

OFFICE OF THE DISTRICT ATTORNEY
THIRD JUDICIAL DISTRICT OF KANSAS
Michael F. Kagay, District Attorney

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December 29, 2022

Maxwell E. Kautsch
President, Kansas Coalition for Open Government
president@kcog.us

RE: Open Records Request for *Brady/Giglio* policy

Mr. Kautsch:

Today, December 29, 2022, I received your request for records pursuant to the Kansas Open Records Act. I was out of the office yesterday, but I was told it was delivered on December 28, 2022. Your request was dated December 20, 2022 and requested that the Shawnee County District Attorney's Office provide a copy of our *Brady/Giglio* Policy.

I have included a copy of your request, as well as a copy of our Policy, along with this letter. Please let me know if you have any further questions.

Respectfully,



Charles F. Kitt



Kansas Coalition for Open Government

December 20, 2022

Michael Kagey
Shawnee County Attorney
200 SE 7th Street, Room 214
Topeka, KS 66603

Re: KORA request for Brady/Giglio policy

Dear Mr. Kagey:

The Kansas County and District Attorney's Association has given guidance to its members about how to comply with the "complex framework of requirements upon prosecutors regarding their duty to disclose material exculpatory evidence to defendants" under "[t]he *Brady/Giglio* cases and their progeny."¹³ The KCDAA has further advised that "each individual office must decide which policies and procedures to enact to ensure compliance with these duties."¹⁴

The Kansas Coalition for Open Government believes that compliance with precedent set forth in cases such as *Brady v. Maryland*, 272 U.S. 83 (1963) and *Giglio v. U.S.*, 405 U.S. 150 (1972) is essential to promoting transparency and accountability in law enforcement. In connection with the Coalition's mission to research and educate the public about issues related to government transparency, it has learned that some number of district and county attorneys in the state maintain a *Brady/Giglio* policy. The Coalition seeks to determine how many other district and county attorneys, in counties where there is at least one city of the first class as defined by Kansas law, maintain such a policy, as well as the substance of any such policy.

Thus, on behalf of the Coalition, **I hereby submit this request under the Kansas Open Records Act (KORA) for a copy of your office's *Brady/Giglio* policy.**

Please direct your response to president@kcog.us.

¹³ *Brady & Giglio*: A Prosecutor's Guide To Producing Evidence, Kansas County and District Attorney's Association August, 2017, Forward, retrieved from <https://www.kcdaa.org/resources/Documents/Brady%20%20Giglio%20Manual%20with%20Kansas%20Case%20Law.pdf> on December 14, 2022.

¹⁴ *Id.*

As you are aware, it is the public policy of the state of Kansas that “public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy.” K.S.A. 45-216(a). If a record subject to this request “contains material which is not subject to disclosure” under KORA, you are required to “separate or delete such material and make available” the “material in the public record that is subject to disclosure.” K.S.A. 45-221(d).

KORA requires that this request be acted upon as soon as possible, but in any event “not later than the end of the third business day following the date that you receive the request.” K.S.A. 45-218(d). If access to the requested record or records is not granted immediately, KORA requires you “to give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection.” K.S.A. 45-218(d).

If there is a cost associated with meeting this open request under K.S.A. 45-219, please indicate the approximate cost, both for copies and for any staff time that might be required to complete the request. K.S.A. 45-219(c)(5) defines a reasonable charge for physical copies as equal to or less than \$.25 per page. If both physical and electronic copies of the requested record or records are available, and the cost of disclosing electronic records is lower than that of disclosing physical copies, I request that you provide electronic copies only.

If this request is denied, KORA requires that you provide me with “a written statement of the grounds for denial. Such statement shall cite the specific provision of law under which access is denied.” K.S.A. 45-218(d). In the event of denial, I hereby request that this “statement” be furnished to me “no later than the end of the third business day following the date that the request for the statement is received.” K.S.A. 45-218(d). Moreover, if a public record subject to this request is discretionarily closed pursuant to K.S.A. 45-221(a)(10), I hereby request that you provide a written citation to the specific provisions of paragraphs (A) through (F) that necessitate closure of that public record.

In the event any record or records are disclosed as a result of this request, I certify, in accordance with K.S.A. 45-220(c)(2), that I do not intend to, and will not: “(A) Use any list of names or addresses contained in or derived from the records or information for the purpose of selling or offering for sale any property or service to any person listed or to any person who resides at any address listed; or (B) sell, give or otherwise make available to any person any list of names or addresses contained in or derived from the records or information for the purpose of allowing that person to sell or offer for sale any property or service to any person listed or to any person who resides at any address listed.”

Thank you for your assistance.

Sincerely,



Maxwell E. Kautsch

President, Kansas Coalition for Open Government

KANSAS COALITION FOR OPEN GOVERNMENT
534 S Kansas Ave., Ste. 1105, Topeka, KS 66603
kcog.us

OFFICE OF THE DISTRICT ATTORNEY
THIRD JUDICIAL DISTRICT OF KANSAS
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STANDARD OPERATING PROCEDURES

Brady & Giglio

1. Primary Objective. The policy is intended to establish clear guidelines, for law enforcement and prosecutors, to govern the reporting, investigation, and disclosure of exculpatory information required to be provided to defendants in criminal cases. The District Attorney's Office ("DAO") is hereby adopting this policy to ensure strict compliance with the discovery obligations of prosecutors and to protect the integrity of any investigation and subsequent prosecution.

2. Overview. In *Brady v. Maryland* 373 U.S. 83 (1963), the United States Supreme Court found that prosecutors are required to provide defendants all exculpatory evidence. In *Giglio v. United States*, 450 U.S. 150 (1972), the Supreme Court determined evidence that could be used to impeach a witness was within the discovery requirements of *Brady*. This duty is an absolute duty and does not require defendants to take any action to obtain the evidence on their own. *United States v. Bagley*, 473 U.S. 667 (1985). Finally, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court found that prosecutors have a duty to learn of favorable evidence known to others that are acting on behalf of the state, including law enforcement officers.

3. Exculpatory Evidence. Exculpatory evidence is evidence that is favorable to the defense and material to guilt or punishment. It includes impeachment information such as (non-exclusive list): (a) specific instances of conduct of a witness that could be used to attack the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) information that the witness provided prior inconsistent statements of material fact on a case; (d) allegations and/or findings of misconduct that reflect upon the truthfulness of the witness; (e) past or present criminal charges against the witness; (f) information that the witness' ability to perceive or recall the truth is impaired; (g) findings that the witness used excessive force while performing duties; and (g) information that may be used to suggest that a witness has a bias against an individual or group of individuals. The duty applies to civilian and law enforcement officers ("LEO") alike. The prosecutor has a duty to seek information known by law enforcement, including information within personnel files.

4. Giglio Tracking. The Chief Deputy is designated as the *Giglio* Official for the DAO and is tasked with identifying, tracking and maintaining necessary standards related to *Giglio* investigations. If it is determined that a LEO is *Giglio* impaired, the Chief Deputy should be consulted when addressing issues related to disclosures to defense. The DAO does not maintain an official list of *Giglio* impaired officers, nor does the DAO maintain personnel files of *Giglio* impaired officers.

5. Giglio Investigations. The DAO requests that all local law enforcement agencies conduct internal agency-wide reviews to identify any LEO that could potentially have a *Giglio* issue. The DAO then conducts investigations into each LEO and/or situation identified and the DA then issues an official opinion. Each agency is notified that the obligation of updating the

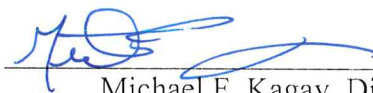
DAO of potential issues is an ongoing obligation and the DAO sends annual reminders of this obligation to all local law enforcement agencies. *Giglio* investigations conducted by the DAO can consist of reviewing police reports, reviewing relevant videos, professional standards reports, CPOST reports, and conducting interviews as deemed necessary.

6. DA Opinions: Upon completion of each *Giglio* investigation, the DA will issue an opinion letter to the law enforcement agency involved. The opinion letter will inform the law enforcement agency that the investigation is complete and, in most situations, will notify the agency of one of the following conclusions:

- It has been determined that no *Giglio* issue exists. Unless further evidence is discovered, this matter is now concluded.
- It has been determined that a *Giglio* issue likely exists and the involved LEO is now deemed *Giglio* impaired. In any case where this LEO is deemed a necessary witness, the information from this investigation is subject to disclosure to defense counsel and the Court. If this LEO is the affiant on a search warrant or charging affidavit, the nature of the *Giglio* impairment must be disclosed within the affidavit. The DAO will continue prosecuting cases in which this LEO is involved. The DAO will request that all matters related to the impairment be sealed until the Court has conducted an *in camera* review. The DAO may change this position depending upon the outcome of future cases involving this particular LEO.
- It has been determined that a *Giglio* issue exists and the LEO is deemed *Giglio* impaired. Due to the nature of the impairment, please refrain from sending any case to the DAO in which this LEO is a necessary witness. Also, please refrain from submitting any search warrant and/or charging affidavit in which this LEO is the affiant or wherein the affiant relies on this LEO to establish probable cause.

7. Pending Cases. If it is discovered that a pending case involves a *Giglio* impaired LEO, as determined by the DA, notify the Chief Deputy immediately. The DA will decide whether to continue prosecution of the case. If prosecution proceeds, the DAO will notify the defendant (counsel if represented) of the *Giglio* impaired LEO. If the defendant requests access to the information, the Chief Deputy will coordinate with law enforcement to make the relevant documents available to be viewed by the defendant, or to be turned over to the Court for an *in-camera* inspection if necessary. The prosecutor of record shall file a *Motion in Limine* requesting a pre-trial finding on whether the *Giglio* material is admissible. Rulings on these motions may affect the DA's decision on whether to proceed with other cases involving this LEO.

8. Non-LEO Witnesses. *Giglio* requirements apply to all witnesses offered by the State. If the DAO has knowledge of criminal history of a witness, specifically for convictions of dishonesty, the DAO must disclose this information to the defendant. However, the DAO will not run NCIC, KCJIS or III searches for the purpose of obtaining this information on witnesses. If a defendant requests *Giglio* or criminal history information on civilian witnesses, and the DAO is not already in possession of such information, the request shall be denied. Defendants seeking this information must obtain this information either by Court Order or directly from the FBI.



Michael F. Kagay, District Attorney