

**Forest Service Manual  
National Headquarters - Washington Office  
Washington, DC**

**Forest Service Manual 5300 – Law Enforcement  
Chapter 5390 – Office of Professional Responsibility**

**Amendment:** 5300-2022-6

**Effective date:** February 17, 2022

**Duration:** This amendment is effective until superseded or removed.

**Approved by:** Angela Coleman, Associate Chief

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**Responsible Staff:**

**Last Change:** 5300-2022-5 to Chapter 80 Law Enforcement Equipment

**Superseded Document(s):**

**Posting Instructions:** Amendments are numbered consecutively by number and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment was 5300-2022-5 to Chapter 80 Law Enforcement Equipment.

**Digest:** Following is an explanation of the changes throughout the directive by section.

**5390:** Establishes codes, captions, and sets forth direction for “Office of Professional Responsibility,” a new section on procedures for investigation of internal affairs and policy for criminal and serious misconduct investigations.

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### **5390.01 - Authority**

See FSM 5301 and FSM 5390.1.

### **5390.02 - Objective**

To ensure the professional standards of Law Enforcement and Investigations (LEI) are maintained through the internal system whereby objectivity, fairness and justice are ensured by an impartial investigation into alleged criminal acts or misconduct involving LEI personnel and specified USFS personnel.

### **5390.04 - Responsibility**

It is the responsibility of the Office of Professional Responsibility (OPR) to conduct or coordinate investigations alleging criminal acts and/or misconduct involving LEI personnel. In addition, OPR conducts criminal investigations involving non-LEI Forest Service employees at the discretion of the Chief of the Forest Service. OPR records and tracks all complaints fitting the above descriptions for reporting purposes to the Washington Office. OPR also conducts reviews of use of force incidents and may open an investigation if misconduct is suspected.

It is the responsibility of all LEI employees to report to OPR all allegations received regarding alleged criminal acts or misconduct of LEI personnel. In addition, pursuant to USDA Departmental Regulation 4070-753-001, LEI employees are required to report actions by other employees that they know of, or have a reasonable basis to believe, are violations of law or regulation. Employees are also required to participate in the investigative process within the parameters of rights afforded to employees such as Weingarten, Garrity, Kalkines, Miranda, and so forth.

### **5390.05 - Definitions**

Administrative Investigation (non-criminal). An investigation related to the non-criminal conduct, actions, or performance of an employee to determine whether such conduct, actions or performance violates established ethics and conduct regulations or agency policy.

Class I Criminal Misconduct. Any violation of Federal, State or local laws that can be addressed through the criminal justice process either as a felony or misdemeanor, including allegations of excessive force and other civil rights violations.

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**Class II Serious Misconduct.** Criminal allegations for which prosecution has been declined and any non-criminal allegation which would be in violation of a Federal or Government-wide, USDA, Forest Service or law enforcement agency standard of conduct, regulation, or policy, which is considered serious in nature. This includes but is not limited to:

1. Flagrant inattention to duty where potential danger to life or extensive damage to property is affected or substantial revenue is lost.
2. Unauthorized or negligent use, damage, or loss of valuable government property, (examples include vehicles, aircraft, vessels, firearms, law enforcement badges and credentials, or other equipment, not including minor traffic accidents).
3. Willful or negligent making of an untruthful statement of any kind in any written document or oral report pertaining to an officer's official duties, or making any untruthful statement before any court or to any authorized government official.
4. Improper association with informants.
5. Retaliation/reprisal actions.
6. Sexual offenses.
7. Improper association/relationship with criminal elements.
8. Refusal to furnish testimony or information in an official investigation, inquiry or other official proceeding.
9. Unauthorized disclosure of classified or sensitive material or information.
10. Use or possession of illegal drugs.
11. Egregious safety violations.
12. Security violations, including those relating to controlled or classified information.
13. Prisoner/inmate mistreatment.
14. Evidence mishandling.
15. Solicitation/acceptance of bribes or gratuities.
16. Failure to promptly report a bribe offer.

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17. Any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct prejudicial to the Government.

**Class III Other Misconduct.**

1. Negligent or careless performance of assigned duties.
2. Failure to observe established policies or procedures in the apprehension or detention of suspects or violators.
3. Failure to promptly report one's own arrest or criminal charges to Supervisors.
4. Failure to promptly report violation of laws enforced by the law enforcement agency.
5. Failure to promptly report information concerning violations of any laws or serious misconduct by a LEI employee.

**Class IV Administrative Misconduct.**

1. Attendance matters, not involving other forms of misconduct.
2. Covering up or attempting to conceal defective work.
3. Failure of or delay in carrying out lawful work assignments, instructions, or insubordination.
4. Interference with other LEI employees in the performance of official duties.
5. Failure to maintain a neat, clean and business-like appearance or to comply with uniform dress standards while on duty.
6. Unauthorized outside employment or business activity.
7. Discourteous or disrespectful conduct toward members of the public, co-workers or Supervisors.
8. Failure to honor just financial obligations in a prompt and timely manner.

**Criminal Investigation.** An investigation relating to an alleged violation of Federal or State criminal statute.

**Complaint.** An allegation from any source of specific wrongful acts or omissions by an employee. The allegation may relate to on-duty conduct or conduct off-duty.

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**Garrity Warning.** An advisement of rights administered to an employee who may be a suspect in a criminal investigation. The warning is given to employees in a non-custodial situation.

**Kalkines Warning.** An advisement provided to an employee who may be a subject or witness in an administrative investigation. Information provided cannot be used in a criminal proceeding, unless the employee knowingly makes false statements.

**Misconduct.** An act or omission violating workplace standards, rules, regulations or laws.

**Office of Professional Responsibility.** The unit within LEI tasked with conducting and/or coordinating internal investigations relating to allegations of criminal activity and misconduct by LEI employees and criminal activity by non-LEI Forest Service employees. The unit is managed by an Assistant Director and the Assistant Director of OPR reports directly to the Director of LEI.

**Preponderance of the Evidence.** That degree of information/evidence which a reasonable person, considering the record, accepts as sufficient information/evidence to support a conclusion that the matter asserted is more likely to be true than not true. Stated another way, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance the claim is true.

**Racial Profiling.** The use of race, ethnicity, or national origin as a criterion in conducting traffic stops, checkpoints, roadblock stops and other law enforcement investigative procedures is prohibited.

**Subject.** Forest Service employee alleged to have committed administrative misconduct.

**Suspect.** Forest Service employee alleged to have committed criminal activity.

## **5392 - Complaint Processing**

1. OPR will accept allegations of misconduct from any person or sources (known or anonymous), in verbal or written format.
2. LEI supervisory employees are required to report all allegations of misconduct to OPR as soon as possible, but no later than two days from the time the complaint was received. Notification shall be made via e-mail or telephone.
3. When LEI supervisory employees become aware of alleged misconduct of a LEI employee, they will attempt to gather initial information to include:
  - a. Name of the complainant(s).

- b. Allegation.
  - c. Name of the subject employee(s).
  - d. Incident date.
4. All employees shall provide contact information for their Supervisors and/or the Assistant Director of OPR to anyone who wishes to make a complaint. In addition to obligations that may arise under other parts of this policy, employees will assist the complainant by taking the complaint and forwarding it to a Supervisor or OPR. If the complainant request information on where and how to file the allegation, the employee will provide it. However, the employee is still responsible for forwarding the complaint to a Supervisor or OPR. If the employee is unable to take the complaint (for example, the allegation is made during a demonstration while the employee is on a line, and so forth) while not interfering or compromising public safety interests, the employee will provide specific information to the complainant on where and how to file the allegation.

### **5393 - Investigation Authorization**

Authorization to open an internal investigation involving a Forest Service employee is granted by the Chief of the Forest Service. The Chief may delegate authorizing authority to investigate allegations involving LEI employees to the Director of Law Enforcement and Investigations. Authorization to conduct an internal investigation is documented in writing on a decision memorandum submitted to either the Chief of the Forest Service or the Director of Law Enforcement and Investigations for LEI employees. The AD of OPR will prepare the decision memorandum to be submitted to the Chief or Director of LEI.

Routine administrative supervisory inquiries with an employee regarding performance-based issues are not considered an internal investigation. Further, preliminary contact with a complainant and/or potential witness to accurately identify the scope or nature of a complaint is not considered opening an internal investigation and does not need approval above the Assistant Director of OPR. However, before a subject/suspect interview regarding a serious allegation of criminal or misconduct, use of technical investigative equipment or affidavits of employees are obtained, authorization above the level of Assistant Director of OPR must be obtained.

#### **5393.1 - USDA OIG Coordination**

U.S. Department of Agriculture (USDA) Departmental Regulation 1710-2 sets forth the authority and requirements for investigations that are conducted within the USDA at the request of the USDA, Office of Inspector General (OIG), Investigations Branch (DR 1710-2).

OPR is the primary contact with USDA, OIG and is tasked with conducting investigations relating to allegations of criminal activity of Forest Service employees to include LEI personnel.

USDA, OIG is responsible for investigating or arranging for the investigation of complaints concerning potential fraud, waste, abuse, or mismanagement in Department programs or

operations. Coordination between OPR and OIG must be deliberate and constant to ensure the Memorandum of Understanding between the Forest Service and OIG regarding investigative jurisdictions is adhered to. Prior to OPR conducting a criminal investigation, OIG must be notified. OPR will only proceed with the criminal investigation once a declination is obtained from OIG. OPR may assist OIG in a criminal investigation when requested by OIG.

### **5393.2 - Notifications**

When OPR receives an allegation of past misconduct or criminal activity involving a LEI employee, notification of the complaint will be provided to the subject/suspect employee once the investigation is opened. Notification will be, at a minimum, in writing and will provide the nature of the complaint, name of the investigator and a reminder of rights afforded to the subject/suspect employee. However, if the complaint alleges potential ongoing misconduct or criminal activity or if there is another compelling investigative need for confidentiality and case integrity, the Assistant Director of OPR may decide not to notify the subject/suspect employee until an interview is scheduled with the employee.

Upon completion of an investigation, the Assistant Director of OPR will provide written notification to the subject/suspect LEI employee and appropriate Special Agent in Charge or Assistant Director of the finding(s) of the allegation(s).

### **5393.3 - Investigative Considerations**

OPR Investigations will comply with The Council of the Inspectors General on Integrity and Efficiency (CIGIE).

The investigation of all complaints will be conducted in a diligent and thorough manner to ensure pertinent issues are resolved and all appropriate criminal, civil or administrative remedies are considered.

Prior to questioning, an employee will be notified of their status (complainant, subject/suspect of investigation, or witness) as it relates to the investigation. As appropriate, investigators will communicate applicable legal warnings to persons before questioning.

OPR will document and review all allegations and either initiate an investigation or refer the investigation through the Special Agent in Charge (SAC) for investigation of Class II, III or IV allegations.

If the investigation is referred to the SAC, the Region will assign an Assistant Special Agent in Charge and/or experienced investigator to conduct the investigation. In certain situations, a Patrol Commander or Patrol Captain may be assigned. An OPR Senior Special Agent will provide oversight responsibility to ensure the investigation is completed in a fair, thorough, and timely manner.



Upon completion of a Class II, III, or Class IV investigation the Supervisor will forward to OPR the following:

1. All documents and supporting evidence used by the Agency in reaching a finding and conclusion, including Supervisory Inquiry, Report of Investigation (ROI), Incident Report, and so forth.
2. The Accountability and Findings Memorandum.

#### **5393.4 - Suspected False Complaints**

If, during the examination of a complaint, it is determined there is probable cause the complainant knowingly made a maliciously false allegation of criminal misconduct against an employee, the investigator or Supervisor will include the basis for that probable cause within the body of the report. This information will be forwarded to the Assistant Director of OPR who will determine if circumstances warrant presentation to the appropriate U.S. Attorney's Office for violation of 18 U.S.C. §1001 or other applicable offenses or to Employee Relations for potential disciplinary action.

#### **5393.5 - Complaint Adjudication**

Sustained complaints of criminal activity will be presented to the appropriate Federal and/or State prosecuting attorney's office for criminal adjudication. Simultaneous administrative action may occur during criminal prosecution of a Forest Service employee. If the case is declined for prosecution, it will be considered an administrative misconduct investigation.

Complaints of administrative misconduct are determined with the level of proof of "preponderance of the evidence" and will be adjudicated with the following classifications.

1. Sustained. The investigation revealed sufficient evidence to justify a reasonable conclusion that the accused employee committed the misconduct alleged.
2. Not Sustained. The investigation failed to disclose sufficient information to clearly prove or disprove the allegation (s).
3. Exonerated. The investigation revealed the alleged act(s) did occur, but the employee's actions were justified, lawful, and proper.
4. Unfounded. The investigation revealed conclusively the alleged act(s) did not occur.
5. Cancelled. The complainant failed to provide enough information to determine which LEI employee was involved and the complaint was anonymous or no contact information for the complainant was provided. Or, the complainant, who has been identified as a habitual complainant, or, who appears to have a mental deficiency, failed to provide any credible or plausible evidence of misconduct and further examination is not warranted. Or, if during this process a supervisor/investigator is able to clarify or resolve the matter

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in question to the satisfaction of the complainant and the complainant states in writing that they wish to cancel the complaint.

If any allegation is sustained, the Assistant Director of OPR will provide the Report of Investigation to appropriate supervisory personnel and Employee Relations for determination of potential discipline. If the Assistant Director of OPR determines the allegation(s) against the employee is/are not-sustained, unfounded or exonerated, the Report of Investigation will be provided to the appropriate Special Agent in Charge or Assistant Director.

### **5394 - Giglio Request Procedures**

Pursuant to the Attorney General's December 9, 1996, memorandum, "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses," the Attorney General's October 19, 2006 amendment to this policy and to conform to USAM § 9-5.001: It is the obligation of Federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include Federal, State, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. Reference, 18 U.S.C. § 3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 {1963}, *Giglio v. United States*, 405 U.S. 105 {1972} and *United States v. Henthorn*, 931 F.2d 29 9th Cir. {1991} collectively referred to as "discovery obligations."

On January 4, 2010, Deputy Attorney General Ogden issued a memorandum that further refined discovery obligations and directs prosecutors to review all potentially discoverable material within the custody or control of the prosecution team. This memo known as the Ogden Memo requires disclosure of the following:

1. Any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry;
2. Any past or pending criminal charge brought against the employee; and
3. Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation. Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information.

Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the Agency, will be provided to the prosecuting office under the following circumstances:

1. When the Government is required by a court decision in the district where the investigation or case is being pursued;

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2. When the allegation was made by a Federal prosecutor, magistrate judge, or judge; or the allegation received publicity;
3. When the U.S. Attorney's Office and the Agency agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the Agency witness; and
4. When disclosure is otherwise deemed appropriate by the agency. The Agency is responsible for advising the prosecuting office, to the extent determined, whether any allegation is unsubstantiated, not credible, or resulted in the employee's exoneration. It is the policy of Forest Service Law Enforcement and Investigations (LEI) to comply with direction in USAM § 9-5.001 and all other pertinent direction from the United States Department of Justice and relevant case law regarding discoverable material.

#### **5394.05 - Definitions**

Requesting Official. A senior official in each United States Attorney's Office (USAO) and DOJ prosecuting office are designated as the Requesting Official for that office. The Requesting Official serves as the contact point for the USAO and DOJ criminal litigating office seeking impeachment information. In addition, it is the responsibility of the Requesting Official to inform the Assistant Director-Office of Professional Responsibility (Giglio Coordinator) or their designee of relevant case law, court practices, and rulings that govern the definition and disclosure of impeachment information in that district.

State court of record prosecutors must also identify a Requesting Official for these types of matters handled within their respective jurisdictions. The designated Requesting Official will inform the Assistant Director-Office of Professional Responsibility (Giglio Coordinator) or their designee of relevant case law, court practices, and rulings that govern the definition and disclosure of impeachment information in that district.

Giglio Coordinator. The Assistant Director (AD) OPR or their designee is responsible for conducting or coordinating the review of LEI employee personnel and administrative files. Their duties include being the point of contact for LEI, coordinating Giglio requests with USDA Office of General Counsel, and providing information necessary to respond to the Giglio requests for LEI personnel.

#### **5394.1 - Purpose**

This direction establishes policies and procedures for Law Enforcement and Investigations employees of the USDA Forest Service regarding the disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice (DOJ) sections; as well as state prosecutors with authority to prosecute criminal cases. The purpose of this policy is to ensure that prosecutors receive required discovery obligations.

## **5394.2 - Background**

This policy is the result of a series of Federal court decisions. *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the failure of the prosecution to turn over evidence favorable to the defendant upon request on the issue of guilt violates due process “irrespective of the good faith or bad faith of the prosecution.” Subsequently, in *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that information known by one Federal prosecutor, including any impeachment information, is deemed known by all Federal prosecutors in the same office. In applying this law, the Ninth Circuit, in *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), held that Federal prosecutors have an obligation to review the personnel file of testifying government employees when requested to do so by defense counsel. The prosecutor shall also disclose any information favorable to the defendant that meets the appropriate standard of materiality. In response to the series of Federal court decisions, DOJ promulgated a policy that (upon a request from DOJ) requires Federal agencies to review the personnel files of employees who are to be affiants or witnesses and report such findings to Federal prosecutors. This DOJ policy has been favorably reviewed in *United States v. Quinn*.

## **5394.3 - Limitations**

This policy broadly controls disclosures of potential impeachment information for LEI employees that are expected to provide a sworn statement or testimony in any investigation or criminal case. It does not cover disclosure of potential impeachment information about witnesses or address the issue of what information the prosecution must produce to the defense or to the court for its review.

In circumstances where non-Law Enforcement and Investigations staff of the USDA Forest Service may serve as members of the prosecution team; the Assistant Director-Office of Professional Responsibility will coordinate with the appropriate unit supervisor, Human Resources, and the requesting office on a case-by-case basis.

## **5394.4 - Obligation of Forest Service Law Enforcement Officers and Criminal Investigators to Provide Potential Impeachment Information to Federal Prosecutor**

All LEI employees are required to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any criminal investigation or case. This obligation arises when a prosecutor has identified a LEI employee as a potential affiant or witness in a specific criminal investigation or case and continues until the investigation or case has been concluded, regardless of whether the prosecutor has made a specific request for such information.

## **5394.5 - Potential Impeachment Information**

Potential impeachment information generally: impeaching information that is material to the defense and includes information that provides evidence of perjurious conduct, acts of dishonesty, or otherwise exculpatory information. The Attorney General’s December 9, 1996 memorandum as amended, provides the following list as examples of potential impeachment

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information of acts or omissions required to be disclosed. This list reflects the minimum amount of information required to be disclosed and should not be considered all-inclusive.

1. Substantiated allegations. Any finding of misconduct demonstrating bias or lack of candor or truthfulness;
2. Pending investigations or allegations. Any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the LEI employee that is the subject of a pending investigation;
3. Criminal charges. Any past or pending criminal charge against the LEI employee;
4. Allegations that are unsubstantiated, not credible, or have resulted in exoneration. Generally, unsubstantiated allegations, allegations that are not credible, or allegations that result in the exoneration of a LEI employee are not disclosed. However, when those allegations can be said to go to the truthfulness of the LEI employee, they are required to be disclosed under the following circumstances:
  - a. When the Requesting Official advises that disclosure is required by a court decision in the district where the investigation or case is being pursued;
  - b. When, on or after the effective date of this policy;
    - (1) The allegation was made by a Federal prosecutor, magistrate judge, or
    - (2) The allegation received publicity;
      - a. When the Requesting Official and the Office of General Counsel agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the LEI witness; or
      - b. When disclosure is otherwise deemed appropriate by LEI and USDA, Office of General Counsel.

**5394.6 - Procedure for Review and Disclosure**

1. Request for Giglio Information by Requesting Official. Once a Federal prosecutor determines to request all potential impeachment information from LEI, the prosecutor should direct the request to the Requesting Official in the prosecutor's office. Subsequently, the Requesting Official should request from LEI through the AD OPR (Giglio Coordinator), in writing, all potential impeachment information regarding a specific Forest Service LEI employee. Upon receipt of a request from the Requesting Official, the AD OPR shall notify Office of General Counsel of the request if there is potential Giglio information which will be shared.

2. Procedure Upon Receipt of Request for Giglio Information. Upon receipt of a request for potential impeachment information from a Requesting Official, the AD OPR is responsible for obtaining the LEI employee's Official Personnel File and other relevant administrative files for review. The AD OPR is responsible for reviewing any relevant files within his or her control and forwarding their findings to the Office of General Counsel and to coordinate a combined response to the Requesting Official, in the form a standard written response, of any potential impeachment information located in the LEI employee's Official Personnel File or other relevant administrative file. The AD OPR shall transmit a copy of the response to the Special Agent in Charge (for Regional personnel) or the Director, LEI (for Washington Office personnel) and the employee made aware of the potential impeachment information unless it compromises an internal investigation into that employee's conduct.
3. Potential Impeachment Information Based Upon Allegations that are Unsubstantiated, Not Credible, or Have Resulted in Exoneration. If the potential impeachment information forwarded to the Requesting Official is based upon "allegations that are unsubstantiated, not credible, or have resulted in exoneration," the AD OPR shall also advise the Requesting Official, to the extent determined, whether any of the allegations were found to be unsubstantiated, not credible, or resulted in the LEI employee's exoneration. In addition, the AD OPR shall stress, with regard to any allegations disclosed, the importance of maintaining the confidentiality of the report and the privacy interests of the LEI employee-witness to whom the report refers.
4. Request Not to Disclose Potential Impeachment Information. If the AD of OPR, Director, LEI or Office of General Counsel believes that the prosecutor should not disclose certain potential impeachment information to defense counsel, the AD of OPR should communicate this view, along with the reasons, to the Requesting Official, so that the prosecutor will be aware of all relevant issues prior to determining whether to disclose the potential impeachment information.
5. Retention by USAO and DOJ of Information Provided by Forest Service Law Enforcement and Investigations. In order to ensure that special care is taken to protect the confidentiality of privacy interests and reputations of LEI employee-witnesses, at the close of the criminal investigation or case, the AD of OPR shall request that all information and documentation that was not disclosed to the defense counsel be expeditiously returned to LEI.
6. Continual Duty to Disclose Potential Impeachment Information During the Pendency of the Criminal Case. During the pendency of the criminal investigation or case, the AD of OPR and any LEI employee who is the subject of the Giglio request each have a duty to immediately inform the Requesting Official of potential impeachment information that arises after an initial request for such information. Therefore, supervisors of LEI employees must immediately inform the AD of OPR of any such potential impeachment information regarding LEI employees under their supervision during the pendency of the criminal investigation or case. Additionally, the LEI employee must be informed of the potential impeachment information unless it compromises an internal investigation into

that employee's conduct.

7. Retention by AD OPR of Potential Impeachment Information Provided to USAO or DOJ. The AD OPR shall retain a copy of all potential impeachment information provided to a Requesting Official, whether or not the information is disclosed to defense counsel. This information, along with copies of all correspondence, memoranda, and any relevant court pleadings and rulings shall be maintained in a secure location, accessible only by the AD OPR, the LEI employee affiant or witness who is the subject of the information, and supervisory officials with an official need to know. The information shall be stored so that it is readily accessible, as necessary.

8. Removal of LEI Employee's Records Upon Transfer, Reassignment, or Retirement. Supervisors of LEI employees shall notify the AD OPR when a LEI employee transfers, is reassigned, or retires. The AD OPR shall inform the Requesting Official of the LEI employee's retirement, transfer to an office in another judicial district, or reassignment to a position in which the LEI employee will neither be an affiant nor witness and request that all records previously forwarded that are accessed by the identity of the LEI employee be returned to the AD OPR. Upon such notification and subsequent to the resolution of any litigation pending in the Federal prosecuting office in which the LEI employee could be an affiant or witness, the Requesting Official shall remove from the Federal prosecuting office's system of records any record that can be accessed by the identity of the LEI employee.

9. Destruction of Potential Impeachment Information Records. The AD OPR shall destroy records of all potential impeachment information that it has maintained no earlier than five (5) years after the retirement or severance of the employee from the United States Forest Service. However, the AD OPR will not destroy any records it has maintained on the LEI employee pursuant to this Giglio Policy due to the transfer or reassignment of the employee within the LEI.

10. Implementation of the Giglio Policy. This Giglio Policy will be disseminated to all LEI employees and incorporated into future training. LEI employees should address questions concerning the obligation to disclose potential impeachment information to prosecutors to the AD OPR, or the Office of General Counsel.

#### **5394.7 - Giglio Impairment**

The exact parameters of potential impeachment information are not easily determined; however, a Giglio-impaired LEI employee, generally, is one against whom there is impeachment evidence that would render the officer or agent's testimony of debatable value in a case, meaning that a case that depends primarily on the testimony of a single Giglio-impaired witness.

Giglio impairment may result from a sustained complaint of lack of candor, deceptive conduct or untruthfulness by the LEI employee (even if there is no discipline issued), a finding that a LEI employee withheld information from an internal or external law enforcement investigation, sustained allegations that a LEI employee fraudulently reported their working hours or overtime,

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sustained allegations of theft by the LEI employee, sustained allegations of improperly handling/securing of evidentiary items, or a finding that the officer was not truthful in personal or public life.

For the purpose of ensuring that potential impeachment information is handled consistently United States Attorney's Offices' may keep a system of records regarding Giglio Impaired or when a LEI employee has been deemed incapable of testifying or to serve as an affiant due to potential impeachment information. USAO's may also keep records of any written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information. Furthermore, if a LEI employee has been transferred to another judicial district or will testify or serve as an affiant in another judicial district, the prosecuting office in the originating district may provide any relevant information from its Giglio system of records relating to that LEI employee to a Giglio Requesting Official in the new district.

Per statutes, case law and DOJ policy previously mentioned in this Giglio Policy, LEI has a continuing duty to disclose potential impeachment information of LEI employees tasked to testify and or act as an affiant in any and all judicial districts of the United States. When a LEI employee is transferred to a new district, LEI shall ensure that a Requesting Official in the new district is advised of any potential impeachment material known to LEI when the employee begins meaningful work on a case or matter within the prosecuting district or is reasonably anticipated to begin meaningful work on such a case or matter.

The ability of a LEI employee to reliably and truthfully testify in criminal and or administrative proceedings is a critical component of their employment. A finding of Giglio Impairment significantly interferes with their credibility and intrudes on the LEI employee's ability perform their duties.

In cases where a LEI employee is found to be Giglio impaired, an investigation into the circumstances must be conducted by the AD OPR or their designee and a report of the findings prepared for the Director of Law Enforcement and Investigations. The Director will then make a determination based on the LEI employee's ability to continue to function as a LEI employee and their inability to testify or serve as an affiant, a critical condition of their employment.

LEI employees that are determined to be Giglio Impaired may be allowed to transfer to another position outside of LEI where their inability to testify and serve as an affiant is not a critical duty. In circumstances to be determined by a review of the Director of Law Enforcement and Investigations where the LEI employee is Giglio Impaired and considered irredeemable based on a variety of factors to be considered by the Director the LEI employee may be removed for cause.



## **5395 - Reports and Forms**

1. Reporting.
  - a. Reports and files will contain appropriate documentation sufficient to support report findings, conclusions, and investigative accomplishments.
  - b. The report will consist of a description of the alleged criminal act(s) or misconduct, any other misconduct identified, and a summary analysis of all relevant evidence and investigative findings.
  - c. Upon completion of all investigations and inquiries all files, documents, and evidence related to the investigation will be forwarded to and maintained by the Assistant Director of OPR and maintained in accordance with applicable records retention policy. Completed reports will also be documented in a LEI Complaint System.
  - d. The Assistant Director of OPR will utilize the LEI Complaint System to report any disciplinary actions taken in response to sustained complaints.
  - e. The Assistant Director of OPR and/or Regional LEI leadership will ensure the Director of LEI is notified of sustained complaints with potential to affect the security clearance of law enforcement personnel, in accordance with the requirements outlined in FSM 5370, "Personnel Security and Suitability Requirements."
  - f. For all complaints where a possible need for a policy revision is noted, the Director of LEI and Assistant Director- Training, Development, and Standards will be notified in writing. This will consist of a summary of the circumstances and the applicable sections of policy that may need revision.
2. Records Management.
  - a. Complaint files and related information will be physically separated from other non-OPR investigative records. Information in these files is considered confidential and will be retained in a secure area under the control of the Assistant Director of OPR or his/her designee with access limited for official purposes, and consistent with applicable laws and procedure.
  - b. Access to electronic files will only be provided to individuals with a need to access those files. The level of access granted to individuals will be kept at the lowest level of control needed.

## **5396 - Inspection (Reserved)**