

EXHIBIT B

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

UNITED STATES OF AMERICA,

Case No. 3:12-CR-00431-HA

v.

**GOVERNMENT'S RESPONSE TO
DEFENDANTS' REQUEST FOR
ACCESS TO BLUE BOOK**

**DAVID JOSEPH PEDERSEN and
HOLLY ANN GRIGSBY,**

Defendants.

The United States of America, by and through S. Amanda Marshall, United States Attorney for the District of Oregon, and Scott Erik Asphaug, Assistant United States Attorney, respectfully responds to defendants' request for production of the Federal Discovery Blue Book as follows:

The Government opposes the defendants' request for production of the Federal Discovery Blue Book. Defendants set forth their rationale for production of the Blue Book as follows: "Counsel...have requested access to the document believing that compliance, or lack thereof, would be relevant to any finding of bad faith on the discovery issues." See p. 2 of Joint Status Report.

The government objects to disclosure of the Blue Book because it is not relevant to whether the government acted in good faith relative to discovery. Instead, relevant DOJ policies governing discovery are publicly available and will fully address defendant's needs. More specifically, the government objects on the following grounds:

A. The Blue Book does not embody USDOJ policy.

The Federal Criminal Discovery Blue Book is the work of the Office of Legal Education and is not a statement of USDOJ policy. Instead, the book incorporates publicly available DOJ policy in conjunction with legal research relevant to those policies: it acts much like a bench memo. The cover sheet specifically limits the intended purpose of the book for use as a training tool for federal prosecutors and law enforcement agents, makes clear that the book is for internal use only, and that the book is not intended "to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter, by any prospective or actual witnesses or parties," citing *United States v. Caceres*, 440 U.S. 741 (1979).

The fact that the Blue Book is a training tool and not intended to create any substantive or procedural rights, negates the defendants' rationale for gaining access to the book in anticipation of the evidentiary hearing. Since the book does not embody the policy of the DOJ and adherence to the training suggestions contained therein not required, and because the policies that do

govern federal discovery practices are publicly available, there is no relevancy to compliance, or lack thereof, with information contained in the Blue Book.

B. No Prima Facie Showing of Materiality.

Pursuant to FRCP 16 (a) (1)(E)(i), the defendants are required to make a prima facie showing of materiality. See *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984). A general description of the materials sought or a conclusory argument as to their materiality is insufficient. *Id.* The rule does not require discovery relating to claims challenging the prosecution's conduct of the case in general. See *United States v. Armstrong*, 517 U.S. 456, 462-63 (1996) (Rule 16 does not permit discovery of materials in connection with a claim of selective prosecution).

As evidenced by the discussion above, the Blue Book is a training material, not a regulation or policy. It does not create any right or benefit enforceable in any criminal proceeding. Based on that limitation, defendants' stated objective cannot form the basis of a prima facie showing of materiality. In addition, following the status conference on Monday, March 6, 2014, the defendants requested and were provided with the District of Oregon Criminal Discovery Policy. Given their receipt of that document, they can make no showing of materiality to the Blue Book.

C. The Blue Book is protected by the work-product privilege.

The work-product doctrine protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Ins. Co. v. Dist. St.*, 881 F.2d 1486, 1494 (9th Cir. 1989)(citing Fed. R. Civ. P. 26(b)(3)).

To qualify for work-product protection, documents must: (1) be "prepared in anticipation of litigation or for trial" and (2) be prepared "by or for another party or by or for that other

party's representative.” *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*, 357 F.3d 900, 907 (2004). In circumstances where a document serves a dual purpose, that is, where it was not prepared exclusively for litigation, then the “because of” test is used. *Id.* Dual purpose documents are deemed prepared because of litigation if “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” *Id.* In applying the “because of” standard, courts must consider the totality of the circumstances and determine whether the “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation.” *Id.* at 908 (quoting *United States v. Adlman*, 134 F.3d 1194 (2d Cir.1998)).

In the instant case, the Blue Book meets the “because of” test. It was prepared by OLE for the very purpose of assisting federal prosecutors in anticipation of and in furtherance of litigation. The Blue Book is protected by the work-product doctrine and is not discoverable

D. Conclusion.

For all the above reasons, the defendant’s request for Federal Criminal Discovery Blue Book should be denied. For the purpose of the Court’s determination, a copy of the Blue Book will be provided in camera and under seal.

Dated this 7th day of March, 2014.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney

/s/ Scott Erik Asphaug
SCOTT ERIK ASPHAUG
Assistant United States Attorney