); (B)(7)(c)
(USADC); (USADC); (USADC); (USADC) (B)(6)
Cc: (USADC); (USADC) (B)(7)(c)
Subject: Lewis Meeting

Per (B)(6)'s request, I have tentatively scheduled a Lewis Committee meeting for 9/21/07, from 1-2:00. If (B)(6) you are unable attend, please respond with the times you are available that day. Thank you. (B)(7)(c)

(B)(6)
(B)(7)(c)
Administrative Staff Assistant
U.S. Attorney's Office - DC
202-307- (B)(6)
(B)(7)(c)

(USADC) (B)(6)
(B)(7)(c)

From: (B)(6) (USADC)
Sent: (B)(7)(c) Thursday, September 14, 2006 2:49 PM
To: (USADC) (B)(6)
Subject: Declined: Lewis Committee meeting (B)(7)(c)

I have depositions 9/26 (afternoon), 9/27(all day), and 9/28 (all day).

[REDACTED] (USADC) (B)(6) (B)(7)(c)

From: [REDACTED] (USADC) (B)(6)
Sent: (B)(6) Friday, September 15, 2006 1:45 PM (B)(7)(c)
To: (B)(6) [REDACTED] (USADC)
Subject: (B)(7)(c) Tentative: Emergency Lewis meeting

[REDACTED] (B)(6)
[REDACTED] (B)(7)(c)

If Mark is going to explain [REDACTED] I'll be attending too. How about 1/29, same time and place?

(B)(6)
(B)(7)(c)

[REDACTED] (B)(6)
[REDACTED] (B)(7)(c)

-----Original Message-----

(B)(6)

From: [REDACTED] (B)(7)(c)

Sent: Monday, January 12, 2004 4:37 PM

To: [REDACTED] (B)(6)
[REDACTED] (B)(7)(c)

Subject: RE: Meeting at 3-4 on 1/27, in 8th Floor Conference Room

This conflicts with some [REDACTED] training that [REDACTED] is giving from 2:00 to 4:00 that many people in the Criminal Division plan to attend. (B)(6)
(B)(7)(c)

MP

-----Original Message-----

(B)(6)

From: [REDACTED] (B)(7)(c)

Sent: Monday, January 12, 2004 4:31 PM

To: [REDACTED] (B)(6)
[REDACTED] (B)(7)(c)

Subject: Meeting at 3-4 on 1/27, in 8th Floor Conference Room

Folks,

How about a meeting from 3-4 on 1/27 in the 8th Floor Conference Room? I am working on an agenda, and we will have plenty to do -- including discussing responses to letters we have received from Det. [REDACTED] I'll try to get an agenda and copies of relevant materials around this week. Thanks. (B)(6)
(B)(7)(c)

[REDACTED] (B)(6)
[REDACTED] (B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6)
 Sent: (B)(7)(c) Monday, March 1, 2004 5:58 PM (B)(6)
 To: (B)(7)(c) (B)(7)(c)
 Subject: RE: Next Meeting

Thursday is good with me (3/11/04)

(B)(6) -----Original Message-----
 (B)(7)(c) From: (B)(7)(c)
 Sent: Monday, March 01, 2004 1:47 PM (B)(6)
 To: (B)(7)(c) (B)(7)(c)
 Subject: RE: Next Meeting

Thursday at 3 works for me Not Wednesday.

(B)(6) -----Original Message----- (B)(6)
 (B)(7)(c) From: (B)(7)(c)
 Sent: Monday, March 01, 2004 1:37 PM
 To: (B)(7)(c)
 Subject: RE: Next Meeting

both of those times are fine for me, too

Rob

(B)(6) -----Original Message-----
 (B)(7)(c) From: (B)(7)(c)
 Sent: Monday, March 01, 2004 1:35 PM (B)(6)
 To: (B)(7)(c) (B)(7)(c)
 Subject: RE: Next Meeting

Wednesday or Thursday at 3:00 are best for me.

(B)(6) (B)(6)
 (B)(7)(c) (B)(7)(c)
 -----Original Message-----
 (B)(6) From: (B)(7)(c)
 (B)(7)(c) Sent: Monday, March 01, 2004 1:33 PM (B)(6)
 To: (B)(7)(c) (B)(7)(c)
 Subject: Next Meeting

Folks,

I think it's time for our next meeting.

(B)(5)
(B)(6)
(B)(7)(c)

Thanks.

(B)(6)
(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Tuesday, March 30, 2004 2:25 PM
To: (B)(6)
Subject: (B)(7)(c) RE: Lewis list entries based on our last meeting

They look fine to me.

(B)(6) -----Original Message-----
(B)(7)(c) From: (B)(6)
Sent: Tuesday, March 30, 2004 11:12 AM (B)(6)
To: (B)(7)(c) (B)(6)
Subject: Lewis list entries based on our last meeting (B)(7)(c)

Folks.

(B)(5)
(B)(6)
(B)(7)(c)

<< File: Doc1.wpd >>

(B)(6)

(USADC)

(B)(7)(c)

From: [redacted]
Sent: (B)(6) Monday, November 1, 2004 3:54 PM
To: (B)(7)(c)
Subject: (B)(7)(c) RE: Court & Deposition Information

(B)(6)

(B)(7)(c)

I have the following:

11/2/04 2:00 Lewis meeting

11/4/04
1:00 Depo of [redacted] in [redacted] v. BOP (B)(6)
(B)(7)(c)

4:00 Status in [redacted] (Judge Leon) (B)(6)
4:30 Pretrial in Silver (Judge Robertson) (B)(7)(c)

Thanks. (B)(6)
[redacted] (B)(7)(c)

-----Original Message-----

(B)(6)

From: [redacted] (B)(7)(c)
Sent: Monday, November 01, 2004 2:59 PM
To: [redacted]

(B)(6)
(B)(7)(c)

Subject: Court & Deposition Information

Good afternoon.

Please send me your Court & Deposition Information for this week. Thank you so much!

[redacted] (B)(6)
(B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Wednesday, November 3, 2004 10:40 AM
To: (B)(6)
Subject: Lewis Meeting (B)(7)(c)

Sorry I missed the meeting yesterday. Is there any homework?

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Wednesday, November 3, 2004 11:26 AM
To: (B)(6)
Subject: RE: Lewis Meeting (B)(7)(c)

Great. What time on the 9th?

-----Original Message-----

(B)(6) From: (B)(7)(c)
(B)(7)(c) Sent: Wednesday, November 03, 2004 10:56 AM
To: (B)(7)(c)
Subject: RE: Lewis Meeting

Mark,

The meeting is next Tuesday, the 9th. I hope to send pre-meeting homework around today or tomorrow.

(B)(6)

(B)(7)(c)

(B)(6) -----Original Message-----
(B)(7)(c) From: (B)(7)(c)
Sent: Wednesday, November 03, 2004 10:40 AM
To: (B)(6)
Subject: Lewis Meeting (B)(7)(c)

Sorry I missed the meeting yesterday, is there any homework?

(B)(6)

(USADC)

(B)(7)(c)

From: (B)(6) [redacted]
Sent: (B)(7)(c) Monday, November 8, 2004 10:39 AM
To: [redacted] (B)(6)
Subject: RE: Court & Deposition Information (B)(7)(c)

I have the following:

- 11/9/04 10:30 status hearing in Long w/ Judge Leon
- 11/9/04 at 2:00 Lewis meeting
- 11/10/04 10:00 telephone deposition in montemayor
- 11/10/04 2:30 AUSA Applicant interview

(B)(6)

-----Original Message-----

From: [redacted] (B)(7)(c)
Sent: Monday, November 08, 2004 10:00 AM
To: [redacted]

(B)(6)
(B)(7)(c)

Subject: Court & Deposition Information

Good morning:

Please send me your Court & Deposition information for this week. Thank you so much!

(B)(6)

[redacted] (B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Friday, December 3, 2004 3:14 PM (B)(6)
To: (B)(7)(c)
Subject: RE: Meeting Postponement (B)(7)(c)

Fine with me.

-----Original Message----- (B)(6)
From: (B)(7)(c)
Sent: Friday, December 03, 2004 3:03 PM (B)(6)
To: (B)(7)(c)
Subject: Meeting Postponement (B)(7)(c)

Folks,

We are presently scheduled to have our next Lewis Committee meeting Tuesday 12/7 at 2. For a variety of reasons, I haven't had time to get my act together to distribute materials and the like. Although there are some things pending, I don't think that any of them are particularly urgent. So, although I am sure it will be a big blow to you all, I was thinking of postponing the meeting until after the holidays. How about Tuesday 1/11 at 2, in the Appellate Division Conference Room?

(B)(6)
(B)(7)(c)

(B)(6)

(B)(7)(c)

(USADC)

From: (B)(6)
Sent: (B)(7)(c) Friday, December 3, 2004 3:23 PM
To: (B)(6)
Subject: RE: Meeting Postponement (B)(7)(c)

1/11/05 at 2:00 is fine.

(B)(6)

-----Original Message-----

From: (B)(7)(c)
Sent: Friday, December 03, 2004 3:03 PM
To:
Subject: Meeting Postponement

(B)(6)

(B)(7)(c)

Folks,

We are presently scheduled to have our next Lewis Committee meeting Tuesday 12/7 at 2. For a variety of reasons, I haven't had time to get my act together to distribute materials and the like. Although there are some things pending, I don't think that any of them are particularly urgent. So, although I am sure it will be a big blow to you all, I was thinking of postponing the meeting until after the holidays. How about Tuesday 1/11 at 2, in the Appellate Division Conference Room?

(B)(6)

(B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6) [REDACTED]
Sent: (B)(7)(c) Wednesday, July 27, 2005 11:35 AM
To: [REDACTED] (B)(6)
Subject: RE: Lewis Committee (B)(7)(c)

Did we meet while I was away?

(B)(6) -----Original Message-----

(B)(7)(c) **From:** [REDACTED]
Sent: Friday, July 28, 2005 10:46 AM (B)(6)
To: [REDACTED] (B)(7)(c)
Subject: Lewis Committee

Folks,

You probably hoped I had forgotten about this Committee, but I haven't. We have a pile of things to do that I have let sit too long. I'd like to try to schedule a meeting for one of the next two weeks. I'll set up an agenda and distribute the materials once we set a time, but I'd like to get a sense of when would be good for folks. Also, [REDACTED] (B)(6) (B)(7)(c) can you settle on who you would like to include from each of your Divisions? I think the sense of the prior e-mail traffic on the topic was that each Division would have three or four folks.

Thanks.

[REDACTED] (B)(6)
[REDACTED] (B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: [REDACTED] (B)(6)
Sent: Wednesday, September 7, 2005 3:12 PM (B)(7)(c)
To: (B)(6) [REDACTED]
Subject: (B)(7)(c) RE: Court & Deposition Information

9/13/05 2:00 - 3:30 Lewis meeting

9/15/05 SH in [REDACTED] CKK (B)(6)
(B)(7)(c)

Also please note i now have a trial scheduled in [REDACTED] v BOP on 3/21/06 w/ GK (B)(6)
(B)(7)(c)

-----Original Message-----

From: [REDACTED] (B)(6)
Sent: Wednesday, September 07, 2005 12:04 PM (B)(7)(c)
To: USA-DC-CIVIL ATTORNEYS
Subject: Court & Deposition Information

Good morning:

Now that the unofficial end of summer has begun (sigh) I need to begin again soliciting the Court and Deposition information from everyone. Attached as always is the form that you may report any court or deposition schedule information that maybe occurring in your assigned cases. The scheduled information requested, is for the week of 9/12. If you do not want to use the form just send an e-mail response. Thank you for your cooperation.

[REDACTED]

<< File: CDSCHEDULE1.wpd >>

(B)(6)

(USADC)

(B)(7)(c)

From:

(B)(6)

Sent:

(B)(7)(c)

Monday, August 22, 2005 11:09 AM

To:

(B)(6)

(B)(7)(c)

Subject:

Meeting time

Folks,

[REDACTED] has a 5:00 meeting, and [REDACTED] has a potential conflict, so they have an interest in moving the Lewis Committee meeting earlier in the day on Tuesday 9/13. Would 2 - 3:30 work for folks?

(B)(6)

(B)(7)(c)

Please let me know.

Thanks.

(B)(6)

(B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Monday, August 22, 2005 11:15 AM
To: (B)(6)
(B)(7)(c)
Subject: RE: Meeting time

Fine with me.

(B)(6) -----Original Message-----
(B)(7)(c) **From:** (B)(6)
Sent: Monday, August 22, 2005 11:09 AM (B)(6)
To: (B)(7)(c)
Subject: Meeting time (B)(7)(c)

Folks,

(B)(6)
(B)(7)(c) (B)(6)
(B)(7)(c) (B)(7)(c)
[REDACTED] has a 5:00 meeting, and [REDACTED] has a potential conflict, so they have an interest in moving the Lewis Committee meeting earlier in the day on Tuesday 9/13. Would 2 - 3:30 work for folks?

Please let me know.

Thanks.

(B)(6)
(B)(7)(c)

(B)(6)

(USADC)

(B)(7)(c)

Subject: Lewis Committee Meeting
Location: Appellate Conference Room
Start: Tue 10/11/2005 2:00 PM
End: Tue 10/11/2005 3:30 PM
Show Time As: Tentative
Recurrence: Monthly
Recurrence Pattern: the second Tuesday of every 1 month(s) from 2:00 PM to 3:30 PM
Meeting Status: Not yet responded

Organizer:

Required Attendees:

(B)(6)

(B)(7)(c)

When: Occurs the second Tuesday of every 1 month(s) effective 10/11/2005 from 2:00 PM to 3:30 PM (GMT-05:00)
Eastern Time (US & Canada).
Where: Appellate Conference Room

~*~*~*~*~*~*~*~*~*

(B)(6)
(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Friday, December 3, 2004 5:47 PM
To: (B)(6)
(B)(7)(c)
Subject: RE: Meeting Postponement

Dear All,
Of course that's fine. Thanks for asking (B)(6)
(B)(7)(c)

(B)(6) -----Original Message-----
(B)(7)(c) From: (B)(6)
Sent: Friday, December 03, 2004 3:03 PM (B)(6)
To: (B)(7)(c)
Subject: Meeting Postponement

Folks,

We are presently scheduled to have our next Lewis Committee meeting Tuesday 12/7 at 2. For a variety of reasons, I haven't had time to get my act together to distribute materials and the like. Although there are some things pending, I don't think that any of them are particularly urgent. So, although I am sure it will be a big blow to you all, I was thinking of postponing the meeting until after the holidays. How about Tuesday 1/11 at 2, in the Appellate Division Conference Room?

(B)(6)
(B)(7)(c)

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Friday, July 8, 2005 1:19 PM
To: [Redacted]
Subject: Re: Lewis Committee

(B)(6)
(B)(7)(c)

(B)(6)
(B)(7)(c)

The week after next is better for me. How about the 19th at ??

(B)(6)
(B)(7)(c)

Sent from my BlackBerry Wireless Handheld

-----Original Message-----

(B)(6)
(B)(7)(c)

From: [Redacted]@usa.usdoj.gov
To: [Redacted]@usa.usdoj.gov; [Redacted]@usa.usdoj.gov; [Redacted]@usa.usdoj.gov; [Redacted]@usa.usdoj.gov; [Redacted]@usa.usdoj.gov

(B)(6)
(B)(7)(c)

Sent: Fri Jul 08 10:45:30 2005
Subject: Lewis Committee

Folks,

You probably hoped I had forgotten about this Committee, but I haven't. We have a pile of things to do that I have let sit too long. I'd like to try to schedule a meeting for one of the next two weeks. I'll set up an agenda and distribute the materials once we set a time, but I'd like to get a sense of when would be good for folks. Also, [Redacted] can you settle on who you would like to include from each of your Divisions? I think the sense of the prior e-mail traffic on the topic was that each Division would have three or four folks.

(B)(6)
(B)(7)(c)

Thanks.

(B)(6)
(B)(7)(c)

(B)(6)

(USADC)

(B)(7)(c)

From: (B)(6)
Sent: (B)(7)(c) Tuesday, October 11, 2005 12:29 PM
To: (B)(6)
Cc: (B)(7)(c)
Subject: Lewis list updates

(B)(6)

(B)(7)(c)

When you receive an email to add an entry or update an entry on the Lewis list, please forward that email to the Lewis Committee. Here is a distribution list you can use:



Lewis Committee

Thanks,

(B)(6)

(B)(7)(c)

[REDACTED] (USADC) (B)(6)
[REDACTED] (B)(7)(c) [REDACTED] (B)(6)

From: [REDACTED] (USADC) (B)(7)(c)
Sent: Friday, April 11, 2014 7:08 PM
To: (B)(6) [REDACTED] (USADC)
Subject: (B)(7)(c) Accepted: 11:30 meeting on Lewis Issues

(B)(6)

Nails, Gary (USADC) (B)(7)(c)

(B)(6)

From: [REDACTED] (USADC) (B)(7)(c)
Sent: Friday, April 11, 2014 4:07 PM
To: (B)(6) [REDACTED] (USADC); [REDACTED] (USADC)
Subject: (B)(7)(c) FW: 2012 Memo on Lewis Committee / Allegations of Misconduct Involving Law Enforcement Officers
Attachments: Allegations of Misconduct Involving Law Enforcement.pdf

FYI [REDACTED] here is the Office's policy on handling Lewis issues. (B)(6)
(B)(7)(c)

<<Allegations of Misconduct Involving Law Enforcement.pdf>> FYI, for new Lewis Committee members

(B)(6)

(USADC)

(B)(7)(c)

(B)(6)

From:

(USADC)

(B)(7)(c)

Sent:

(B)(6)

Friday, April 11, 2014 4:24 PM

To:

(B)(7)(c)

(USADC)

Subject:

Accepted: 11:30 meeting on Lewis issues

(B)(6)

(USADC)

(B)(7)(c)

Subject: 11:30 meeting on Lewis Issues (B)(6)
Location: [REDACTED] Office (B)(7)(c)

Start: Mon 4/14/2014 11:30 AM
End: Mon 4/14/2014 12:00 PM
Show Time As: Tentative

Recurrence: (none)

Meeting Status: Not yet responded

Organizer: [REDACTED] (USADC) (B)(6)
Required Attendees: [REDACTED] (USADC); [REDACTED] (USADC) (B)(7)(c)

I have court at 10:30, hope to be back in time to start at 11:30. If I'm running a few minutes late, hopefully we can start when I'm back?

(B)(6)

(USADC) (B)(7)(c)

From: (B)(6) (USADC)
Sent: Friday, April 11, 2014 11:15 AM (B)(7)(c)
To: (B)(6) (USADC)
Subject: (B)(7)(c) do you have a few minutes to meet?

I wanted to talk to you about Lewis issues with [redacted] officers in the [redacted] case. Thanks. (B)(6)
(B)(7)(c)

GIGLIO/LEWIS QUESTIONNAIRE

- (1) This form **MUST** be completed and signed by the **AUSA** before each and every occasion on which a law-enforcement officer/agent/employee may be called to testify or serve as an affiant.
- (2) Please inquire of each officer/agent/employee individually and in private.
- (3) If you receive any "YES" answers, please advise your immediate Supervisor.
- (4) In addition to completing this form, you **MUST** check the computerized Lewis database. If your witness is not with MPD, you must complete the Giglio macro at least 30 days prior to trial to ensure that a Giglio request is sent to the appropriate law enforcement agency. Do **NOT** directly contact the agency. If you complete the Giglio macro less than 30 days prior to trial, a request **WILL NOT** be sent to the appropriate law enforcement agency. If you obtain any responsive information, you **MUST** consult your Supervisor before taking any further action.

QUESTIONS TO BE ASKED OF EACH OFFICER/AGENT/EMPLOYEE

AS FAR AS YOU ARE AWARE:

| | | | |
|----|---|---|---|
| 1. | Are you aware of any use of force or other conduct allegedly committed by you that is currently under review and/or investigation by your agency, the USAO, or any other agency? | Y | N |
| 2. | Are there any allegations currently under investigation or have any findings ever been made during a criminal, civil, or administrative proceeding concerning your: <ul style="list-style-type: none"> ▪ lack of truthfulness, integrity, and/or candor, or ▪ possible bias, or ▪ official misconduct (which includes, but is not limited to, failure to disclose exculpatory information; witness coaching; obstruction; manufacturing or altering evidence)? | Y | N |
| 3. | Have you ever been arrested, charged with, or convicted of a criminal offense in any jurisdiction? | Y | N |
| 4. | Has a judge ever found that you have testified untruthfully, made a knowing false statement in writing, made an unlawful arrest, conducted an illegal search or seizure, illegally obtained a confession, or engaged in some other misconduct? | Y | N |

| | | |
|----|---|---|
| 5. | <p>Are you aware of any finding or pending allegation that relates to a substantive violation concerning your:</p> <ul style="list-style-type: none"> ▪ Failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, or in obtaining consents to search; ▪ Failure to comply with agency procedures for supervising the activities of a cooperating witness or informant; ▪ Failure to follow mandatory protocols with regard to the forensic analysis of evidence? | <p>Y N</p> <p>Y N</p> <p>Y N</p> |
| 6. | <p>Is there anything now, or during the time of your involvement in this case, that would affect your ability to perceive or recall events?</p> | <p>Y N</p> |
| 7. | <p>Do you currently have, or have you ever had, any significant personal relationship with any of the victims, witnesses (including other police officers, social workers, or medical professionals), lawyers, judge, or defendant(s) in this case? A significant personal relationship is a relationship beyond being mere acquaintances or work colleagues that could potentially influence your testimony or create a possible bias either in favor of or against any victim, witness, lawyer, judge, or defendant.</p> | <p>Y N</p> |
| 8. | <p>Do you understand that you have a continuing duty to disclose, throughout the pendency of this case, any information that may change your responses to the questions above?</p> | <p>Y N</p> |

AUSA NAME _____ WITNESS NAME _____

CASE NAME & NUMBER _____ DATE OF INQUIRY _____

AUSA Signature

Date

GIGLIO/LEWIS QUESTIONNAIRE

WITNESS NAME _____ CAD/BADGE _____

CASE NAME & NUMBER _____ DATE OF INQUIRY _____

AUSA COMPLETING THE FORM _____

[Instructions for AUSAs have been moved to the last page]

QUESTIONS TO BE ASKED OF EACH FOR THE OFFICER / AGENT / EMPLOYEE:

AS FAR AS YOU ARE AWARE:

| | | | |
|----|--|---|---|
| 1. | <p>Are you aware any pending investigations into your conduct by your agency, the USAO, the Office of Police Complaints (OPC), or any other agency?</p> <p><i>This is intended to capture all pending investigations. The current questionnaire appears to limit the types of pending investigations that are responsive (see questions 1 and 2), and additionally lumps together pending investigations with sustained investigations (question 2), resulting in incorrect answers.</i></p> <p>This is a rewording of Q1 on old form: Are you aware of any use of force or other conduct allegedly committed by you that is currently under review and/or investigation by your agency, the USAO, or any other agency?</p> | Y | N |
| 2. | <p>Are you currently appealing or otherwise challenging any findings made against you by any agency?</p> <p><i>We don't ask this question anywhere, and it is something that is not otherwise captured in our PPMS runs.</i></p> <p>New question, not on old form or Giglio letter</p> | Y | N |
| 3. | <p>Are you aware of any pending civil lawsuits against you?</p> <p><i>We don't ask this question anywhere. Although MPD endeavors to track pending civil suits against officers, their actual effectiveness is limited.</i></p> <p>New question, not on old form or Giglio letter</p> | Y | N |
| 4. | <p>Has a judge ever found that you testified untruthfully or made a false statement in writing?</p> <p><i>This is the first half of current question 4.</i> Q4 on old form and Giglio letter ¶3 also included: "made an unlawful</p> | | |

| | | | |
|----|---|---|---|
| | arrest, conducted an illegal search or seizure, illegally obtained a confession, or engaged in some other misconduct?" | | |
| 5. | <p>To your knowledge, you ever been found by your agency to have: Q5 on old form and Giglio letter ¶4: Are you aware of any finding or pending allegation that relates to a substantive violation concerning your:</p> <ul style="list-style-type: none"> ◆ [NEW:] Made a false statement, lacked integrity, or otherwise failed to be candid; ● Failed [Failure] to follow [legal or] agency requirements for the collection and handling of evidence, obtaining statements, recording communications, obtaining consents to search, or [NEW:] handling of prisoners; ● [NEW:] Engaging in biased policing (<i>this attempts to include the former question 2b re "possible bias," though I'm not sure what a yes answer to that question for be</i>); ● Failed [Failure] to comply with agency procedures for supervising the activities of a cooperating witness or informant; ● Failed [Failure] to follow mandatory protocols with regard to the forensic analysis of evidence; or ◆ [NEW:] Engaged in the improper use of force. <p><i>This is current question 5, amplified with additional language from current question 2.</i></p> | Y | N |
| | | Y | N |
| | | Y | N |
| | | Y | N |
| | | Y | N |
| | | Y | N |
| 6. | <p>Have you ever been arrested, charged with, or convicted of a crime in any jurisdiction?</p> <p><i>This is current question 3.</i></p> <p>Same as Q3 on old form; Giglio letter ¶2 limits disclosure to "adult"</p> | Y | N |
| 7. | <p>To your knowledge, have any findings ever been made that you engaged in conduct that you obstructed justice, for instance by altering or manufacturing evidence, or by coaching a witness to lie?</p> <p><i>This is the second half of former question 4.</i> The second half of former question 4 was: "Has a judge ever found that you ...made an unlawful arrest, conducted an illegal search of seizure, illegally obtained a confession, or engaged in some other misconduct." Rather, this seems to be a change from Q2 of the old form and Giglio letter ¶1, which asked:</p> <p>Are there any allegations currently under investigation or have any findings ever been made during a criminal, civil, or administrative</p> | Y | N |

| | | | |
|-----|--|---|---|
| | <p>proceeding concerning you:</p> <ul style="list-style-type: none"> * lack of truthfulness, integrity, and/or candor, or * possible bias, or * official misconduct (which includes, but is not limited to, failure to disclose exculpatory information; witness coaching; obstruction; manufacturing or altering evidence)? | | |
| 8. | <p>Have findings ever been sustained against you by the Office of Police Complaints?</p> <p><i>This is new –most findings of “biased policing” are likely made by OPC, at least for MPD officers.</i></p> <p><i>New question, not on old form or Giglio letter</i></p> | Y | N |
| 9. | <p>Is there anything now, or during the time of your involvement in this case, that would affect your ability to perceive or recall events?</p> <p><i>This is current question 6, which I assume is meant to get at the officer with a drinking problem or whose spouse just divorced him?</i></p> <p><i>Same as Q6 on old form; Giglio letter does not request this info.</i></p> | Y | N |
| 10. | <p>Do you currently have, or have you ever had, any significant personal relationship with anyone involved in this case (i.e. victims, witnesses other police officers, social workers, medical professionals, lawyers, judges, or defendant(s))? A significant personal relationship is a relationship beyond being mere acquaintances or work colleagues that could potentially influence your testimony or create a possible bias either in favor of or against any victim, witness, lawyer, judge, or defendant.</p> <p><i>Same as Q7 on old form except it says “anyone involved” and then puts the possibilities in a parenthetical; Giglio letter does not request this info.</i></p> | Y | N |
| 11. | <p>Do you understand that you have a continuing duty to disclose, throughout the pendency of this case, any information that may change your responses to the questions above?</p> <p><i>Same as Q8 on old form; Giglio letter includes this instruction</i></p> | Y | N |

INSTRUCTIONS FOR THE AUSA:

This form must be completed and signed by you [used to say “the AUSA”] before each and every occasion on which a law-enforcement officer/agent/employee may be called to testify or serve as an affiant. Please inquire of each officer/agent/employee individually and in private. If you receive any “YES” answers, please advise your immediate Supervisor.

This instruction combines instructions 1-3 on old form, and replaces the bracketed language with “you.”

In addition to completing this form, you must perform a check of the computerized Lewis database.

This instruction is the same, except "must" is no longer capitalized and the instruction now stands on its own.

For MPD officers, you must also request that your supervisor perform a check of the PPMS database. (For AUSAs in Superior Court, this must only be done prior to sponsoring the testimony of an officer in a felony trial.) This is new.

If your witness is not with MPD, you must complete the Giglio macro at least 30 days prior to trial to ensure that a Giglio request is sent to the appropriate law enforcement agency. Do not directly contact the agency. If you complete the Giglio macro less than 30 days prior to trial, a request will not be sent to the appropriate law enforcement agency. If you obtain any responsive information, you must consult your Supervisor before taking any further action.

This instruction is the same, except the underlined words were in all capital letters in the old version.

AUSA Signature

Date

Memorandum

Vincent H. Cohen, Jr.
Acting United States Attorney
District of Columbia



Subject: *Giglio* and *Lewis* Procedures

Date: April 22, 2015

To:

All Criminal Division and
Superior Court Division Personnel

From:

Jonathan M. Malis
Chief, Criminal Division
Richard Tischner
Chief, Superior Court Division

Below are the procedures to be followed for *Giglio* and *Lewis* checks, or requests, for both District Court and Superior Court.¹ *Giglio* and *Lewis* checks are designed to assist Assistant United States Attorneys (AUSAs) in fulfilling our Constitutional and Department of Justice policy obligations to identify and disclose, as appropriate, potential impeachment information concerning government witnesses -- both law enforcement witnesses and civilian witnesses. If you have any questions about these procedures, please speak with a supervisor.

Lewis Requests (Metropolitan Police Department)

The Office's "*Lewis* list" database contains information about officers assigned to the Metropolitan Police Department (MPD). This database includes information we have that may suggest a bias or veracity concern relating to the officer, and Sharon Johnson, one of our intelligence analysts, routinely conducts criminal history checks for the officers as well. The criminal history checks, however, expire after 60 days. Please run your officers through the *Lewis* database macro in a timely manner, as these checks may need to be updated prior to trial. If you are notified that the criminal history check must be updated, the computer will automatically generate an email with a notification attached to Sharon Johnson. Because these checks are **only valid for 60 days** please do not submit your request more than a month in advance. Sharon will forward you the original requests, with the results, and the *Lewis* database will be updated within a day or two.

If a particular MPD officer is not listed in the *Lewis* database, then you should ask the *Giglio* questions, and follow the procedures outlined below for civilian witnesses. You should also alert a supervisor that the officer was not included in the database. If you have state or local officers from another jurisdiction, i.e., Prince George's County, you should ask the *Giglio* questions and follow the procedures outlined below for civilian witnesses.

¹ As a reminder to all, *Giglio* refers to *Giglio v. United States*, 405 U.S. 150 (1972), and *Lewis* refers to *Lewis v. United States*, 393 A.2d 109 (D.C. 1978).

Giglio Requests (Federal Agencies)

For all federal agents and officers, as well as DEA chemists, *Giglio* requests should be submitted via the USAODC intranet home page:

<http://districtweb64.usa.doj.gov/district/DC/Wiki%20Pages/dc/forms.aspx>.

These requests must be submitted at least 30 calendar days prior to trial, as they are sent to the agent/officer/chemist's home agency for a personnel file review. Once the agency responds, you will receive notice of its response. We do not maintain an in-house database for these agents. The requests are valid for a 30-day period. If your trial is continued beyond this time frame, you will need to submit a new request.

Giglio/Lewis Questionnaire

In addition to relying on the *Giglio* and/or *Lewis* procedures outlined above, prior to calling each officer, agent, or chemist at any proceeding, AUSAs must complete the *Giglio/Lewis* Questionnaire, notwithstanding the results of any prior *Giglio* or *Lewis* checks.

The *Giglio/Lewis* Questionnaire must be completed for every officer, agent, and chemist, every day, in every case during trial. It must also be completed before any officer, agent, or chemist testifies in the grand jury, or in a detention hearing, preliminary hearing, or motions hearing. It must also be completed before any officer or agent signs any affidavits or warrants. By completing this questionnaire, the AUSA helps to ensure that we have done all we reasonably can to ascertain any bias or veracity concerns that we would need to disclose to the defense. If an AUSA receives an affirmative response to any of the questions, or otherwise learns of information potentially bearing on bias or veracity, the AUSA should consult with a supervisor to determine whether we should disclose the information and how we should handle the information in the grand jury, at the hearing or trial, or in the affidavit. Also, an AUSA should never tell an officer or agent that he or she has been flagged in our *Lewis* database or that we have information potentially bearing on the officer's bias or credibility. Doing so may adversely impact our litigation position in not only your case, but also in cases handled by other AUSAs. Asking the questions of every agent, officer, and chemist in every case as a routine matter gives agents, officers, and chemists less cause for concern than would be the case if inquiries were only made of certain agents, officers, and chemists. These questions should be asked in private, where the agent, officer, or chemist can be comfortable responding to the questions. In addition, *Giglio* and *Lewis* information should not be shared with anyone other than the court and defense counsel in appropriate situations.

Civilian Witnesses

Giglio and *Lewis* checks of civilian witnesses are done by running the witness's criminal record in WALES, FBI's Interstate Identification Index (III), and Pretrial Real Information System Manager (PRISM). This is done by the paralegal or legal assistant. For each witness, an AUSA should obtain the witness's full name, date of birth, and social security number as soon as possible so that the criminal history check may be run promptly. The criminal history of the victim or an eyewitness may require a reassessment of the strength or readiness of a case

It is not unusual for a witness to be hesitant to provide this information, so it is important that the AUSA explain why it is necessary. The witness should be told that we will be checking to see if the witness has a criminal record and that the information may be turned over to defense counsel and introduced during the trial. A witness should not be confronted with his or her criminal record for the first time in open court. Moreover, a witness may deny the existence of a conviction solely due to the confusion regarding the charge or the disposition, so the earlier an AUSA gets the criminal history check, the more time the AUSA has to review it and discuss it with the witness to avoid these issues. Witnesses' personal information must also be safeguarded. An AUSA should never turn over the WALES printout to defense counsel in an attempt to fulfill our disclosure obligations. It is sufficient to orally report the witness's convictions to defense counsel.

An AUSA may also come across *Giglio* information for civilian witnesses in the form of relocation expenses and other assistance provided to them by our office. This is more likely to occur when the witness is involved, either as a witness or a defendant, in a violent crime case being handled by another AUSA in the office. Be sure to check RCIS and LIONS for any other pending cases and coordinate with the assigned AUSA. If this situation arises, please see a supervisor to assist with whether, what and when to disclose this type of information.

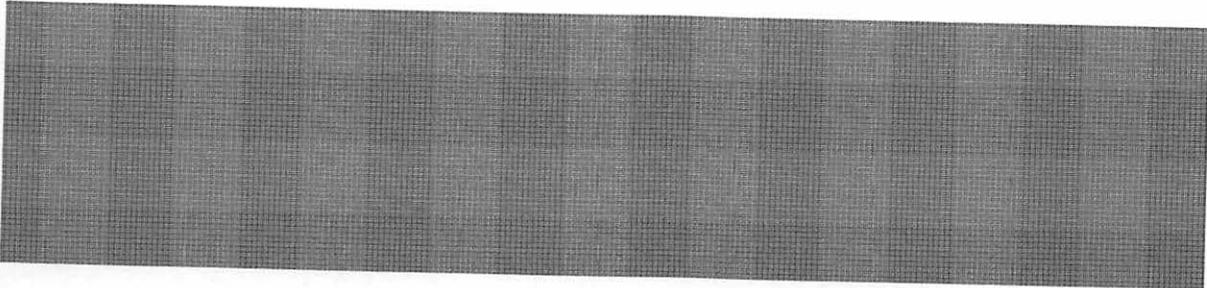
Finally, if an AUSA has a testifying cooperator or Special Employee (SE), the *Giglio* process will be much more expansive than that which is outlined here, and the AUSA should consult with a supervisor once the case has been set for trial to begin the process of collecting the necessary information and determining whether, what, and when to make disclosures.

Information Potentially Subject to Disclosure:

- 1) All pending cases/investigations at the time of testimony;¹
- 2) All findings of misconduct that reflect upon the truthfulness or candor of the officer (to include evidence of corruption bias);
- 3) All criminal convictions;
- 4) Any finding that casts a serious doubt upon the accuracy of evidence that the prosecutor intends to rely upon a trial.
- 5) Information that reflects that an officer's ability to perceive and recall truth may be impaired.
- 6) Where defense has made a specific proffer, other information that is directly responsive to the proffer.

A non-exhaustive list of examples of findings that "reflect upon the truthfulness or candor of the officer" or that arguably constitute "corruption bias:"

- Judicial negative credibility findings;
- False statement findings by MPD;
- Officer lied about his status to obtain a badge to which he was not entitled
- Officer stopped an individual for selling tickets outside of the Verizon center illegally, but agreed not to arrest the seller if the seller provided him with tickets to an event;
- Officer stopped a driver of a vehicle; driver was in possession of drugs. Officer told the driver that he would not arrest him if the driver could lead him to a gun. Officers drove defendant to a location in Maryland and procured a gun for him. Officers returned to the District and reported in paperwork that they had recovered the gun in DC;



(B)(5)

- Officer takes photos of arrestees and posts them on his open Facebook account with degrading captions;
- Officer took sick leave from MPD in order to work his part-time position;
- Officer directed other officers to delete BWC footage;
- Officer directed other officers not to complete UFIR paperwork where the paperwork was required by MPD policy.
- An officer is late for roll call, and his sergeant calls him. The officer tells the sergeant that he is stuck in court. When the officer shows up later an hour to 90 minutes later, the sergeant asks to see his PD 140. At that point the officer admits that he wasn't in court but at home waiting for a delivery from Best Buy. The PD 140 accurately reflected his time in court. The officer is suspended for several days.

Below is a non-exhaustive list of examples of "findings that cause a substantial doubt upon the accuracy of evidence that the prosecutor intends to rely on at trial." Note that whether these findings are discloseable depends very specifically on what the officer is being called to testify about. That means that certain findings may be discloseable in one case, but not in another (posing the potential for inconsistencies in disclosures between cases...);²

- Where an officer is part of a chain of custody, sustained findings that the officer has mishandled evidence in the past;
- Where an officer has completed paperwork in a case, and has prior sustained findings against him for failing to properly fill out paperwork;
- Where a detective has repeatedly violated Miranda in the taking of confessions, and has taken a statement in the instant case;
- Where an officer obtained consent to search from an individual, and the officer has previously been found to have improperly obtained consent.

Findings that are presumptively not discloseable, absent a specific proffer from defense or a case-specific reason:

- Any failure to appear anywhere;
- Preventable traffic accidents;
- Mouthing off at roll call, sending inappropriate emails;
- Causing damage to MPD property;
- Harassment;
- Domestic Violence findings (?);

- Sustained findings that do not relate to the officer's testimony
- Sustained finding for orders/directive violation where the officer checked out of court at 1523 hours, but didn't report to MPD until 1900 hours. Officer found AWOL for the intervening period

Below is a non-exhaustive list of findings that fall within a gray area:

- Unjustified Use of Force findings (in a case where the defendant was injured as part of the arrest, prior sustained use of force allegations against officers involved in the arrest would arguably be discloseable to defense)
- Losing a prisoner/notebook;
- A finding in connection with outside employment where the detective was working in plain clothes, which enabled the store owners to obtain security services without paying mandatory insurance, but where MPD had otherwise approved the outside employment, so it is not a fraud case;
- "Misfeasance" findings -- findings that an officer could have done more, in the absence of a specific tie to an officer's role in a case.
- Officer fires pistol at a moving vehicle. This is a "Not Justified" use of force. He is reprimanded. Finding doesn't give rise to bias/veracity or relate to the accuracy of his testimony in the case, but nature of the finding is the sort of thing defense might want to know. Disclose in camera?
- Sustained OPC finding where the officer was argumentative with the driver and findings were sustained for harassment. No truth or veracity issue. Do not know whether defendant intends to claim that she was harassed by police at stop.
- Sustained findings that an officer failed to give a statement to OPC, where officer had a union representative present and OPC had failed to review/get from MPD the officer's PD 119.