

Appendix J

Examples of Traditional Assistance and Gifts to Law Enforcement

The examples below of what constitutes a gift or traditional assistance to law enforcement are based on the examples included with a memorandum issued by Deputy Attorney General Paul J. McNulty entitled *Guidance for Acceptance of Assistance and Gifts from Private Parties for Use in Connection with Investigations and Litigation* (May 2006). These examples highlight certain factors to consider and address the consultative process that should be followed. Please note that not every factor that should be considered has been identified below for each scenario. The examples are provided to highlight certain elements, but do not reflect the entire analysis.

- 1. Scenario:** The Department has received information from a private investigator who has an ongoing contract with a motion picture association to investigate pirated and counterfeit goods, including pirated movie DVDs. The investigator provides information regarding websites and points of contact for persons/entities that may have a connection to the counterfeit materials.

Analysis: This information constitutes traditional assistance; no particular consultation is required before a Departmental employee may accept this information.

Continuing Scenario: The Department has initiated its own investigation based on the initial information provided by the association's private investigator. After the Department's investigation has begun, and without any further communications or direction from an FBI agent or the Criminal Division attorney assigned to the matter, the private investigator uncovers another source that appears to be involved with the counterfeit materials. The investigator reports this new information to the FBI agent.

Analysis: This information also constitutes traditional assistance that the FBI agent and attorney may accept. The attorney and agent may need to consult with each other to determine whether the investigator's efforts may interfere with the Department's activities, and whether the investigator should be advised to alter his activities in some manner in

order to avoid any interference. Neither the agent nor attorney should advise the investigator what types of evidence are desired for the Department's investigation.

2. **Scenario:** A nationwide retail giant has its own security force and has spent considerable resources to set up its own forensics laboratory to fight shoplifting and other crimes against the company. The local FBI office is investigating a matter that has no connection to the retail company. The FBI office, however, believes that the equipment at the retail company's laboratory is superior to the Department's capabilities for enhancing photographs for identification. The FBI office solicits the retail giant for help, and the business readily agrees to provide forensic assistance without charge. The enhanced photograph allows the FBI to continue its investigation with greater efficiency.

Analysis: Initially, the FBI must obtain prior approval from the Deputy Attorney General or the Attorney General before any representative may contact the retail company to seek its services. The free forensic services constitute a gift. Since the value of these services is less than \$50,000, the agent and attorney must seek the component head's approval in order to accept these services for free. In considering this offer, the component head must consider why the Department is seeking outside forensics aid. The Department may need a third party's gift because the Department does not own or have at its disposal the same equipment. In addition, the time-sensitive nature of the case might require immediate action, and the Department might not gain access to such equipment with the same speed as that offered as a gift. In this situation, with advance approval of the solicitation the Department may accept the gift.

3. **Scenario:** Consider the same facts set forth in Scenario #2, but assume that the retail giant informed the local FBI office that it had a forensics laboratory with equipment capable of performing a variety of functions, and that it was offering general access to its equipment and staff for investigative purposes any time that the Department determined the company's resources would benefit the Department.

Analysis: A retail giant's standing offer to allow the Department to use its forensic facilities, whether for case-specific matters or general investigative purposes, should be considered carefully. (Initially, this company's offer does not trigger the same considerations set forth in Scenario #2, where the Department solicited the gift.). As noted above, there may be instances when private industry has forensic resources that are not available to the Department, and the immediacy

of the situation may warrant the Department's use of outside resources. However, the decision to use a third party's services is distinct from the decision to accept such services free of cost. In deciding whether to accept the services for free, counsel should consider whether there are any pending matters in the Department in which the retail giant is a party or could be affected directly by a particular matter.

One-time gifts of free assistance may be permissible. However, it is particularly important that the Department carefully scrutinize a third party's offer to use its services for free on multiple occasions or on a periodic basis for separate cases or matters (e.g., several times a year). The Department should be circumspect in accepting more than one gift from the same source within one fiscal year.

Again, while the donor may have resources unavailable to the Department, the Department should consider paying for the services provided. Even if the full cost is difficult to assess, the Department and a third party can identify a reasonable value for the unique services provided.

One reason for the Department's disinclination to accept multiple offers from one source is that the costs of pursuing the Department's mission must be fully identified and presented as part of its budget for Congress to accept or reject. Accepting free services that are critical to the Department's performance of its mission on a frequent or regular basis masks the actual costs of its annual operations. Second, periodic or regular acceptance of free services from an entity can raise an appearance of a conflict of interest, particularly if any matter later arises involving that donor.

The component head may accept the first offer from a source up to \$50,000. A second or subsequent offer in the same fiscal year from the same source must be submitted to the Assistant Attorney General for Administration (AAG/A) for approval when the value combined with the first gift exceeds \$50,000.

4. **Scenario:** A corporation's products are being counterfeited and its computer network has been infiltrated. The corporation has hired a computer security firm to evaluate the extent of the computer breach and to recommend modifications to its system. The corporation has told Departmental attorneys and investigators that they may speak with its employees and the computer security firm's personnel about the breach, and utilize their expertise as necessary. The corporation is paying for the computer security firm's services throughout the

Department's investigation, including time spent meeting with Department employees. One computer firm employee has particular proficiency in computer programming, and he would be an expert witness in any litigation against the defendant to discuss the unauthorized access and damage to the corporation's security and computer privacy. The victim corporation also has provided office space for Departmental employees to interview corporate staff and the computer firm employees.

Analysis: The corporation is a victim. The computer firm is a “related party” because it is retained by the corporation. Access to both companies' personnel during the investigation is traditional assistance that does not warrant any formal approval process. The corporate and security firm employees are in a unique position to provide useful information on behalf of their employer/contractor. The agent and attorney should consult with each other, and potentially with the Professional Responsibility Officer (PRO) and the Deputy Designated Agency Ethics Official (DDAEO), to determine the extent to which they will accept the corporation's offers. Using corporate space for interviews does not raise any particular concerns. The computer security expert who assessed the damage to the corporation has distinct advantages over another computer expert who was not involved in the assessment. Despite this favorable position, the trial attorney should determine whether the potential appearance of the corporation's self-interest in paying for the expert witness' testimony does not outweigh the benefit of this expert's testimony before accepting the services.

5. **Scenario:** The DEA is investigating a suspect for selling and delivering drugs from his apartment. In order to enhance its surveillance and consistent with its investigative procedures, DEA wants to rent an apartment in the building where the suspect lives. DEA approaches the owner of the building and offers to pay market rent for an apartment. The owner has a vacant apartment in a desirable location to conduct surveillance in the building. The owner is supportive of the DEA's efforts and offers the apartment to DEA for three months free of charge. The fair market value of the vacant apartment is \$1,500/month.

Analysis: The owner is an indirect victim since the suspect's illegal activities have an adverse affect on the owner's property. Offers of aid from an indirect victim generally constitute assistance, although the value of the offer may be such that it should be considered a gift. Given the short time frame (three months) and the value involved

(\$4,500), this offer constitutes assistance, and an agent in consultation with an attorney may decide to accept the offer. However, if the owner offered the DEA agent free use of the apartment for nine months and that amount of time (or longer) was necessary for a more complex investigation, the agent and attorney should seek approval to accept the offer as a gift. Given that the owner is taking the apartment off the market for an extended period of time, the offer is more substantial than before, and higher-level approval (by the component head for a gift) is warranted. There is no clear line defining when assistance becomes a gift because of the financial value or imposition involved. For offers that exceed three months, an attorney should consult with the DDAEO to determine whether the offer may be accepted as assistance, or considered a gift.

6. **Scenario:** The Criminal Division is investigating a highly technical computer crimes case. A university professor has conducted research in the narrow field at issue. A Criminal Division attorney contacted the professor for general background information on this issue, saying that the Department is willing to pay for his consultative services. The professor is willing to provide advice, assistance, and testimony in federal court for free. Although the professor has no prior experience as a witness, the attorney intends to proffer the professor as an expert.

Analysis: The professor is a third party and he has offered the attorney a gift. Assuming that the number of hours to prepare and present testimony is limited, the value of the professor's services will be below \$50,000. Although the Department (and component's budget) will always benefit from no-cost expert services, it is not always appropriate to accept this type of offer. While the professor will benefit professionally from his "expert" qualification, this intangible benefit does not necessarily mean the Department should avoid the costs of payment. The attorney should consult with the PRO and DDAEO to determine the appropriate course of action.

7. **Scenario:** The FBI is investigating the sale of counterfeit goods. The corporate maker of the true product has offered to give the FBI \$1 million to purchase the counterfeit goods from an identified broker. The FBI, in consultation with the local United States Attorney's Office, accepts the offer, and makes arrangements with the corporation to provide the \$1 million. The counterfeit goods are purchased. The corporation arranged for the goods to be transported and stored in its warehouse pending its initiation of a civil proceeding.

Analysis: Because the Department is serving as the conduit for cash to recover counterfeit materials, the Department may accept the victim's offer of funds for this particular purpose. The agent should seek approval from the AUSA prior to accepting the victim's funds. Because the cost of storage to the company at its own facilities is minimal, the Department may accept the company's offer to store the goods at the victim's expense.

8. **Scenario:** An industry leader in the computer field has developed a software program that can meld various databases and enhance search capabilities for the law enforcement community. The company has offered this program to the Department. While it is not available for sale to the public, the program (including the technical support to assist its operations) is valued over \$800,000.

Analysis: Given the high value, this offer must be submitted to the AAG/A for acceptance. Moreover, more concerns arise because this program would enhance the Department's general capabilities, and not just be used for a specific case investigation. Again, there are appearance issues in accepting resources of such significant value from an entity that may be the subject of Department action in another arena. This type of offer also directly impacts the Department's operations and mission. However, the company is also offering a capability that is unparalleled. Given the magnitude of this offer, high-level attention to determine whether this offer may be accepted is warranted.