**(700)-90 Testimony and Production of Documents**

During the course of their official duties, Treasury Inspector General for Tax Administration (TIGTA) employees may be called upon or subpoenaed to give oral testimony in, or to produce TIGTA documents for, various types of legal proceedings. These legal proceedings include court hearings, trials, depositions, administrative proceedings, and the like. This section describes some of the situations in which TIGTA employees may be called upon to testify or produce documents. It also sets out the procedures for responding to each type of request. Strict compliance with these procedures is essential to ensure TIGTA’s and employees’ compliance with the law and to protect TIGTA’s rights and prerogatives in litigation.

90.1 Treasury Regulation.

Currently, testimony or the production of records by TIGTA employees in a court or other proceeding in response to a subpoena is covered by the Department of the Treasury regulation set forth at 31 C.F.R. § 1.11, which requires that specified Treasury Department employees, including TIGTA employees, obtain official approval before testifying about or producing information obtained during the course of their official duties. The authorization provides guidance to the TIGTA employee/witness as to any limits on his or her testimony and protects the employee from a contempt citation. The regulation applies to all testimony concerning official TIGTA activities and to the production of TIGTA documents sought by subpoena.

Specifically, 31 C.F.R. § 1.11 provides:

1. Treasury Department … employees are prohibited from testifying or otherwise furnishing information obtained as a result of their official capacities or in connection with the transaction of public business, in compliance with a subpoena or other order or demand of any court or other authority without the prior approval of an officer authorized to determine the availability of records under these regulations.
2. Treasury Department … employees are prohibited from furnishing any record in compliance with subpoenas duces tecum or other order or demand of any court or other authority, without the prior approval of an officer authorized to determine the availability of records under the regulations in this part.
3. In court cases in which the United States or the Treasury Department is not a party, where the giving of testimony is desired, an affidavit by the litigant or the litigant’s attorney, setting forth the information with respect to which the testimony of such … employee is desired, must be submitted before permission to testify will be granted. Permission to testify will, in all cases, be limited to the information set forth in the affidavit or to such portions thereof as may be deemed proper.
4. Where approval to testify or to furnish records in compliance with a subpoena, order or demand is not given the person to whom it is directed shall, if possible, appear in court or before the other authority and respectfully state his inability to comply in full with the subpoena, order or demand, relying for his action upon this section.

As stated above, subsection (c) of Treasury Reg. § 1.11 also requires that the litigant seeking the employee’s testimony or production of documents submit an affidavit describing the information about which the employee’s testimony is sought or that specifies the documents that the employee is to produce. The purpose of the affidavit is to permit TIGTA officials to make informed decisions about whether the information or documents being sought is legally disclosable and whether testimony is in the government’s interests. The contents of this affidavit are pivotal as they will be the basis for the approval or the denial of the litigant’s request.

When TIGTA refers documents to state or local law enforcement agencies for prosecution, TIGTA will provide the state or local prosecutor a form entitled “[Description of Information Sought Through Testimony](#Sampleform)” to submit with the subpoena. The form’s text is contained in the exhibit, but the template should be used. It is retrievable via the Counsel tab in Word through File/New. In non-referred cases, the party seeking the testimony or information must submit an affidavit, as described in Treasury Reg. § 1.11.

90.2 Testimony Authorization.

90.2.1 Scope of Testimony.

A testimony authorization authorizes the employee's testimony and designates the matters about which the employee may testify. A TIGTA employee may only testify regarding official duties and may not testify or produce TIGTA records without prior authorization except when such testimony or production of records falls into the following categories:

* The TIGTA employee is called to testify or produce records by the Department of Justice on behalf of the Government;
* The TIGTA employee is called to testify by the Internal Revenue Service at an administrative hearing involving personnel matters; or
* A response to a discovery request.

The testimony authorization generally indicates that employee is prohibited from:

* Disclosing tax returns or return information in violation of I.R.C. § 6103;
* Disclosing information that would tend to identify, either directly or indirectly, a confidential informant;
* Disclosing information protected by Grand Jury secrecy laws;
* Answering hypothetical questions;
* Answering any questions concerning the polices, practices, procedures or other matters of official business of the Treasury Inspector General for Tax Administration except as they relate or are relevant to the legal proceeding in which they are testifying; and,
* Revealing attorney-client or deliberative process privileged information.

The employee's testimony must be limited to the information set forth in the authorization. If an employee is asked to testify beyond the scope of the authorization, the employee should refuse citing the authorization and 31 C.F.R. § 1.11 as the basis for the refusal. If necessary, the employee should contact the Office of Chief Counsel for assistance.

90.2.2 Authorization and Procedure.

90.2.2.1 The Office of Chief Counsel's Disclosure Branch is responsible for generating testimony authorizations for TIGTA employees. The decision to authorize the testimony of a TIGTA employee has been delegated to the Deputy Inspector General for Audit, the Deputy Inspector General for Investigations, the Deputy Inspector General for Mission Support/CFO, the CIO, Office of IT, or the Chief Counsel. These executives have the authority to delegate the authority to authorize testimony to other individuals on their staff.

90.2.2.2 A TIGTA employee should immediately forward a subpoena or request for testimony/production of records to the Disclosure Section upon receipt. In addition, the employee should forward a brief narrative or any documents, *e.g.*, Report of Investigation, that sets forth the expected scope of the testimony to be provided by the employee.

90.2.2.3 The employee will generally receive an electronic version of the testimony authorization. The office of the authorizing official is responsible for forwarding the authorization to the employee. In emergency situations oral authorization can be provided to the employee.

90.2.2.4 If it is decided that the TIGTA employee will not be authorized to testify, the Office of Chief Counsel will assist the United States Attorney's office in determining what legal efforts should be undertaken, *e.g.*, removal to federal court or seeking to quash the subpoena.

90.3 Discovery.

“Discovery,” in this section, refers to the process by which parties in litigation, through their counsel, seek information from and provide information to the opposing party(ies). Methods for conducting discovery include depositions (attorneys asking a witness questions under oath before a court reporter), interrogatories (asking written questions answered in writing under penalty of perjury), requests for production of documents and information, and requests for admissions. Discovery requests are often made in accordance with a pre-trial order that specifies the time by which discovery must be completed. As such, a deadline by which specific discovery must be answered is generally included in each discovery request. Attorneys often conduct discovery in an order that builds on the foundation created by previous discovery. Compliance with time deadlines is particularly important so that the requesting counsel may keep to a schedule of requesting discovery, obtaining a response, analyzing the response, and issuing the next series of discovery requests built on the information already obtained.

The scope of and process for conducting discovery varies from case to case and depends, in part, on the court in which the proceeding is filed, whether the case is a criminal or civil matter, and the issues in dispute. Discovery is a critical stage of litigation; the skill with which an attorney conducts discovery can determine the outcome of the entire litigation.

Records may be sought from TIGTA by parties in litigation through discovery requests such as requests for production of documents. While the Office of Chief Counsel operates as a contact point, the TIGTA function that maintains the responsive records is responsible for gathering and reviewing the records sought to determine relevancy and possible assertion of privilege (e.g., informant privilege).

If a TIGTA employee receives a subpoena seeking testimony or records, the subpoenaed employee should immediately notify the Office of Chief Counsel, Disclosure Section, and forward a copy of the subpoena to the Office of Chief Counsel.

90.4 Brady v. Maryland and the Jencks Act.

Criminal trials pose unique issues related to testimony and document production. Two of these issues are discussed in this section: *Brady v. Maryland,* 373 U.S. 83 (1963) and the Jencks Act, 18 U.S.C. § 3500. *See also* [§ 90.8 (Giglio/Henthorn requests).](#Giglio)

90.4.1 Brady v. Maryland.

In 1963, the Supreme Court ruled in *Brady v. Maryland*, 373 U.S. 83 (1963), that the United States must provide to a criminal defendant any evidence in its possession that is favorable to the accused and relevant to guilt or punishment. Usually, the obligation to produce *Brady* material is predicated on a request by defense counsel. If, however, the material is of “obviously substantial value to the defense,” the United States is required to produce the material even absent a request. Failure to comply with *Brady* requirements may constitute a violation of the defendant’s due process rights and may result in dismissal of the charges.

*Brady* has practical ramifications for TIGTA employees. First, TIGTA employees, usually Special Agents, working with a federal prosecutor must call possible *Brady* material to the prosecutor’s attention. Further, a court may deem the prosecutor to have knowledge of and access to *Brady* material in the possession, custody, or control of any federal agency participating in the investigation of the defendant. Thus, TIGTA may need to search its files for *Brady* material concerning a defendant standing trial.

It is the responsibility of any employee working with a federal prosecutor to perform a search of TIGTA records for any evidence that is favorable to the accused and relevant to guilt or punishment, *i.e., Brady* material. The Special Agents-in-Charge (SAC) in the Field Divisions and the Internal Affairs and Procurement Fraud Division, Headquarters Office are responsible for reviewing and releasing *Brady* material to the federal prosecutor. TIGTA Counsel is available to provide assistance in reviewing documents to determine if information is considered to be *Brady* material.

When material protected by I.R.C. § 6103 is possible *Brady* material, the TIGTA employee responsible for releasing the documents should contact TIGTA's Office of Chief Counsel prior to the release. The Office of Chief Counsel attorney assigned to the matter may coordinate with the prosecutor to seek the court's review of the material and determination that it constitutes *Brady* material. If the court rules that the material is *Brady* material, the prosecutor may request a court order releasing the I.R.C. § 6103 material to ensure compliance with *Brady* to ensure protection of the defendant’s Constitutional rights, and to protect the prosecutor from civil liability for unauthorized disclosures. Ideally, the court’s order would also limit defendant’s use of the I.R.C. § 6103 material to that particular criminal case. Coordination with TIGTA’s Office of Chief Counsel is recommended when I.R.C. § 6103 material is possible *Brady* material.

90.4.2 Jencks Act.

The Jencks Act, 18 U.S.C. § 3500, states that no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of discovery until the witness has testified on direct examination in the trial of the criminal case. To be covered by the Jencks Act, the “statement” may be either 1) written and signed or otherwise adopted or approved by the witness; 2) a recording or substantially verbatim transcription of an oral statement; or, 3) a statement the witness made to a grand jury.

TIGTA employees, mostly Special Agents, must follow the direction of the prosecutor in all criminal cases regarding the Jencks Act because the Act is applied differently in different judicial districts. For example, although the Act states that no statement shall be subject to discovery before a witness for the United States testifies, the practice in some districts is to give the witness’s statement to the defense in advance of the trial. In some districts and under some circumstances, the statement is given to the defense during the discovery period. If this practice might lead to witness intimidation or threats, the Special Agent should speak with the prosecutor about her/his concerns. A TIGTA “Report of Investigation” may be Jencks material if the Special Agent who prepared the Report testifies at the criminal trial.

# 90.5 Privileges.

The Government may assert privilege in declining to provide access to its documents, or to provide information orally (e.g., in deposition or trial testimony), based upon three different grounds: statutory privileges, evidentiary privileges, and governmental privileges. Privilege situations normally arise in the context of litigation.

90.5.1 Statutory privileges are based on federal statutes which allow or require that certain information be kept confidential. The statutory privileges which TIGTA would most commonly invoke are:

* Internal Revenue Code (I.R.C.) § 6103: The definitions of returns and return information under I.R.C. § 6103, and some of the circumstances under which TIGTA must protect information under I.R.C. § 6103, are discussed at Chapter (700)-50.
* The Privacy Act of 1974, 5 U.S.C. § 552a: The type of information covered by the Privacy Act, and the circumstances under which TIGTA cannot disclose information protected by the Privacy Act, are discussed at [Chapter (700)-70](../700-70/700-70.docx).

90.5.2 Evidentiary privilegeswhich the Government most commonly asserts include:

* Attorney-Client Privilege: The attorney-client privilege protects communications between clients and their attorneys that are meant to be confidential and that are made for the purpose of securing legal advice or services. The privilege clearly extends to an agency’s confidential communications with its attorneys. The privilege belongs to the agency and may only be asserted or waived by the agency. Unlike the attorney work product privilege, the attorney-client privilege is not limited to the litigation context. The confidentiality of the communication must have existed at the time of the communication and still remain at the time of the privilege claim.
* Attorney Work Product Privilege: The attorney work product privilege protects all documents prepared by attorneys (or by non attorneys supervised by attorneys) in contemplation of litigation. The privilege includes all factual information contained in the protected documents. Litigation need not have actually commenced in order for the privilege to exist so long as specific claims have been identified which make litigation probable. The privilege extends to documents relating to possible settlement of, as well as to the decision to end, litigation.

90.5.3 Governmental privileges are privileges which are available only to the Government. Certain courts require that formal claims of Governmental privilege be made by the head of the Government agency involved, while other courts will accept claims made by other senior agency officials.

* Deliberative Process Privilege: The deliberative process privilege (also referred to as executive privilege) may be asserted by the Government to protect predecisional and deliberative information (opinions, recommendations and advice) generated pursuant to the decision making processes within the Government. The privilege is intended to ensure that open and frank discussions will take place during decision making. The privilege protects only information reflecting the thoughts and opinions expressed during the decision making process and normally will not protect factual material. Factual material is protected if it is so inextricably intertwined with the deliberative material that the factual information cannot reasonably be separated out. Factual information may also be protected if the revelation of the facts discussed would itself reveal the thought processes involved. Records submitted by outside consultants may be covered by the deliberative process privilege if they played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done. The consultant would not represent an interest of its own or the interest of a client; its obligations would be to the truth and to its sense of what good judgment requires. Because the information protected must be predecisional in nature, the privilege does not cover final agency decisions or documents specifically incorporated by reference in final agency decisions. The deliberative process privilege is qualified. If the information is sought in litigation the court will balance the public interest in protecting the deliberative process with the litigant’s need for the information.
* “Informant’s” Privilege: The “informant’s” privilege protects the identities of persons who furnish information under an express or implied promise of confidentiality concerning possible violations of law. The privilege protects only the identity of the confidential source and does not protect the information furnished by the confidential source to the Government, unless the information furnished would reveal the source’s identity. Assurances of confidentiality need not have been expressly made by the agency to the confidential source for the privilege to attach; confidentiality may be implied from the circumstances surrounding the contact between the source and the agency. The privilege is the government’s to assert or waive. In preparing a declaration to support its claim of privilege, TIGTA will necessarily rely on contemporaneous documentation of circumstances under which confidentiality assurances were given. The privilege is qualified. To prevail, the Government must show that its law enforcement interests outweigh the litigant’s need to know the confidential source’s identity.
* Investigatory Files Privilege: Investigatory files compiled for law enforcement purposes are privileged when disclosure of the files would undercut the Government’s efforts to prosecute by disclosing unique or uncommon techniques, forewarning suspects of the investigation, and/or prematurely revealing the scope and direction of the Government’s case. The privilege is qualified and will be lost if the court determines that the litigant’s need for the information outweighs the law enforcement interests involved. Once the investigation for which the files were generated or compiled is closed, the privilege usually is no longer available.

90.6 Briefing Employees.

90.6.1 Disclosure personnel must advise the requested/subpoenaed employee of the authorization and the permissible scope of testimony and production of internal revenue information prior to the time that the employee is scheduled to appear.

90.6.2 The following items are examples of matters that the Disclosure Branch personnel may cover.

* The specifics of the testimony and production authorization, including identification of the particular records, tax entities and tax records about which disclosure is permitted.
* The need to segregate documents and not testify to matters which are not authorized to be disclosed.
* Testimony should be confined to the limits of the authorization. Additional information (and personal opinions, unless authorized) should not be volunteered.
* During testimony, employees should make sure that they understand a question and give the accompanying counsel time to raise any objections they might have before responding. If a question is not understood or the employee does not know the answer, he/she should say so.
* If a "yes or no" answer is requested and such answer would be misleading, the employee should explain that the question cannot be properly answered without an explanation.

90.6.3 Disclosure personnel shall instruct all employees appearing in testimony cases in federal and state courts and administrative proceedings other than TIGTA tax administration cases to provide feedback to the Disclosure Office regarding the nature of the testimony given and documents produced.

90.6.4 Feedback information will be used by Disclosure personnel to close out the testimony file and, if necessary, account for disclosures in compliance with the notice requirement of section [70.6, Accounting and Notification](../700-70/700-70.docx#Accounting)*.* The Privacy Act of 1974, at 5 USC 552a(e)(8), provides that each agency make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record.

90.7 Witness Fees

Witness fees may be encountered any time an employee testifies as a witness in a judicial or administrative proceedings. TIGTA's Personnel Policy Manual contains additional information on the different types of court leave and related fees set forth in 5 U.S.C. §§ 5515, 5537 and 6322.

Witness fees may be tendered by an opposing party requesting trial testimony or seeking to take deposition testimony of a TIGTA employee. Whether a TIGTA employee may accept the tendered witness fees depends upon whether the testimony is given in the employee's official or personal capacity.

90.7.1 Testimony in an Employee’s Official Capacity.

Employees are not entitled to witness fees when testifying on behalf of the United States. When the payment of witness fees is required under federal or state law, the fees must be tendered prior to the appearance and testimony of a TIGTA employee. If an employee testifies in an official capacity or produces official records on behalf of a state or local government or a private party or if the employee is summoned on behalf of a state or local government, and the payment of witness fees is required under federal or state law, the employee must collect the authorized witness fees and allowances for expenses of travel and subsistence. Employees who are granted court leave for service as witnesses are required to turn in any fees along with a copy of the court order, subpoena, summons, or other written request to office of the Director, Finance & Procurement. If the subpoena is withdrawn or quashed, notify the National Director to initiate refund of the payment.

90.7.2 Testimony in an Employee’s Nonofficial Capacity.

When the employee renders witness service in an unofficial capacity to which a government body is not a party to the proceeding, the manager and/or timekeeper shall charge the employee’s absence to annual leave or leave without pay. For example, if a TIGTA employee witnesses an automobile accident while walking to the office or during his or her lunch period, any testimony on behalf of a party to the accident would be rendered in a nonofficial capacity. Here the employee may accept any fees and expenses incidental to such testimony.

90.8 Giglio/Henthorn Policy.

90.8.1 Overview.

90.8.1.1 TIGTA employees who are potential witnesses are required to inform the federal prosecutor with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each potential witness should have a candid conversation with the prosecutor regarding any on-duty or off-duty potential impeachment information including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it producing the material or taking steps to preclude its improper introduction into evidence.

Because there are times when a potential witness is unaware that he or she is the subject of a pending investigation, prosecutors will receive the most comprehensive potential impeachment information by having both the candid conversation with the potential witness and by submitting a request for potential impeachment information to the investigative agency. It is likely that a prosecutor will decide to request potential impeachment information from the employing agency. Requests originating with prosecutors are known as Giglio requests.

**Note: Henthorn requests are discovery motions by defense counsel in federal prosecutions for similar information and are processed following the same procedures.**

90.8.1.2 The disclosure of potential impeachment information concerning Department of the Treasury employees who are witnesses in federal criminal trials or cases is governed by the [Department of Justice (DOJ) Giglio Policy](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.100).

90.8.1.3 Potential impeachment information is not easily determined. Potential impeachment information has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include, but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness’ credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness’ character for truthfulness; (c) prior inconsistent statements; and, (d) information that may be used to suggest that a witness is biased.

90.8.1.4 Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the Requesting Official under the following circumstances:

* When the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued;
* When: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity;
* When the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or,
* When disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

90.8.2 Giglio Responsibilities.

The Office of Investigations Special Agents-in-Charge (SACs) in the Field Divisions and Internal Affairs and Procurement Fraud Division, are designated as the Agency Officials to serve as points of contact within TIGTA concerning Giglio requests. Each Agency Official should inform the U.S. Attorney’s Offices within his/her area of responsibility of his/her designation as TIGTA’s Agency Official for Giglio requests and is responsible for consulting periodically with the relevant Requesting Officials about case law and practice governing the definition and disclosure of impeachment information. Upon receiving a request for potential impeachment information, the Agency Official shall conduct a review of relevant files.

Each U.S. Attorney’s Office will appoint a Requesting Official to serve as the Department of Justice (DOJ) point of contact for Giglio requests. All requests for impeachment information from a U.S. Attorney’s office will be made to TIGTA’s Agency Officials through Requesting Officials.

Agency Officials are responsible for ensuring that tax information protected by 26 U.S.C. § 6103 is only disclosed to a Requesting Official if it is relevant to the potential impeachment of the witness. TIGTA’s Disclosure Office is available to assist in reviewing material for 26 U.S.C. § 6103 issues. The Agency Official must comply with the Privacy Act Accounting of Disclosure requirements set forth at 5 U.S.C. § 552a(c).

## 90.8.3 Giglio Requests Involving TIGTA Employees.

Use the following procedures to process Giglio requests for TIGTA employees:

90.8.3.1 The DOJ Requesting Official will contact the appropriate Agency Official and request impeachment information affecting witness credibility, or other exculpatory or impeachment material subject to discovery.

90.8.3.2 Six categories of files are relevant to requests for impeachment information, and relevant portions of these files must be obtained and examined:

* **Official Personnel Files** must be requested through the Bureau of the Fiscal Service (BFS), email [OPFInquiries@fiscal.treasury.gov](mailto:OPFInquiries@fiscal.treasury.gov), or telephone number (304) 480-8276.
* **Employee Performance Files** must be requested from employee’s immediate manager.
* **Drop Files** must be requested from employee’s immediate manager.
* **Employee Investigative Files** may be queried in the Performance and Results Information System (PARIS).
* **Grievance Files** must be requested from the TIGTA Employee Relations Specialist.
* **Equal Employment Opportunity Files** must be requested from the TIGTA EEO Program Manager.

90.8.3.2.1   The Agency Official should contact TIGTA Counsel to request that TIGTA Counsel conduct a records check of its legal files for disciplinary matters on the employee.  TIGTA Counsel will notify the Agency Official whether any Merit System Protection Board matters involving the employee exist or whether any disciplinary matters that are **not** associated with, or related to, a specific TIGTA complaint or investigation number exists.  TIGTA Counsel matters associated with specific TIGTA complaint or investigation numbers should be found through the PARIS query required in 90.9.3.2.

Upon request from the Agency Official, Counsel may provide copies of relevant disciplinary actions or administrative findings from any TIGTA Counsel legal file, such as signed and dated written reprimands, proposal letters, decision letters, and Merit System Protection Board (MSPB) decisions, to the Agency Official for examination, in instances that OI does not have these documents.

90.8.3.3 The Agency Official is responsible for reviewing and releasing potential impeachment information contained in the files subject to review. Agency Officials should make broad disclosures of potential impeachment information to the prosecutor so that the prosecutor can assess the information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, among other variables. Unless advised by a Requesting Official or prosecutor that case law or court rulings in the district require broader disclosures, potential impeachment information relating to agency employees may include, but is not limited to, the categories listed below:

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

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

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

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

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

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

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

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

vi) information that may be used to suggest that the agency employee is biased for or against a defendant (*See U.S. v. Abel*, 469 U.S. 45, 52 (1984). The Supreme Court has stated, "[b]ias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest."); and

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

The DOJ Requesting Official is the best resource to contact when an Agency Official has questions regarding the scope of information to be disclosed to the prosecutor. TIGTA Counsel is also available to provide assistance in reviewing documents to determine if information is considered impeachment information under current case law.

90.8.3.4 The Agency Official provides potential impeachment information regarding TIGTA witnesses directly to the DOJ Requesting Official.

90.8.4 Giglio Requests Involving IRS Employees.

90.8.4.1 Use the following procedures to process Giglio requests for IRS employees:

90.8.4.2 IRS Criminal Investigation (CI) has designated the Special Agents-in-Charge (SAC), CI, as the Agency Officials to conduct a review of relevant files for witnesses in CI cases. One of the categories of records that must be checked for those witnesses is TIGTA Office of Investigations investigative files. The SAC, CI, will contact the TIGTA Agency Official to request that a check of Office of Investigations records be conducted. Upon receiving a request, the TIGTA Agency Official will:

* Query PARIS for relevant investigative records pertaining to the subject of the Giglio request and obtain investigative files for review. Review TIGTA investigative files for potential impeachment information. See 90.8.3.3 for categories. The DOJ Requesting Official is the best resource to contact when an Agency Official has questions regarding the scope of the information to be disclosed to the prosecutor. TIGTA Counsel is also available to provide assistance in reviewing documents to determine if information is considered impeachment information under current case law.
* Pursuant to an agreement with CI, and in light of privacy interests of employees, potential impeachment information that may be responsive to a Giglio request will be provided directly to the DOJ Requesting Official by the TIGTA Agency Official.

90.8.5 Responsibilities After Disclosure of Potential Impeachment Information

90.8.5.1 When Agency Officials have provided potential impeachment information to a Requesting Official, DOJ’s Giglio policy requires Requesting Officials to inform the Agency Official how the prosecuting office used the information. A circumstance may arise in which a prosecutor or Requesting Official learns of potential impeachment information relating to a TIGTA employee from a source other than TIGTA – including, but not limited to, the TIGTA employee. In such circumstance, the Requesting Official shall notify the Agency Official of such information and provide the Agency with a timely opportunity to meaningfully express its views regarding the information. Regardless of the source of the information, the Requesting Official will:

(a) advise the Agency Official whether the employee provided an affidavit or testimony in a criminal proceeding or whether a decision was made not to use the employee as a witness or affiant because of potential impeachment issues;

(b) advise the Agency Official whether the information was disclosed to a court or to the defense and, if so, whether the court ruled that the information was admissible for use as impeachment information; and

(c) provide the Agency Official a copy of any related pleadings, and any judicial rulings, findings or comments relating to the use of the potential impeachment information.

The Agency Official shall maintain judicial rulings and related pleadings on information that was disclosed to the court or the defense in a manner that allows expeditious access upon the request of any Requesting Official.

90.8.5.2 Before any prosecutor or Requesting Official uses or relies upon information included in the prosecuting office's Giglio system of records, the Requesting Official will contact the relevant Agency Official(s) to determine the status of the potential impeachment information. The Agency Official(s) is required to provide an update so that the Requesting Official can update the prosecuting office's Gigliosystem of records to ensure that the information in the system of records is accurate.

90.8.5.3 TIGTA has a continuing duty to disclose potential impeachment information to prosecuting offices. Once a request for potential impeachment information has been made, the Agency Official is required to make the Requesting Official aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which a TIGTA employee is a potential witness or affiant. DOJ Giglio policy requires prosecuting offices to promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the TIGTA’s duty to disclose shall cease.

90.8.5.4 When a TIGTA employee has been transferred to another judicial district, or will testify or serve as an affiant in another judicial district, DOJ Giglio policy allows the prosecuting office in the originating district to provide any relevant information from its Giglio system of records relating to that TIGTA employee to theRequesting Official in the new district. The Requesting Official(s) providing the information shall notify the Agency Official(s) when distributing materials from its Gigliosystem of records to another prosecuting office.

If the potential impeachment information relates to pending investigations or other incomplete matters, the status of which may have changed or been resolved favorably to the agency employee, the DOJRequesting Official transferring the information is required to notify the relevant Agency Official(s) before providing any information to another prosecuting office, except in cases where there is no time to provide notice. The Agency Official(s) should then provide a prompt update. Whether notice is provided before or contemporaneously with the transfer, the Requesting Official is required to advise the Agency Official(s) what materials will be or have been distributed.

DOJ Giglio policy also requires the Requesting Official in the new prosecuting office to request an update from Agency Official(s) as part of the Giglio analysis, and give TIGTA the timely opportunity to fully express its views and to provide an update. The Requesting Official in the new district is not bound by the former district’s decisions regarding disclosure of information to the court or defense, or use of the TIGTA employee as a witness or affiant.

90.8.5.5 When a TIGTA employee is transferred to a new district, TIGTA is required to ensure that the Requesting Official in the new district is advised of any potential impeachment material known to TIGTA when the employee begins meaningful work on a case or matter within the prosecuting district or is reasonably anticipated to begin meaningful work on such a case or matter.

DESCRIPTION OF INFORMATION

SOUGHT THROUGH TESTIMONY

The attached subpoena requests the testimony of a Special Agent of the Office of the Treasury Inspector General for Tax Administrations (TIGTA) at the prosecution of a matter TIGTA investigated and referred to my office. The scope of the requested testimony will be the Special Agent’s knowledge of facts and circumstances concerning the allegation(s) and investigation, and of matters contained in the Report of Investigation provided to my office in connection with the matter to which the subpoena refers.

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