



# MIDDLESEX COUNTY PROSECUTOR'S OFFICE POLICY AND PROCEDURE



<b>SUBJECT:</b>  <b><u>BRADY/GIGLIO POLICY (IDENTIFYING, OBTAINING, REVIEWING &amp; DISCLOSURE OF RELATED MATERIAL)</u></b>	<b>DATE OF ISSUE:</b>  <b>12-16-2020</b>	<b>EFFECTIVE DATE:</b>  <b>12-16-2020</b>
<b>RELATED POLICY/PROCEDURE:</b>  <b>N.J. Attorney General Directive #2019-6</b>  <b>REVISION DATES:</b>	<b>POLICY NUMBER:</b>  <b>20-06</b>	
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I. BACKGROUND

The purpose of this Policy is to establish a procedure to assist the personnel of the Middlesex County Prosecutor's Office ("MCPO") in meeting their obligations to disclose exculpatory witness impeachment material pursuant to Brady v. Maryland, and Giglio v. United States.

II. POLICY

It is the policy of the MCPO to comply with the mandates delineated in N.J. Attorney General Directive #2019-6 by identifying and disclosing to defense counsel qualifying exculpatory information in our case file at the earliest possible stage of the instituted criminal proceedings. It is recognized, however, the possibility that a local law enforcement agency may be in possession of potential impeachment information about an *investigative employee* that is not part of our case file. Accordingly, this policy specifically sets forth a procedure for identifying, obtaining, and reviewing impeachment information about *investigative employees*, which will often be in the possession of local law enforcement agencies that operate within Middlesex County. The cooperation of local law enforcement agencies is essential in this regard because a prosecutor's duty includes a requirement that the prosecutor learn of any evidence favorable to the defendant that is known to those acting on the State's behalf, including local law enforcement agencies. Further, this duty requires disclosure of Brady/Giglio material whether or not the defense makes a request for such information.

Thus, this policy ensures that Assistant Prosecutors receive enough information to meet their Brady/Giglio obligations and to protect a defendant's right to a fair trial, while also protecting the confidentiality rights of *investigative employees*.



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### ***POLICY RELATED FORMS:***

The following forms have been created to address specific tasks associated with this policy. All such forms are located on Forms on Proserver3. Furthermore, those forms that have an asterisk (\*) following the form title means that this particular form is also included in the CD of Forms that is periodically distributed to Chiefs/Directors for use by law enforcement agencies in the County.

- *Brady/Giglio - Suggestions for the Candid Conversation with the Investigative Employee (\*)*
- *Brady/Giglio – Formal Request Form*
- *Brady/Giglio - Investigative Employee Disclosure Form (\*)*
- *MCPO Letter to Agency/Employee Concerning Disclosure of Brady/Giglio Material*

### III. ACTION

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**MIDDLESEX COUNTY PROSECUTOR'S OFFICE POLICY  
IDENTIFYING, OBTAINING, REVIEWING AND DISCLOSING  
BRADY AND GIGLIO MATERIAL**

**I. PURPOSE**

The purpose of this Policy is to establish a procedure to assist the Middlesex County Prosecutor's Office (MCPO) personnel in complying with their obligations to disclose evidence under Brady v. Maryland, 373 U.S. 83 (1963), which includes impeachment material, pursuant to Giglio v. United States, 405 U.S. 150 (1972). Assistant prosecutors have a legal and ethical duty to disclose exculpatory evidence to the defense. Exculpatory evidence is evidence which is favorable to the defendant and material to the issues of guilt or punishment. Exculpatory evidence also includes impeachment evidence or evidence that affects a witness's credibility. Such impeachment material will herein be referred to as "Brady/Giglio material."

It is the practice of the MCPO to turn over exculpatory information in our case file at the earliest possible juncture. We recognize, however, the possibility that a local law enforcement agency may be in possession of potential impeachment information about an investigative employee<sup>1</sup> that is not part of our case file. Accordingly, this policy specifically sets forth a procedure for identifying, obtaining, and reviewing impeachment information about police witnesses, which will often be in the possession of local law enforcement agencies within Middlesex County. The cooperation of local police agencies is essential in this regard because a prosecutor's duty includes a requirement that the prosecutor learn of any evidence favorable to the defendant that is known to those acting on the State's behalf, including local police departments. Further, this duty requires disclosure of Brady/Giglio material whether or not the defense makes a request for such information.

Thus, this policy attempts to ensure that assistant prosecutors receive information necessary to meet their Brady/Giglio obligations and to protect a defendant's right to a fair trial while also respecting the confidentiality rights of investigative employees.

**II. THE LAW**

In Brady v. Maryland, the United States Supreme Court announced:

We now hold that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

[373 U.S. at 87.]

In Giglio v. United States, the United States Supreme Court held that Brady material

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<sup>1</sup> This includes sworn law enforcement officers, analysts, civil investigators, and civilian employees working for a law enforcement agency.

includes material that might be used to impeach key government witnesses, stating:

When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within the general rule [of Brady].

[405 U.S. at 154.]

Ten years later, the New Jersey Supreme Court in State v. Carter held:

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

[91 N.J. 86 at 111 (1982).]

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

### III. THE "PROSECUTION TEAM"

There may be cases when a law enforcement officer or other investigative employee (the "investigative employee") knows about Brady and/or Giglio material and the prosecutor does not. In Kyles v. Whitley, 514 U.S. 419, 437-38 (1995), the United States Supreme Court made clear that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Knowledge of potential Brady and/or Giglio material is imputed to the prosecutor, and therefore, it is the prosecutor's responsibility to gather and disclose such relevant material. Giglio, 405 U.S. at 154; State v. Womack, 145 N.J. 576, 589, cert. denied, 519 U.S. 101 (1996); State v. Russo, 333 N.J. Super. 119, 133-35 (App. Div. 2000). Citing the Tenth Circuit, the New Jersey Supreme Court has held that "the 'prosecution' for Brady purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office . . . , as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." State v. Nelson, 155 N.J. 487 (1998) (quoting Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 824 (10th Cir. 1995)); State v. Mustaro, 411 N.J. Super. 91, 102 (App. Div. 2009) (finding even if prosecutor was unaware of existence of impeachment material on videotape, arresting officer was aware; consequently, officer's knowledge was imputed to State).

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

### IV. BRADY AND GIGLIO: PRACTICAL APPLICATION

#### A. Responsibilities Under Brady

The obligation to turn over exculpatory and material information is embedded in New Jersey's discovery rules. See Rule 3:13-3(a), (b), and (f). Beyond that, it is the prosecutor who decides, based on his or her professional judgment, what evidence is covered by Brady and must, therefore, be disclosed to the defendant. Further, because knowledge of Brady material is imputed to the prosecutor, it is imperative that the prosecutor request and obtain any Brady material in the prosecution team's possession. The prosecutor must ask the investigative employees with whom he or she works if they, or any other member of the prosecution team, know of any Brady material related to the case.

Investigative employees must turn over Brady material, which pertains to that investigative employee, to the prosecutor in order to ensure that the prosecutor can adhere to the Brady rule. If unsure about the rule or what is covered by Brady, the investigative employee shall consult with the assigned assistant prosecutor handling the case.

Ultimately, it is the decision of the assistant prosecutor assigned to the case in consultation with the assistant prosecutor assigned to review all Brady/Giglio material ("the Giglio liaison")<sup>2</sup> (see Section VI.A) to determine whether to disclose or not to disclose potentially exculpatory evidence and to whom disclosure will be made, i.e., the Court and/or defense counsel. Evidence may be identified by the investigative employee as Brady material, and the assigned prosecutor may conclude under the circumstances that the evidence is not exculpatory. Once the assigned prosecutor determines evidence is clearly exculpatory or meets the definition of Brady, it must be turned over to the defense during the normal course of discovery pursuant to Rule 3:13-3. If a prosecutor is uncertain on the decision to disclose, he or she shall consult with the Giglio liaison or his or her supervisor.

## **B. Examples of Brady Material**

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

- a. Evidence linking a State witness to the crime for which defendant is being charged. State v. Landano, 271 N.J. Super. 1 (App. Div.), certif. denied 137 N.J. 164 (1994);
- b. Evidence related to defendant's theory of third-party guilt. State v. Smith, 224 N.J. 36, 50 (2016);
- c. Potentially exculpatory polygraph test of State's witness. State v. Carter, 85 N.J. 300 (1981); and
- d. Prior inconsistent and exculpatory statements made by a State's witness. State v. Cahill, 125 N.J. Super. 492 (Law Div. 1973).

## **C. Responsibilities Under Giglio**

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<sup>2</sup> The Section Chief of the Special Investigations Unit is designated as the Giglio liaison for Middlesex County.

As with Brady material, there is a constitutional requirement to disclose all Giglio material because Giglio is indeed under the purview of Brady. “Evidence impeaching the testimony of a government witness falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence.” State v. Carter, 91 N.J. at 111 (citing Giglio v. United States, 405 U.S. 150 (1972)). The New Jersey Supreme Court in Carter went on to hold that “the State’s obligation to disclose is not limited to evidence that affirmatively tends to establish a defendant’s innocence but would include any information material and favorable to a defendant’s cause even where the evidence concerns only the credibility of a State’s witness.” Ibid. (internal quotations omitted).

#### **D. Civilian Witnesses<sup>3</sup> and Potential Giglio Material**

With respect to civilian witnesses, investigative employees must turn over Giglio material to the prosecutor. Consequently, every member of the prosecution team must know the Giglio rule, and if unsure about the rule or what is covered by Giglio, the investigative employee should consult with the assigned assistant prosecutor and/or the Giglio liaison.

Ultimately, it is the decision of the assistant prosecutor assigned to the case in consultation with the Giglio liaison (see Section VI.A) to determine whether to disclose or not disclose potentially exculpatory evidence and to whom disclosure will be made, i.e., the court and/or defense counsel. Evidence identified as Giglio material by the investigative employee and provided to the assigned prosecutor will not necessarily be disclosed to the court or to defense counsel. If the assigned prosecutor is uncertain, he or she shall consult with the Giglio liaison or his or her supervisor.

#### **E. Examples of Giglio Material with respect to Civilian Witnesses**

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

1. Bias. A witness can be impeached with evidence that he or she has a bias against the defendant or in favor of the State (actual or potential exposure to criminal penalties, promises of leniency/plea agreement, payments, immigration benefits, etc.);
2. Specific Instances of Dishonesty. A witness can be impeached with evidence of a prior act of misconduct involving dishonesty, even if it has

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<sup>3</sup> For purposes of this Policy, a civilian witness is defined as a witness who is not employed by a law enforcement agency or entity. Non-law enforcement witnesses, such as civilians who are employed by the New Jersey State Police, are not considered civilian witnesses, but rather are defined as investigative employee witnesses under this Policy.

not resulted in a criminal charge or conviction. This includes lying and falsifying records. N.J.R.E. 608;

3. Criminal Conviction. N.J.R.E. 609; and
4. Prior Inconsistent Statements. N.J.R.E. 613.

#### **F. Investigative Employees and Potential Giglio Material**

It is imperative that investigative personnel assist with the prosecuting agency's legal duty to review and, if necessary, disclose evidence that may impact the credibility of investigative employees who may be called as State's witnesses. To help investigative employees meet this burden, when this policy goes into effect, the MCPO's Professional Standards Unit shall contact the Internal Affairs Officer/Chief/Director for each police agency operating in Middlesex County and (1) provide them with this Policy; (2) remind them of their duty to disclose the aforementioned Brady/Giglio material; and (3) direct that they review their records to determine if any of their investigative employees have matters that potentially fall into one of the categories listed in section IV F. below.

This review shall be conducted for all current police officers and for any officers who have retired or have left the police agency who may still be a potential witness in a pending case.

Allegations that cannot be sustained,<sup>4</sup> are not credible, or have resulted in exoneration of a police officer are generally not considered to be potential impeachment information; however, any doubt about whether an officer's conduct may be Brady/Giglio material shall result in disclosure to the Middlesex County Prosecutor's Office, Professional Standards Unit for review. However, if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the Giglio-related charge is dismissed, the charge would still be considered sustained if the officer does not challenge the finding or unless and until a sustained finding is overturned by a judge or magistrate.

If the Internal Affairs Officer's review reveals that an officer has or potentially has a matter which falls into the Brady/Giglio categories, the Internal Affairs Officer must immediately contact the Commanding Officer, Professional Standards Unit to arrange for the MCPO to review the matter.

If the Internal Affairs Officer's review reveals that no officers within the department have potential Brady/Giglio impeachment material as outlined under section IV. F. of this policy, the Internal Affairs officer must notify the Commanding Officer, Professional Standards Unit to advise that the review was conducted and that no officers have matters which qualify as Brady/Giglio material.

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<sup>4</sup> For the purposes of this Policy, "sustained" is the equivalent of "substantiated."

This review and notification process shall be completed within **30** days of the effective date of this policy or the date of the solicitation of such documents, whichever is sooner.

In addition, the Internal Affairs Officer, after this review and notification process, shall prepare a notice letter to the employee when notification to a prosecuting agency has been made that the employee may have Giglio-related material in the employee's file or other potential Giglio-related information as outlined in Section IV. F. The letter shall inform the employee that possible Giglio material may exist and that further discussions may be warranted. The Internal Affairs Officer of the investigative employee's agency shall ensure that the employee receives a copy of the notice letter and that this Policy is attached thereto. A copy of the letter shall be kept in the employee's personnel file and is to remain confidential. If such a letter is issued, the investigative employee shall also disclose a copy of the letter to the prosecuting agency as early as practicable in any investigation or prosecution in which the employee is involved, but no later than 10 days after the start of an investigation, a subsequent arrest, or the commencement of a prosecution. A supplemental letter may be issued, if appropriate, under circumstances in which the employee has been exonerated, including where the previous Giglio finding has either been vacated, dismissed, or overturned in any subsequent action. A copy of said letter should be forwarded to the MCPO's Professional Standards Unit for inclusion in their Brady/Giglio documents.

#### **G. Examples of Giglio Material with respect to investigative employees**

Potential impeachment information relating to investigative employees may include, but is not limited to, the following<sup>5</sup>:

1. A sustained finding<sup>6</sup> that an investigative employee has filed a false report or submitted a false certification in any criminal, administrative,

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<sup>5</sup> The following list is modeled after the matters listed in the Attorney General Internal Affairs Guidelines with respect to credibility of police officers. Internal Affairs Policy & Procedures at 43-44.

<sup>6</sup> For the purposes of this Policy, a sustained finding is any finding where a preponderance of the evidence shows an officer violated any law, regulation, directive, guideline, policy or procedure issued by the Attorney General or County Prosecutor; agency protocol; standard operating procedure, rule or training, following the last supervisory review of the incident(s) during the internal affairs process or a ruling by a hearing officer, arbitrator, Administrative Law Judge, or the Superior Court. Allegations that cannot be sustained, are not credible, or have resulted in the exoneration of an employee, including where the previous Giglio finding has either been vacated, or overturned on the merits in any subsequent action, generally are not considered to be potential impeachment information, subject to the requirements herein. On the other hand, if the officer negotiates a plea or there is an administrative or civil settlement with the employer whereby the Giglio-related charge is dismissed, the charge would still be considered sustained, if there was sufficient credible evidence to prove the allegation, and the officer does not challenge the finding and obtain a favorable ruling by a hearing officer, arbitrator, Administrative Law judge, or the Superior Court. In reviewing dispositions reached before the issuance of this Directive, prosecutors must be mindful that officers may not have had an incentive to challenge Giglio-related charges or findings when the overall negotiated disposition of the matter was acceptable to the officer. Therefore, in such cases, prosecutors must thoroughly review the entire investigative file before making determinations on the disclosure of Giglio-related charges that were ultimately dismissed as part of an administrative or civil settlement. Prosecutors should review the underlying facts of any sustained charge rather than rely on the abbreviated title or top-level characterization of the charge, in making Giglio determinations.



employment, financial, or insurance matter in his or her professional or personal life;

2. A sustained finding that an investigative employee was untruthful or has demonstrated a lack of candor;
3. A pending criminal charge or conviction of any crime, disorderly persons offense, petty disorderly persons offense, municipal ordinance, or driving while intoxicated matter, noting that any such charges or convictions will be reviewed for disclosure under N.J.R.E. 609;
4. A sustained finding that undermines or contradicts an investigative employee's educational achievements or qualifications as an expert witness; and
5. A finding of fact by a judicial authority or administrative tribunal that is known to the employee's agency, which concludes a finding that the investigative employee was *intentionally* untruthful in a matter, either verbally or in writing;
6. A sustained finding, or judicial finding, that an investigative employee intentionally mishandled or destroyed evidence. Generally, law enforcement agencies and investigative employees should disclose findings or allegations that relate to substantive violations concerning: (1) the intentional failure to follow legal or departmental requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications; (2) failure to comply with agency procedures for supervising the activities of a cooperating person; and (3) the intentional failure to follow mandatory protocols with regard to the forensic analysis of evidence;<sup>7</sup>
7. Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;
8. Information that may be used to suggest that the investigative employee is biased for or against a defendant. See United States v. Abel, 469 U.S. 45, 52 (1984). The Supreme Court has stated, "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise,

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<sup>7</sup> This category does not include incidents deemed by a supervisory authority to be a mistake or done in error without intention, even in cases where the incident was sustained. For example, if an officer failed to follow a mandatory protocol due to a misunderstanding and that mistake resulted in a sustained finding, that would not be considered Giglio information for purposes of this policy.

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

9. A sustained finding or judicial finding, that an investigative employee is biased against a particular class of people, for example, based on a person's gender, gender identity, race, or ethnic group.

Other information or material may exist that, depending on the circumstances of the case and the crimes charged, may need to be disclosed even though the information or material does not fit into one of the categories listed above.

## **V. DUTY TO GATHER POTENTIAL GIGLIO MATERIAL**

### **A. Points of Contact**

All potential Giglio information obtained from an investigative employee or the employee's agency should be carefully protected and kept confidential within a separate file in the agency and at the MCPO and only disclosed to those with a need to know. The procedure for gathering the Brady/Giglio material from the local police agencies operating in Middlesex County is outlined in section IV E. of this policy. The duty of local law enforcement agencies to disclose Brady/Giglio material to the MCPO is a continuing duty. After this initial review is conducted, every local agency must immediately contact the Commanding Officer of the Professional Standards Unit or the Giglio liaison should an officer be involved in a matter which fits into one of the categories listed in section IV. A-F, above.

Aside from gathering all the Giglio material, as set forth in Section IV. B. of this policy, the Commanding Officer, Professional Standards Unit and the Giglio liaison will consult periodically about the relevant Supreme Court case law, New Jersey case law, court rulings, and practice governing the definition and disclosure of impeachment information.

### **B. Duty to Disclose**

#### **1. Investigative Employee's Role**

It is the policy of the MCPO to establish and maintain a system so that assistant prosecutors may obtain and review potential Giglio material related to investigative employees prior to any plea offer — Rule 3:13-3(a) — grand jury appearance, testimonial hearing, or trial. To fulfill this policy, investigative employees must disclose all potential Giglio material on an ongoing basis to the MCPO Professional Standards Unit and/or the assigned assistant prosecutor, especially when (1) that individual has made an arrest or has signed a complaint or may be a testifying witness, or (2) at the request of the prosecuting agency. Each investigative employee is obligated to inform prosecutors with whom they work of potential impeachment information (or confirm that the prosecuting authority is aware of the existence of potential Brady/Giglio material) *as early as possible*, but no later than

10 days after the start of an investigation, a subsequent arrest or the commencement of a prosecution. This disclosure shall be made by the use of the “Investigative Employee Brady/Giglio Disclosure Form.” (Form D). Each investigative agency should ensure that its employees comply with this obligation through the use of this form.

## **2. Prosecutor’s Role**

### **a. The “Candid Conversation” Guide**

New Jersey’s discovery rules are broad. To ensure compliance with the rules, a MCPO employee shall, at the inception of the criminal case or as soon as practicable, have a discussion with the investigative employee, in the presence of a MCPO detective, often termed a “candid conversation.” (See Form A, Suggestions for the Candid Conversation with the Investigative Employee). The purpose of this discussion is to determine: (1) whether potential Brady/Giglio material exists relating to that individual investigative employee that may or may not be captured in the employee’s personnel file; and (2) whether other information exists in the internal affairs file or any other location that may be material and relevant to the current case. The assigned assistant prosecutor should immediately inform the Commanding Officer, Professional Standards Unit and the Giglio liaison of potential Brady/Giglio information learned during this discussion. The information received and shared with the Commanding Officer, Professional Standards Unit and the Giglio liaison shall be kept confidential.

### **b. Supplemental Requests and Local Agency Review**

Prosecutors have a continuing duty to exercise due diligence in discovering and disclosing both Brady and Giglio material. There are times when an investigative employee will be unaware that he or she is the subject of a pending investigation or adverse finding, therefore, prosecutors will endeavor to receive the most comprehensive potential impeachment information by having both the candid conversation with the investigative employee and by receiving mandatory quarterly updates concerning potential Brady/Giglio information from the investigative agency regarding any investigative employee.

Prior to any plea offer — Rule 3:13-3(a) — testimonial hearing, or trial, the assistant prosecutor assigned to the specific case shall fill out a form (Attached as Form B), listing the date of the next court appearance and the names and agency of the officers that are reasonably expected to testify at Grand Jury, any testimonial hearing or a trial of a matter. Form B will then be hand-delivered to the Commanding Officer, Professional Standards Unit at least one week prior to said hearing or appearance. The assigned assistant prosecutor may make supplemental requests through the Commanding Officer,

Professional Standards Unit, if necessary, as the investigation and/or prosecution progresses.

Once the Commanding Officer, Professional Standards Unit, receives Form B from the assistant prosecutor, the Commanding Officer, Professional Standards Unit will determine whether there is any potential Brady/Giglio information concerning the named investigative employees. The results of that determination, whether positive or negative, will be made known to the assigned assistant prosecutor. In order to keep this information current, the Internal Affairs Officer of every police agency in Middlesex County will contact the Commanding Officer, Professional Standards Unit in Middlesex County quarterly to advise of any changes or additions to the potential Brady/Giglio material identified after the initial review and notification process as noted in Section IV.E.

The Internal Affairs Officer shall notify the Commanding Officer, Professional Standards Unit of the existence of any records responsive to that request. If so, the Internal Affairs Officer will advise the Commanding Officer, Professional Standards Unit and make the responsive records available to them. If there are no new records responsive to the request of the Commanding Officer, Professional Standards Unit, the Internal Affairs Officer shall advise the Commanding Officer accordingly, in writing. Upon receipt of any responsive records, the Commanding Officer, Professional Standards Unit shall subsequently make such information available to the Giglio liaison to review. If it is determined that those records are Brady/Giglio material, a notification shall be made concerning the named investigative employee in the instant and future cases.

Any physical records supplied shall be stored with the Commanding Officer, Professional Standards Unit and be kept confidential unless and until a determination to disclose these records has been made. Any local Internal Affairs Officer and/or the investigative employee shall be responsible for immediately updating the Commanding Officer, Professional Standards Unit should any new internal affairs matters arise.

**c. MCPO Review**

With respect to investigative employees identified by the assigned assistant prosecutor on Form B as witnesses, the Professional Standards Unit shall, on each occasion, search its own records to determine if any investigative employees listed as witnesses have matters known to the Unit which fall into one of the Brady/Giglio categories listed in section IV. A-F above.

**d. Middlesex County Prosecutor's Office Review of its Employees and those Temporarily Assigned**

The Commanding Officer, Professional Standards Unit will review the MCPO's internal records to determine if any MCPO investigative employee or those temporarily assigned to the MCPO have any matters falling into one of the categories in section IV. A-F above.

If the Commanding Officer, Professional Standards Unit locates any records falling into the categories in section IV.A-F, the Commanding Office will make the responsive records available to the Giglio liaison to review. After a review, if it is determined that those records are potential Brady/Giglio material, the Giglio liaison will determine, in consultation with the assigned Assistant Prosecutor if appropriate, whether Brady/Giglio disclosure must be made. If it is determined that the records are Brady/Giglio material, a notification shall be made to the Chief of MCPO, as well as the MCPO investigative employee.

Should no Brady/Giglio materials be found, the Commanding Officer, Professional Standards Unit shall note that he/she conducted the review and found no Brady/Giglio materials. If there is any question as to whether material located regarding an investigative employee is Brady/Giglio material, the Commanding Officer, Professional Standards Unit shall consult with the Giglio liaison.

## **VI. DISCLOSURE OF POTENTIAL GIGLIO INFORMATION TO THE COURT OR DEFENSE COUNSEL**

### **A. Independent Review**

Similar to the responsibilities under Brady, it shall be the responsibility of the Giglio liaison to independently review the potential Brady/Giglio material or any other information found to be relevant and material to the particular case. This is to be done prior to a plea offer —Rule 3:13-3(a) — testimonial hearing, or trial.

If it is determined that potential Brady/Giglio materials exists, the Giglio liaison will review the material to determine whether it should be disclosed to the court for an *ex parte, in camera* review or whether it should be disclosed directly to defense counsel. If the Giglio liaison determines that Brady/Giglio material exists or if the Giglio liaison questions whether or not certain material should be disclosed, the liaison shall prepare a memorandum summarizing the case, with a recommendation regarding disclosure with any conditions, such as redaction and/or with a protective order, to a Deputy First Assistant Prosecutor, who will review the material and make the determination in consultation with the Giglio liaison and the First Assistant Prosecutor, if necessary.

All final decisions regarding the disclosure of impeachment material shall be made by the Deputy First Assistant Prosecutor, in consultation with the First Assistant Prosecutor. This evaluation requires a review of the potential impeachment information in light of the facts of the case, role of the witness in the case, potential defenses, the memorandum prepared by the Giglio liaison and the rules of evidence.

It shall be the policy of the MCPO that prior to disclosing the existence of any material under Section IV.F(7) "Any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation," or any allegation which is pending investigation, to defense counsel, said material will be first presented to a Superior Court Judge for an *ex parte, in camera* review for that Court to determine whether disclosure to defense counsel should be made and to what extent. Moreover, the presentation of said material should be accompanied by a Motion in Limine and a detailed proposed protective order, limiting the use and distribution of any material relating to a pending investigation.

If the review by the Court determines that the materials must be disclosed, the assigned assistant prosecutor shall assure that the Giglio liaison is aware of the decision authorizing the disclosure. The Giglio liaison shall note any determination that disclosure was authorized and the manner in which that disclosure is to be made and to whom. The Giglio liaison shall make the notifications to the local agency and the investigative employee as required by Section X, below.

It must be remembered that disclosure of exculpatory evidence does not equal admissibility. The New Jersey Rules of Evidence places limits on what evidence is admissible in court and specifically, what evidence may be used to challenge a witness's credibility. There will be instances where this office authorizes the disclosure of Brady/Giglio material but argues that such is inadmissible at trial under the New Jersey Rules of Evidence. This is an additional determination that must be made on a case-by-case basis and shall be the subject of the appropriate Motion in Limine.

The Commanding Officer, Professional Standards Unit shall assist in the aforementioned determinations. In all instances, the Commanding Officer, Professional Standards Unit must be made aware of all Brady/Giglio material and determinations since the analysis will necessarily be recurring.

## **B. Method of Disclosure Following Independent Review**

There are a variety of options with respect to disclosure of Brady/Giglio materials including: (1) seeking an *ex parte, in camera* review by the Court to determine if, in fact, potential Brady/Giglio materials must be disclosed, with or without a protective order pursuant to R. 3:13-3(e), prohibiting the dissemination of the materials by the defense or limiting their use through a Motion *In Limine*; (2) the release of information to defense counsel with redactions to protect the privacy interests of third parties, investigative personnel and/or the witness; (3) the release of information to defense

counsel without restriction. All options should be discussed during the review process set forth in section VI. above.

## **VII. CONFIDENTIALITY**

Identifying, obtaining and reviewing potential Brady/Giglio materials is a confidential process. Assistant Prosecutors and members of the Detective Bureau who review confidential internal affairs materials must keep those matters confidential. All documents requested and obtained shall be kept confidential and secured in a manner to be determined by the Professional Standards Unit. This confidentiality requirement is in effect until it is determined that Brady/Giglio material shall be released to the defense and/or the Court under the procedures provided herein. Personnel and internal affairs files are confidential materials and will not be released except pursuant to this Policy, State law and in accordance with an appropriate Court order.

## **VIII. NOTIFICATION TO LOCAL AGENCY AND INVESTIGATIVE EMPLOYEE**

Upon identification of Brady/Giglio material, certain disclosures need to be made by the Commanding Officer, Professional Standards Unit and/or the Giglio liaison to the Chief/Director and the Internal Affairs Officer of the investigative employee's agency and the investigative employee in question: (1) informing them of the intention to disclose Brady/Giglio material; (2) identifying what information will be disclosed; (3) informing them of any decision by the Court as to the scope of the disclosure of the information; and (4) indicating if the investigative employee witness was not called to testify because of the Brady/Giglio materials. This notification will provide the investigative employee and their agency the opportunity to verify the accuracy of the noted Brady and Giglio material and the opportunity to rectify any inaccuracies, which must be done immediately.

The Giglio liaison shall also inform the investigative employee, the Internal Affairs Officer and the Chief /Director of any determination made by the Court as to the admissibility of such information at trial. If a decision has not been made by the Court at the time of the initial notification, the Giglio liaison shall make a supplemental notification informing the investigative employee, the Internal Affairs Officer and the Chief/Director of the admissibility of the material.

If the assigned assistant prosecutor or a supervisor makes the decision not to use an investigative employee because of Giglio concerns, or the Giglio material substantially affected the case in any way, the assigned assistant prosecutor shall inform the Giglio liaison of those issues. The Giglio liaison shall notify the Internal Affairs Officer, the Chief/Director and the investigative employee of that decision.

After any Brady/Giglio disclosures are made, the investigative employee may seek review of that determination from the County Prosecutor or their designee. This review shall not interrupt or interfere with the assigned assistant prosecutor's obligation to disclose information in the ongoing case.

Consistent with the Attorney General's Law Enforcement Directive No. 2019-6, "Establishing County Policies to Comply with Brady v. Maryland and Giglio v. United States," promulgating a "do-not-call" list of individuals who can never be called as witnesses is not a preferred means of complying with Brady and Giglio obligations, and should be avoided.

**IX. EFFECTIVE DATE**

This Policy is effective immediately.

Attachments:

Form A-MCPO Suggestions for Candid Conversation with Investigative Employee

Form B-Assistant Prosecutor's Request for Brady/Giglio review by Professional Standards Unit personnel

Form C-MCPO letter to Agency/Employee Concerning Disclosure of Brady/Giglio material

Form D- Investigative Employee Brady/Giglio Disclosure Form