Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,	)	
Plaintiff,	)	
v.	)	Civil Action No. 14-cv-269 (CKK)
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS and UNITED STATES DEPARTMENT OF JUSTICE	)	
Defendants.	)	

SECOND DECLARATION OF ANDREW D. GOLDSMITH

I, Andrew D. Goldsmith, declare the following to be true and correct:

(1) I am the National Criminal Discovery Coordinator for the U.S. Department of Justice (DOJ or Department), having been appointed in January 2010 by the Deputy Attorney General. I have been an attorney for over 30 years, roughly twenty-four of which have been spent as a prosecutor and the balance working at a law firm in New York City.

(2) I make the statements herein on the basis of personal knowledge, as well as based on information I have acquired in the course of performing my official duties.

(3) On June 11, 2014, I submitted a declaration in this case in support of Defendants' Motion for Summary Judgment (Goldsmith Decl. I). I incorporate that declaration by reference.

(4) On July 23, 2014, Plaintiff filed its Cross Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment. I submit this declaration to provide information in response to some of the issues Plaintiff raised in that filing regarding the DOJ

document entitled Federal Criminal Discovery, also referred to as "the Federal Criminal Discovery Blue Book" (Blue Book).

The Blue Book Is Legal Advice Rather than DOJ Policy

(5) The Department's policies regarding federal prosecutors' obligations concerning criminal discovery are publicly available and reflect the Department's strong commitment to ensuring that federal prosecutors not just meet, but exceed, their constitutional obligations. In 1988, DOJ published the "United States Attorneys' Manual" (USAM). The USAM was intended to establish DOJ policy regarding a range of issues, including federal criminal discovery. Accordingly, the USAM was "prepared under the general supervision of the Attorney General and under the direction of the Deputy Attorney General[.]" USAM § 1-1.200. The USAM states that it "is intended to be comprehensive" and that it controls in the event that it "conflicts with earlier Department statements, except for Attorney General's statements[.]" USAM § 1-1.200. The USAM was amended in 1996 to add Section 9-5.001, which requires federal prosecutors to surpass their constitutional obligations when it comes to disclosing exculpatory or impeaching information:

> [A] fair trial will often involve examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or . . . make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt . . . .

USAM § 9-5.001(C). Under the policies set forth in the USAM, federal prosecutors must go further than the Constitution requires in several other ways. For exculpatory information, prosecutors "must disclose information that is inconsistent with any element of any crime charged . . . or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal. .

. .” *Id.* § 9-5.001(C)(1). Similarly, for impeachment information, prosecutors “must disclose 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 . . . . regardless of whether it is likely to make the difference between conviction and acquittal . . . .” *Id.* § 9-5.001(C)(2). Also, unlike *Brady* and its progeny, which focus on evidence, the USAM requires prosecutors to disclose information regardless of whether that information would itself constitute admissible evidence. *Id.* § 9-5.001(C)(3).

(6) As stated in my previous declaration, in early January 2010, then-Deputy Attorney General David Ogden issued three memoranda to all federal prosecutors that provide overarching guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants. Goldsmith Dec. I ¶ 8. The memoranda specifically reference the USAM and reiterate its policies providing for “broader disclosures of exculpatory and impeachment information than *Brady* and *Giglio* require.” *See* “Guidance for Prosecutors Regarding Criminal Discovery,” January 4, 2010 (“”[P]rosecutors should be aware that Section 9-5.001 details the Department’s policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*.”); “Issuance of Guidance and Summary of Actions in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group” (“the United States Attorney’s Manual (USAM) sets forth broad discovery policies that establish the Department’s minimum expectations for prosecutors handling criminal cases in all jurisdictions.”); *see also* “Requirement for Office Discovery Policies in Criminal Matters” (directing each U.S. Attorney’s Office and each Department litigating component to develop its

own district-specific discovery policy to account for controlling precedent, existing local practices, and judicial expectations).

(7) In contrast to these various documents setting forth Department policy on criminal discovery, the Blue Book has a different function. The Blue Book does not establish new rules or policies that prosecutors have an obligation to follow in all investigations and prosecutions. Indeed, the very first chapter of the Blue Book, entitled "Department of Justice Policy, Positions, and Guidance," identifies the two primary sources of DOJ criminal discovery policy as the USAM and the Ogden Memo entitled "Guidance for Prosecutors Regarding Criminal Discovery." Rather than establishing Department policy, the Blue Book was written by DOJ attorneys to assist prosecutors in meeting their disclosure obligations, as established in rules and precedent, and in complying with existing DOJ policies, as set forth in in the USAM, the Ogden memoranda, and their office's discovery policy, while at the same time safeguarding legitimate law enforcement concerns and advancing the Government's interests in litigation. The Blue Book describes discovery-related rules, precedent, and existing DOJ policies in order to provide "legal strategies that in-the-field prosecutors may and do employ during the course of criminal proceedings" and to "ensure that discovery-related issues do not compromise investigations and prosecutions." Goldsmith Decl. I ¶¶ 6, 7. Factual information about disclosure obligations in the Blue Book is interspersed with practice notes, risk assessments, strategies, and other legal advice. *See* Goldsmith Decl. I ¶ 9, 14.

(8) The Blue Book advises prosecutors on the types of challenges they may encounter in the course of prosecutions and potential responses and approaches to those challenges that they are encouraged to consider. Prosecutors at the different United States Attorneys' Offices around the country, as well as in other DOJ components, are called upon to make strategic decisions

regarding discovery and all other matters related to investigations and prosecutions according to the particular circumstances of their cases. The Blue Book anticipates the challenges that may arise and provides advice for prosecutors to consider in addressing them. *See* Goldsmith Decl. I ¶ 9 ("the Blue Book is replete with guidance where prosecutors are urged to 'exercise caution',' 'take care,' 'be mindful,' or to 'be aware' when exercising their discretion in this area."). The Blue Book also encourages prosecutors to consult with the designated criminal discovery coordinator in their offices and, if appropriate, with the National Criminal Discovery Coordinator, in deciding if and how to apply the recommendations and strategies offered in the book.

The Blue Book Is Different From the United States Attorney Bulletin

(9) The United States Attorneys' Bulletin (USAB) is a document published on a bimonthly basis by the Office of Legal Education (OLE) of the Executive Office for United States Attorneys (EOUSA). It was first published in August 1953. The USAB is currently made available in electronic format through posting on DOJ's internal Intranet. An electronic version is also available to the public on the Department's publicly-accessible website.

(10) In my role as National Criminal Discovery Coordinator, I was directly involved in the creation of the "Criminal Discovery Issue" of the USAB (CDI). I solicited authors for the CDI, edited the various articles submitted, and co-authored an article regarding Electronic Discovery. The CDI is analogous to an edition of a law review journal focused on criminal discovery, with the articles designed to reflect prosecutors' perspectives on discovery-related topics of interest to other prosecutors as well as the public.[1] Accordingly, I sent out an email in

[1]An even better analogy would be publications issued by a law firm on topics relevant to its various areas of practice. Much as the Department makes the United States Attorneys' Bulletin available to the public on the internet, law firms – such as Jones Day – make certain publications

February 2012 seeking potential authors (and topics) for the CDI, and suggested "connect[ing] a broad area (e.g., *Brady*, agent-*Giglio*) to something topical – such as an important case or two, a trend, a new statute, etc." I specifically advised potential authors that they should keep in mind the public nature of the USAB when preparing their articles and should not include within them anything that was sensitive. Similarly, the guidelines sent by OLE to authors of USAB articles explicitly state: "Authors should be aware that the articles will be posted on both the Intranet and the Internet. Consequently, they will be available to the public. Any material that should not be disseminated publically should be omitted."

(11) The CDI, which contains seven articles written by different DOJ attorneys, was published in September 2012. It was made available to the public by being posted on the publicly-accessible DOJ website at roughly the same time it was electronically distributed to federal prosecutors.

(12) The CDI and the Blue Book cover issues related to criminal discovery, but their purpose and contents are distinguishable. As stated above, the CDI was designed to reflect prosecutors' perspectives on certain discovery-related topics of interest to other prosecutors as well as the public. From its commencement, the CDI was intended to be publically available, and its authors were advised of this fact. In contrast, the Blue Book was designed to serve as a confidential litigation manual comprehensively covering the law and practice of a prosecutors' discovery obligations as well as offering legal analysis and strategies to protect the Government's interest in litigation and defend against discovery-related challenges by criminal

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available on their firm website (see, e.g., http://www.jonesday.com/newsknowledge/publicationresults.aspx?type=27). Yet, the fact that a law firm chooses to issue publications concerning particular practice areas (e.g., antitrust, environmental, pharmaceutical, etc.) does not mean that its internal guidance and strategy memoranda on the same topics are – or should – be available to the public.

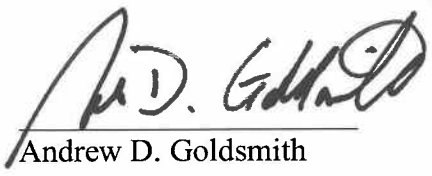
defendants. *See* Goldsmith Decl. I ¶¶ 5, 6, 9, 12, 14. It was never intended to be public, and the Department has steadfastly maintained its confidentiality. *See id.* ¶¶ 7, 9.

(13) While the CDI does include some practical advice for prosecutors to fulfill their disclosure obligations and addresses certain arguments by defense counsel, it does not include attorney work product and other sensitive law enforcement information, which is included in the Blue Book. *See* Goldsmith Decl. I ¶¶ 10-14. Unlike the CDI, the Blue Book essentially provides a blueprint to the strategies federal prosecutors employ in criminal cases, advising prosecutors on every aspect of the criminal discovery process. *See id.* ¶¶ 5, 6. It contains information to represent the Government in litigation, such as a comprehensive set of strategic considerations and procedures, extensive compilations of cases to support different arguments and contrary authority, the limitations of some of these arguments, specific recommendations to obtain electronic and other kinds of evidence, advice for avoiding discovery disputes and falling into some pitfalls, potential consequences of some practices, circumstances under which sanctions against the Government are likely, and circumstances under which prosecutions should consider taking certain steps, among others. *See* Goldsmith Decl. I ¶¶ 6, 9-11. *See also* Declaration of Susan Gerson ¶ 21. Disclosure of this information would provide defense counsel an unfair advantage in litigation by revealing law enforcement procedures and litigation strategies, risks, and vulnerabilities. *See* Goldsmith Decl. I ¶ 10. It would also hamper the adversarial process by undermining DOJ's ability to counsel its prosecutors, would limit the ability of prosecutors to safeguard legitimate law enforcement objectives, and would increase the risk that criminal defendants escape punishment and circumvent the law. *See id.* ¶¶ 10-14.

Disclosure of the Blue Book Would Undermine DOJ's Law Enforcement Function

(14) Clearly, the responsibilities of a prosecutor go beyond those of an ordinary litigant. Yet, in many situations, the prosecutor must function as an advocate of the United States. If the defense knew ahead of time what the likely litigation strategies and tactics the prosecution would employ, it stands to reason that the defense would be more likely to prevail – and gain access to discovery to which it would not otherwise be entitled. For example, if the defense knew how the prosecution would seek to protect the identity of confidential informants,[2] this would adversely affect the public's interest in protecting the anonymity – and safety – of citizens who report criminal activity to law enforcement officials. There are similar safety risks from premature disclosure of the identity of cooperating witnesses and undercover agents. In circumstances concerning organizational defendants, knowledge of the prosecution's approach to disclosure under Rule 16 could provide all defendants – including the organization *and* the individual defendants – with premature identification of Government witnesses. And providing the defense the arguments and strategies that prosecutors use to protect sensitive law enforcement techniques, such as the type and precise location of equipment used in electronic surveillance, could thwart the prosecutors' ability to protect this information. All of these and other results can be anticipated if the defense had a roadmap laying out the Government's approach to handling discovery in prosecutions nationwide. *See* Goldsmith Decl. I ¶¶ 9-14.

I declare under penalty of perjury that the foregoing is true and correct.



Andrew D. Goldsmith

Executed this 2nd day of September 2014.

[2] *See Roviaro v. United States*, 353 U.S. 53 (1957).