

# Exhibit 2

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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NATIONAL ASSOCIATION OF	)	
CRIMINAL DEFENSE LAWYERS,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
EXECUTIVE OFFICE FOR UNITED	)	
STATES ATTORNEYS and UNITED	)	
STATES DEPARTMENT OF JUSTICE	)	
	)	
	)	
Defendants.	)	

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Civil Action No. 14-cv-269 (CKK)

**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), having been appointed in January 2010 by the Deputy Attorney General as the first person to occupy this position. In November 2011, this position was elevated to a career SES-level position in the Office of the Deputy Attorney General (ODAG), which is the position I currently have. In this role, I oversee a wide range of national initiatives designed to provide federal prosecutors and other law enforcement officials with training and resources relating to criminal discovery.

(2) I have been an attorney for over 30 years, all but six years of which have been spent as a prosecutor. I began my career in 1983 at the Manhattan District Attorney’s Office, and have also worked as an Assistant U.S. Attorney in the District of New Jersey;

as a supervisor in the New York Attorney General's Office; and as the First Assistant Chief of DOJ's Environmental Crimes Section.

(3) 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.

(4) On December 20, 2012, plaintiff submitted a Freedom of Information Act (FOIA) request to the Department's Executive Office for United Attorneys (EOUSA) for a copy of a DOJ document entitled "Federal Criminal Discovery," also referred to as "the Federal Criminal Discovery Blue Book." Plaintiff's initial request, the administrative processing of that request, and correspondence between EOUSA and plaintiff, including EOUSA's final determination on plaintiff's request on behalf of DOJ, are described in detail in the declaration of Susan Gerson, Assistant Director, FOIA/Privacy Act Staff, EOUSA (Gerson Declaration). This declaration supplements and incorporates by reference the Gerson Declaration.

#### Description of the Withheld Document

(5) Upon my appointment as National Criminal Discovery Coordinator in early 2010, one of my first responsibilities was to spearhead DOJ's effort to create a Federal Criminal Discovery Blue Book (Blue Book). The Blue Book was designed to provide advice regarding the law and practice of federal prosecutors' discovery disclosure obligations and to serve as a litigation manual to be used by all DOJ prosecutors and paralegals. The Blue Book contains nine chapters, written by DOJ prosecutors with expertise in a wide range of discovery-related topics, covering subjects such as Rule 16, *Brady*, *Giglio*, the Jencks Act, items protected from disclosure, protective orders, and *ex parte* or *in camera* submissions, among others. From the outset – indeed, this was something I addressed during my very first week on the job – I advised the authors that

the Blue Book should contain practical “how-to” advice for federal prosecutors across the nation. From early 2010 up to and including March 2011, when the Blue Book was distributed to federal prosecutors in electronic and hard copy format, I was directly involved in the review and editing of all of its chapters. I engaged in numerous conversations with authors of the various chapters, and was responsible for drafting the bulk of the chapter concerning Rule 16.

(6) The Blue Book contains comprehensive legal analysis and advice on criminal discovery practices, potential strategic and logistical concerns, interpretations of law and risk assessments in light of relevant legal authority, as well as precedent, practice notes, techniques, procedures, and legal strategies that in-the-field prosecutors may and do employ during the course of criminal proceedings. The Blue Book, as a matter of course, contemplates facts that may arise in judicial proceedings and an evaluation of how a court would likely consider those facts. As explained in subsequent paragraphs, revealing the content of the Blue Book would essentially provide a road map to the strategies federal prosecutors employ in criminal cases.

Law Enforcement Nature of the Blue Book

(7) The criminal discovery process is directly related to the law enforcement function carried out by DOJ, as further described in paragraph 8. In addition to helping federal prosecutors handle discovery-related challenges in the course of prosecuting federal criminal cases, the Blue Book is also used by prosecutors during their work with other law enforcement officials – including special agents from the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) – to conduct federal criminal investigations. In both the investigative and prosecution stages of federal crimes, the Blue Book functions as a critical law enforcement tool. The advice

and strategies provided in the book are meant to ensure that discovery-related issues do not compromise DOJ investigations and prosecutions. Importantly, in addition to federal prosecutors, the only group to receive access to the Blue Book has been the other federal law enforcement officials with whom federal prosecutors work on criminal investigations and prosecutions.<sup>1</sup>

(8) In early January 2010, shortly before my appointment, then DAG David Ogden issued three memoranda to all criminal prosecutors: “Issuance of Guidance and Summary of Actions Taken in Response to the June 2009 Report of the DOJ Criminal Discovery and Case Management Working Group,” “Requirement for Office Discovery Policies in Criminal Matters,” and “Guidance for Prosecutors Regarding Criminal Discovery.” These memoranda, which are publicly available, provide guidance on gathering and reviewing potentially discoverable information and making timely disclosure to defendants. Pursuant to the memoranda, prosecutors are instructed to provide broader and more comprehensive discovery than the law requires. Before making disclosures, however, the memoranda direct prosecutors to consider countervailing law enforcement-related concerns, such as “protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; [and] investigative agency concerns . . .”

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<sup>1</sup>In the one criminal case where a court ordered disclosure of the Blue Book, over the Government’s objection that the Blue Book constituted attorney work product, the court (in a sealed order) required a protective order that prohibited the defense from copying the Blue Book, disseminating its contents to anyone outside the defense team, or maintaining a copy of it after the motion relevant to the Blue Book had been resolved.

Potential Ramifications if the Blue Book is Released

(9) The Criminal Discovery Blue Book was created for the internal use of criminal prosecutors and contains, in addition to legal analysis, a comprehensive set of strategic considerations, procedures, and practical advice for conducting criminal prosecutions. Some of these are specifically set out as “Practice Notes,” “Caveats,” “Strategic and Logistical Concerns,” or “Practical Considerations,” but many are interspersed within the legal analysis. For example, 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. It also describes techniques and procedures for prosecutions and investigations, such as how to protect witnesses from retaliation and intimidation; how (and when) to disclose documents and other objects; how (and when) to disclose reports of examinations and tests and reports relating to expert witnesses; a wide variety of guidance relating to handling statements of defendants and lay witnesses; practical considerations concerning law enforcement witnesses; how to obtain electronic and other forms of evidence; how to ensure that the Government receives appropriate discovery from the defense; procedures for dealing with subpoenas seeking information that may be discoverable; and how, why, and when to seek protective orders relating to potentially discoverable information (or materials protected from disclosure), among others. The totality of the techniques, procedures, guidelines, strategic considerations, and practical advice set forth in the Blue Book are not generally known to the public. Indeed, the Department has steadfastly maintained the confidentiality of this document, as described above in paragraph 7.

(10) Additionally, release of the Criminal Discovery Blue Book would give defense counsel an unfair advantage over the prosecution as it would reveal internal details of the

prosecution's strategy for the handling and development of criminal cases. Many factors affect the manner and timing of disclosure by the prosecution in criminal cases. A prosecutor may be able to take a broad approach to discovery in one case, yet may seek to delay or limit disclosure in another case with different facts and circumstances. If defense counsel were aware of the myriad legal, strategic, and tactical considerations that go into this analysis, they would have unfair – and potentially dangerous – insight into the prosecution's approach to discovery in criminal cases. When Deputy Attorney General James Cole testified before the Senate Judiciary Committee in June 2012, he described

the carefully constructed balance that the Supreme Court and lower courts, the Criminal Rules Committee, and Congress have painstakingly created over decades – a balance between ensuring the protection of a defendant's constitutional rights and, at the same time, safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, does not unnecessarily intrude on victims' and witnesses' personal privacy, protects on-going criminal investigations from undue interference, and recognizes critical national security interests.

If the Blue Book were released and defense counsel nationwide knew how the Government would likely litigate discovery-related motions, that balance could be disturbed.

(11) Moreover, if this insight enables defense attorneys nationwide to know the procedures that prosecutors use to protect witnesses and to obtain certain evidence, or to use the Blue Book to obtain discovery beyond that which they are entitled (even under DOJ's liberal discovery policy), some criminal defendants may circumvent the law and escape punishment by modifying their behavior, hiding incriminating evidence, or worse. Some criminal defendants may obtain discovery earlier than appropriate, some may receive it in unredacted format (where it otherwise would have been redacted), and others yet may obtain discovery where that material would otherwise have been protected. As a result, ongoing investigations could be compromised, such as by disclosing the identity of undercover officers and confidential informants; there may

be a greater likelihood of witness intimidation and retaliation; there could be an increased likelihood that documents, electronically stored information, and other evidence might be destroyed by criminals who become aware of ongoing investigations; and a higher risk that national security will be breached, whether perpetrated domestically or abroad.

(12) Timely and just results in the criminal justice system require that both sides are able to perform their duties on equal footing with their counterparts. Disclosure of a DOJ prosecutorial litigation manual such as the Blue Book would upset the balance inherent in the adversarial process by revealing the core attorney work-product that is essential to effective federal prosecutions, providing unprecedented insight into the thought processes of federal prosecutors. The Blue Book does not simply provide legal analysis; it is a comprehensive litigation guide intended to offer strategy and advice to prosecutors in defending against discovery-related challenges by criminal defendants.

(13) Disclosure of the Blue Book would also undermine the criminal trial process by revealing the internal legal decision-making, strategies, procedures, and opinions critical to the Department's handling of federal prosecutions. Disclosure would severely hamper the adversarial process as DOJ attorneys would no longer feel free to memorialize critical thoughts on litigation strategies for fear that the information might be disclosed to their adversaries to the detriment to the government's current and future litigating positions.

(14) The Blue Book consists of guidelines for federal prosecutors to follow in conducting the discovery phase of law enforcement prosecutions. As noted above, these guidelines consist not only of an exposition of the many legal principles applicable to criminal discovery, but also interpretation and analysis of those principles by DOJ attorneys, legal



strategy, practice tips, and logistical considerations. In other words, the Blue Book is a litigation guide intended to offer strategy and advice to prosecutors. It is also intended to assist prosecutors in defending against discovery-related challenges by criminal defendants. The Blue Book offers a set of comprehensive guidelines for this phase of criminal federal prosecutions, and is relied upon heavily by federal prosecutors across the entire country to conduct criminal discovery. Disclosure of the Blue Book would provide unprecedented insight into the thought processes of federal prosecutors in conducting criminal discovery, investigations, and prosecutions, which would create a reasonably expected risk that future prosecutions could be undermined and weakened by criminal defendants and their attorneys.

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

  
Andrew D. Goldsmith

Executed this 11<sup>th</sup> day of June 2014.