UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Plaintiff v. EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, ET. AL., Defendants.	Case No. 14-269 (CKK) Memorandum

MEMORANDUM REGARDING SEGREGABILITY

This case returns to the Court in a new posture. On appeal, the Circuit Court agreed with this Court's prior ruling that the Federal Criminal Discovery Blue Book ("Blue Book") includes exempt attorney work product, but concluded that the Book *also* contains non-exempt policy statements. It thus directed this Court to review the Blue Book once again—this time with an eye to whether non-exempt material in the Book can be reasonably segregated and disclosed.

Unsurprisingly, DOJ contends that almost all the material in the Blue Book is work product or inextricably intertwined with work product. There are, however, a number of reasons to doubt that proposition. DOJ appears to have adopted an overly *narrow* understanding of what constitutes DOJ "policy" subject to disclosure, and an overly *broad* understanding of what constitutes "strategy" and "advice" subject to work-product protection. Moreover, DOJ's current characterization of the Blue Book is in direct conflict with its prior testimony before Congress, in which it described the Book as a quintessential government policy manual.

Accordingly, in making its segregability assessment, this Court should put little weight on DOJ's sweeping claims of privilege. Rather, it should independently review the Blue Book, taking care to differentiate between strategic material that is designed to advance DOJ's litigation prospects (which the D.C. Circuit confirmed is protected as attorney work product), and neutral exposition of DOJ's legal duties or policies (which the Court of Appeals clarified is not protected). In light of FOIA's policy of government openness—and the particular need for transparency about the government's criminal justice policies, as Judges Sentelle and Edwards emphasized in their concurrence—NACDL urges this Court not to permanently cloak virtually all of the manual in secrecy, as DOJ requests.

BACKGROUND

DOJ's description of the Blue Book has changed again and again. First, in the wake of the public outcry surrounding the unethical prosecution of former U.S. Senator Ted Stevens, DOJ touted the Blue Book as a tool for preventing prosecutorial misconduct. When Congress was considering a bill to codify DOJ's disclosure obligations, DOJ promised that the Blue Book, among other reforms, had obviated the need for legislation. The Blue Book "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations," and once distributed to all DOJ prosecutors around the country, would help ensure that prosecutors have "a full appreciation of their responsibilities" to make appropriate disclosures to criminal defendants. ECF No. 16-2, Exh. H at 1, 4 (DOJ's congressional testimony). Or so DOJ told Congress at the time.

But then, when NACDL initiated this FOIA litigation to obtain public release of the Blue Book, DOJ's description of the Book shifted. No longer a manual to teach prosecutors about their discovery obligations and thereby ensure their full compliance, the Blue Book became a compilation of strategic advice designed to help prosecutors outwit criminal defendants in court. *E.g.*, Govt's Mem. In Support of M. Summ. J. at 7, ECF 13-1 ("The [Blue Book] constitutes attorney work product because it contains legal advice and litigation strategies to support the Government's investigations and prosecutions."); *id.* at 9 (the Blue Book contains "arguments and authority to defeat discovery claims by defendants"). Not only that, DOJ said, releasing the Book would allow criminal defendants to somehow circumvent the law, leading them to destroy evidence and intimidate witnesses, thus threatening a "breach[]" of our "national security." *Id.* at 24-25. Indeed, the Government claimed that the Blue Book was so sensitive and strategic that not a single one of its 500 pages could be disclosed to the public. *Id.* at 3.

On appeal, however, the D.C. Circuit expressed skepticism about the Government's categorical position. It noted that, according to the Government's own submissions, the Blue Book "contains a discussion" of "policy statements," apparently including the Book's first chapter: "Department of Justice Policy, Positions, and Guidance." D.C. Cir. Op. at 18. Thus, "[i]n light of the government's submissions," the Court of Appeals "th[ought] it appropriate to assess whether the Blue Book contains non-exempt statements of policy that are reasonably segregable," and remanded to this Court to undertake that assessment. *Id.*

DOJ has now pivoted once again. Today, DOJ admits that the first chapter of the Blue Book is not strategic; the chapter merely regurgitates already-public statements of policy. Govt's Supp. Decl. at 5, ECF No. 38 ("The Chapter summarizes DOJ discovery policy as reflected primarily in the United States Attorneys Manual … and the Ogden Memorandum …."). So too, DOJ acknowledges, do three paragraphs from two subsections in the Blue Book: "Th[o]se sections summarize the coverage of the Department's *Giglio* Policy and public amendments to that policy in 2006." *Id.* at 6. But apart from those sections—as well as the cover page and a small part of the table of contents—every single other section of the Book, *including even the Index*, reveals "legal analysis and advice" and "legal strategies." *Id.* at 8. And "any discussion of policy contained therein is inextricably intertwined with that legal advice and strategy," DOJ now says. *Id.*

ARGUMENT

I. IN SEPARATING WORK PRODUCT FROM POLICY, THE COURT SHOULD SCRUTINIZE THE CONTENT AND FUNCTION OF EACH SECTION OF THE BLUE BOOK.

On appeal, the Court of Appeals agreed that the Blue Book includes attorney work product. But it also remanded to this Court to determine in the first instance which parts of the "the Blue Book contain[] reasonably segregable statements of the government's discovery policy." D.C. Cir. Op. 18. In conducting that assessment, the first step must be to identify the line between the exempt work product and the non-exempt policy statements. Here, the inquiry is aided in large part by the Court of Appeals' decision, which elucidates the boundaries of the work-product privilege. Two points in particular deserve to be highlighted.

First, in evaluating segregability, this Court should consider the function played by each divisible section of the Blue Book. If a portion of the Book is plainly "designed to help federal prosecutors prevail in court on behalf of the government," it is exempt from disclosure. *Id.* at 13. The purpose of the work-product privilege is to protect "'the integrity of the adversary trial process,'" *id.* at 5 (quoting *Jordan v. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978) (en banc)), and revealing the materials a party creates to win in court undermines that purpose. In contrast, the Court agreed that "materials serving no cognizable adversarial function … generally would not constitute work product." *Id.* at 13. When the function of a document is to convey agency policies—*even if the particular policies will be applied in future litigation*—its disclosure does nothing to jeopardize the integrity of the adversarial system, and the privilege is thus unnecessary. *See Am. Immigration Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 222 (D.D.C. 2012) (documents conveying "routine agency policies" were not work product). Indeed, "the prospect of future litigation touches virtually any object of a DOJ attorney's attention," and "if the agency were allowed to withhold any document prepared by any person … with a law degree simply because litigation might someday occur, the policies of the FOIA would be largely defeated." *Senate of P.R. ex rel. Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574, 586-87 (D.C. Cir. 1987).

Thus, as the Court of Appeals explained in this case, the parts of the Blue Book that "describe[] the types of claims defense counsel have raised and could raise regarding different discovery issues, or the tactics they could employ in litigation …

[,] and the arguments prosecutors can make to respond to these claims" in court are protected attorney work product. D.C. Cir. Op. at 14. But in contrast, statements of "agency policy" designed to, for example, guide prosecutors' discretion or promote adherence with their constitutional obligations are not protected from disclosure. *See id.* at 13, 18.

Second, this Court should carefully review the content of each subsection of the Blue Book. When a document describes "a lawyer's litigation strategy or theory of the case," *id.* at 14, disclosing it threatens the adversarial process; such a disclosure allows attorneys to litigate "'on wits borrowed from the adversary,'" *see id.* at 5 (quoting *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)). But when a document contains a "neutral recitation of legal rules or case law in the manner of a treatise," *id.* at 14, it is not work product; publicizing it does not invade a working attorney's "'zone of privacy within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories,'" *see id.* at 5 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980)).

As for the Blue Book, the Circuit Court explained based on these principles that the sections that comprise "tips and tactical advice for litigating discovery matters in criminal prosecutions" must be withheld as work product. *Id.* at 15. But the same is not true of portions that convey "neutral accounts of government policy." *Id.* To be sure, sections of the Blue Book that "come with a seeming air of neutrality if considered in strict isolation" may be work product if, when considered together

with other material in the Book, they "would tend to reveal the lawyer's thoughts" about what DOJ deems important for prevailing in litigation. *See id.* at 15-16. But if portions of the Blue Book, considered in proper context, simply flesh out in an impartial way the scope of DOJ's disclosure obligations or policies, those portions should be segregated and disclosed.

In short, as this Court reviews the Blue Book for segregability, it is critical to differentiate strategic content designed to help DOJ defeat criminal defendants from neutral, descriptive content that educates prosecutors about their disclosure obligations. The consequences of drawing the wrong line—of accepting DOJ's characterizations of the Blue Book without appropriate skepticism—are significant. If "read over-broadly," the work-product privilege "could preclude almost all disclosure from an agency with substantial responsibilities for law enforcement." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1203 (D.C. Cir. 1991). And here, transparency of government policy is uniquely important. As Judge Sentelle, joined by Judge Edwards, noted in concurrence in this case:

> There is no area in which it is more important for the citizens to know what their government is up to than the activity of the Department of Justice in criminally investigating and prosecuting the people…. [T]he conduct with the U.S. Attorney must not only be above board, it must be seen to be above board. If the people cannot see it at all, then they cannot see it to be appropriate, or more is the pity, to be inappropriate.

Conc. Op. at 3-4 (Sentelle, J.). Particular care is thus necessary here.

II. THERE ARE REASONS TO BELIEVE THAT MUCH OF THE BLUE BOOK IS SUBJECT TO REASONABLE SEGREGATION AND THEREFORE SHOULD BE RELEASED.

Because NACDL is unable review the Blue Book, its ability to assist the Court in identifying which parts of the Book should be segregated and disclosed is necessarily limited. That said, while DOJ uses the right buzzwords (*e.g.*, "litigation strategy," "legal advice"), there is reason to believe that a substantially larger set of subsections must be released than DOJ has acknowledged. This Court should look behind DOJ's labels.

First, DOJ's brief appears to reflect a cramped understanding of what may constitute DOJ's policy. It seems to assume that the only way the Blue Book might contain policy is if it *summarizes* policies created *elsewhere*. For example, DOJ's declaration juxtaposes the Blue Book against "*primary sources* setting forth the Department's policy on criminal discovery." Supp. Decl. at 7 (emphasis added); *accord id.* at 8. It repeatedly notes that particular sections of the Book are not devoted to "*summarizing* DOJ discovery policy." *Id.* at 10 (emphasis added) (discussing Chapter Two); *see also id.* at 11 (same for Chapter Three); *id.* at 12 (Chapter Four); *id.* at 14 (Chapter Five); *id.* at 17 (Chapter Seven); *id.* at 18 (Chapter Eight); *id.* at 19 (Chapter Nine). And predictably, the only portions of the Book that DOJ (now) admits are segregable simply summarize disclosure policies created by other sources. *See, e.g.*, *id.* at 5 ("Chapter [One] summarizes DOJ discovery policy as reflected primarily in the [USAM] and [Ogden Memo]."); *id.* at 6 (Subsections 6.13.2 and 6.13.3 "[s]ummarize the coverage of the Department's *Giglio* Policy and public amendments to that policy in 2006" set forth elsewhere).

What all of this ignores, however, is that the Blue Book would also contain policy *if it creates that policy itself*. In other words, policies that may not have been previously formalized in a memo or manual may well have been established by the Blue Book. If that is the case, then any statements describing those policies would be subject to disclosure under the D.C. Circuit's opinion. Yet, according to DOJ, not a single subsection of the 500-page Blue Book *creates* any policy on any topic—a doubtful contention, particularly in light of DOJ's prior congressional testimony about the Book. *See supra* at 2. This Court should therefore pay heed to whether subchapters of the Blue Book are themselves independent statements of policy.

DOJ also appears to believe, erroneously, that if a subsection of the Blue Book directs a prosecutor to consider two or more factors in determining how to proceed, or if it directs a prosecutor to take an action only in limited circumstances, it cannot be policy and therefore need not be disclosed. *See, e.g.*, *id.* at 9 (acknowledging that the introduction and first subsection of Chapter Two "note[] Department of Justice policies," but disclaiming disclosure because they "identify[] several factors that may affect the scope of the prosecution's discovery obligations"); *id.* ("The Chapter then discusses the factors prosecutors should consider in determining the additional governmental components (if any) that should be searched for discoverable information, interweaving discussion of particular rules and policies."); *id.* at 17 (sections are exempt because topics include "circumstances in which prosecutors should seek or consider seeking protective orders [and] the types of information prosecutors should and should not disclose"); *id.* ("The Chapter

also discusses whether and under what circumstances the Government should seek *ex parte* relief, and provides practical guidance for doing so.").

Of course, that is incorrect. A DOJ policy to provide early discovery, for example, would not be less of a policy subject to disclosure if it applied only in certain cases (*e.g.*, non-homicide cases), or if it directed prosecutors to consider certain factors in implementing it (*e.g.*, to take into account the seriousness of a defendant's criminal conduct in determining how early to make disclosures). This, too, is something the Court should focus on when reviewing the Book.

Second, DOJ appears to incorrectly presume that all legal "analysis" and "advice" categorically warrants work-product protection. The Government thus repeatedly defends its decision to withhold almost all of the Blue Book by claiming it contains "analysis" or "advice." *E.g.*, *id.* at 9 (Chapter Two "provides prosecutors with legal analysis and practical advice concerning the scope of their obligations to search for and potentially disclose exculpatory evidence"); *id.* at 10 (Chapter Three "provides prosecutors with legal analysis and practical advice concerning their duties under Federal Rule of Criminal Procedure 16"); *id.* at 11 (Chapter Four "provides prosecutors with legal analysis and practical advice concerning their compliance with 18 U.S.C. § 3500, regarding the production of witness statements, and, to a lesser extent, with certain Federal Rules of Criminal Procedure"); *id.* at 13 (Chapter Five "discusses, analyzes, and provides advice on various sources of legal authority"); *id.* at 14 (Chapter Six "provides prosecutors with legal analysis and practical advice concerning the scope of their obligations to disclose favorable

information in the possession of the prosecution team to criminal defendants"); *id.* at 18 (Chapter Eight "provides legal analysis and accompanying strategic considerations related to efforts to obtain information from the Government").

As discussed, however, and as the Court of Appeals reiterated, work-product analysis considers the content and purpose of the material. "Analysis" and "advice" are not magic words that resolve the work-product inquiry on their own. Indeed, a policy manual may include analysis or advice and still be a policy manual that does not trigger the work-product privilege. For example, the USAM *analyzes* the law governing prosecutors' constitutional disclosure obligations. *See, e.g.*, USAM 9-5.001 ¶ B ("The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence." (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419 (1995))). It also *advises* prosecutors to take or consider taking certain actions in particular circumstances. *Id.* at ¶ D.1 ("Exculpatory information must be disclosed reasonably promptly after it is discovered."); ¶ F ("Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court."). But it does so in the course of setting forth the Government's *policy* about the proper interpretation and practical implementation of *Brady*, and

therefore is not exempt from disclosure—as the Government admits. *See* ECF 20 at 8; Supp. Decl. at 5, 7-8; Blue Book Ch. 1.2.

For the most part, however, DOJ fails to adequately describe the function and content of each subsection's "analysis" or "advice," making it impossible to tell from the declaration whether the "analysis" or "advice" is necessarily work product. Does the section of the Book that "analyzes background legal principles while also providing practical advice regarding collection and disclosure of evidence [under *Brady*]," Supp. Decl. at 14, for instance, simply advise prosecutors about DOJ's policies on how to collect and disclose evidence in practice? Or does it counsel prosecutors on how to maximize their chances of prevailing in discovery battles? Do the subsections devoted to "advice on various issues concerning Rule 16's coverage and application, what events trigger various disclosure obligations, and how to effect disclosure," *id.* at 10, aim to communicate DOJ's interpretation and practical implementation of Rule 16 in various circumstances (*i.e.*, its Rule 16 policy)? Or do they convey legal strategy in order to minimize the disclosures DOJ may be ordered by a tribunal to make? NACDL cannot advise the Court on the answers to these questions without consulting the Blue Book directly, but it respectfully urges the Court to ask these questions itself when reviewing the Book. DOJ's buzzwords do not substitute for critical analysis of the Blue Book, and they do not justify keeping it secret.

Finally, if history is a guide, the Court should bear a healthy skepticism of DOJ's characterizations of the Blue Book in light of DOJ's past statements. Indeed,

at every turn DOJ has described the Blue Book in self-serving and contradictory ways. And what once "comprehensively cover[ed] the law, policy, and practice of prosecutors' disclosure obligations," ECF No. 16-2, Exh. H at 4 (DOJ's congressional testimony), cannot now be almost entirely strategic litigation advice. What was once a key "tool[]" for prosecutors "to meet their discovery obligations rigorously," *id.* at 7, cannot today be only a compendium of tricks to defeat criminal defendants' requests for discovery. In conducting its own *in camera* review of the Blue Book, the Court should be guided by *everything* DOJ has said about the Book, not only its statements in this most recent round of litigation.

III. THE BLUE BOOK MAY NOT BE WITHHELD FROM DISCLOSURE UNDER EXEMPTION 7(E).

For all the reasons NACDL has identified in its prior filings, the Blue Book may not be withheld under Exemption 7(E) of FOIA. *See* NACDL Opp. to Govt's M. for Summ. J. at 30-39, ECF No. 16-1. NACDL adopts those prior filings by reference here.

CONCLUSION

Accordingly, NACDL respectfully requests that this Court review the Blue Book *in camera* to determine whether additional portions of the Book are subject to reasonable segregation.

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