

Code of Federal Regulations

Title 6. Domestic Security (Refs & Annos)

Chapter I. Department of Homeland Security, Office of the Secretary (Refs & Annos)

Part 5. Disclosure of Records and Information (Refs & Annos)

Subpart C. Disclosure of Information in Litigation (Refs & Annos)

6 C.F.R. § 5.41

§ 5.41 Purpose and scope; definitions.

Currentness

(a) This subpart C sets forth the procedures to be followed with respect to:

(1) Service of summonses and complaints or other requests or demands directed to the Department of Homeland Security (Department) or to any Department employee or former employee in connection with federal or state litigation arising out of or involving the performance of official activities of the Department; and

(2) The oral or written disclosure, in response to subpoenas, orders, or other requests or demands of federal or state judicial or quasi-judicial or administrative authority as well as state legislative authorities (collectively, “demands”), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, responses to interrogatories, document production, interviews, or other litigation-related matters, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules (collectively, “requests”), of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the demand or request is or was employed by the Department, or served as Secretary of the Department, as part of the performance of that person's duties or by virtue of that person's official status.

(b) The provisions established by this subpart shall apply to all Department components that are transferred to the Department. Except to the extent a Department component has adopted separate guidance governing the subject matter of a provision of this subpart, the provisions of this subpart shall apply to each component of the Department. Departmental components may issue their own guidance under this subpart subject to the approval of the General Counsel of the Department.

(c) For purposes of this subpart, and except as the Department may otherwise determine in a particular case, the term employee includes all former Secretaries of Homeland Security and all employees of the Department of Homeland Security or other federal agencies who are or were appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of Homeland Security, whether residing or working in the United States or abroad, including United States nationals, foreign nationals, and contractors. The procedures established within this subpart also apply to former employees of the Department where specifically noted.

(d) For purposes of this subpart, the term litigation encompasses all pre-trial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards (including the Board of Appellate Review), grand juries, or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature. This subpart governs, inter alia, responses to discovery requests, depositions, and other pre-trial, trial, or post-trial proceedings, as well as responses to informal requests by attorneys or others in situations involving litigation.

However, this subpart shall not apply to any claims against the Department by Department of Homeland Security employees (present or former), or applicants for Department employment, for which jurisdiction resides with the U.S. Equal Employment Opportunity Commission; the U.S. Merit Systems Protection Board; the Office of Special Counsel; the Federal Labor Relations Authority; the Foreign Service Labor Relations Board; the Foreign Service Grievance Board; or a labor arbitrator operating under a collective bargaining agreement between the Department and a labor organization representing Department employees; or their successor agencies or entities.

(e) For purposes of this subpart, official information means all information of any kind, however stored, that is in the custody and control of the Department, relates to information in the custody and control of the Department, or was acquired by Department employees, or former employees, as part of their official duties or because of their official status within the Department while such individuals were employed by or served on behalf of the Department.

(f) Nothing in this subpart affects disclosure of information under the Freedom of Information Act (FOIA), [5 U.S.C. 552](#), the Privacy Act, [5 U.S.C. 552a](#), [Executive Order 12958](#) on national security information (3 CFR, 1995 Comp., p. 333), the Government in the Sunshine Act, [5 U.S.C. 552b](#), the Department's implementing regulations or pursuant to congressional subpoena. Nothing in this subpart permits disclosure of information by the Department, its present and former employees, or the Secretary, that is protected or prohibited by statute or other applicable law.

(g) This subpart is intended only to inform the public about Department procedures concerning the service of process and responses to demands or requests and is not intended to and does not create, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department or the United States.

(h) Nothing in this subpart affects the rules and procedures, under applicable U.S. law and international conventions, governing diplomatic and consular immunity.

(i) Nothing in this subpart affects the disclosure of official information to other federal agencies or Department of Justice attorneys in connection with litigation conducted on behalf or in defense of the United States, its agencies, officers, and employees, or litigation in which the United States has an interest; or to federal, state, local, or foreign prosecuting and law enforcement authorities in conjunction with criminal law enforcement investigations, prosecutions, or other proceedings, e.g., extradition, deportation.

SOURCE: [68 FR 4056](#), Jan. 27, 2003; [68 FR 4070](#), Jan. 27, 2003, unless otherwise noted.

AUTHORITY: [Pub.L. 107-296](#), [116 Stat. 2135](#); ([6 U.S.C. 101 et seq.](#)); [5 U.S.C. 301](#). Subpart A also issued under [5 U.S.C. 552](#). Subpart B also issued under [5 U.S.C. 552a](#).

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6 C.F.R. § 5.42

§ 5.42 Service of summonses and complaints.

Currentness

(a) Only the Office of the General Counsel is authorized to receive and accept on behalf of the Department summonses or complaints sought to be served upon the Department, the Secretary, or Department employees. All such documents should be delivered or addressed to the Office of the General Counsel, United States Department of Homeland Security, Washington, DC, 20258. The authorization for receipt shall in no way affect the requirements of service elsewhere provided in applicable rules and regulations.

(b) In the event any summons or complaint described in § 5.41(a) is delivered to an employee of the Department other than in the manner specified in this part, the recipient thereof shall decline to accept the proffered service and may notify the person attempting to make service of the Departmental regulations set forth herein.

(c) Except as otherwise provided §§ 5.42(d) and 5.43(c), the Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity. Copies of summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may, however, be served upon the Office of the General Counsel.

(d) Although the Department is not an agent for the service of process upon its employees with respect to purely personal, non-official litigation, the Department recognizes that its employees should not use their official positions to evade their personal obligations and will, therefore, counsel and encourage Department employees to accept service of process in appropriate cases.

(e) Documents for which the Office of the General Counsel accepts service in official capacity only shall be stamped "Service Accepted in Official Capacity Only". Acceptance of service shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under applicable laws or rules.

SOURCE: 68 FR 4056, Jan. 27, 2003; 68 FR 4070, Jan. 27, 2003, unless otherwise noted.

AUTHORITY: Pub.L. 107-296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

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6 C.F.R. § 5.43

§ 5.43 Service of subpoenas, court orders, and other demands or requests for official information or action.

Currentness

(a) Except in cases in which the Department is represented by legal counsel who have entered an appearance or otherwise given notice of their representation, only the Office of the General Counsel is authorized to receive and accept subpoenas, or other demands or requests directed to the Secretary, the Department, or any component thereof, or its employees, whether civil or criminal in nature, for:

- (1) Material, including documents, contained in the files of the Department;
- (2) Information, including testimony, affidavits, declarations, admissions, responses to interrogatories, or informal statements, relating to material contained in the files of the Department or which any Department employee acquired in the course and scope of the performance of his official duties;
- (3) Garnishment or attachment of compensation of current or former employees; or
- (4) The performance or non-performance of any official Department duty.

(b) In the event that any subpoena, demand, or request is sought to be delivered to a Department employee other than in the manner prescribed in paragraph (a) of this section, such employee shall, after consultation with the Office of the General Counsel, decline service and direct the server of process to the Departmental regulations. If the subpoena, demand, or other request is nonetheless delivered to the employee, the employee shall immediately forward a copy of that document to the Office of the General Counsel.

(c) Except as otherwise provided in this subpart, the Department is not an agent for service, or otherwise authorized to accept on behalf of its employees, any subpoenas, show-cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, which are not related to the employees' official duties except upon the express, written authorization of the individual Department employee to whom such demand or request is directed.

(d) Acceptance of such documents by the Office of the General Counsel does not constitute a waiver of any defenses that might otherwise exist with respect to service under the Federal Rules of Civil or Criminal Procedure or other applicable rules.

(e) Copies of any subpoenas, show cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, directed to former employees of the Department in connection with legal proceedings arising out of the performance of official duties shall also be served upon the Office of the General Counsel. The Department shall not, however, serve as an agent for service for the former employee, nor is the Department otherwise authorized to accept service on behalf of its former employees. If the demand involves their official duties, former employees who receive subpoenas, show cause orders, or similar compulsory process of federal or state courts should also notify in the component of the Department in which they were employed if the service involves their official duties while so employed.

(f) If the subpoena, demand, or other request is nonetheless delivered to the employee, the employee shall immediately forward a copy of that document to the Office of the General Counsel.

SOURCE: [68 FR 4056](#), Jan. 27, 2003; [68 FR 4070](#), Jan. 27, 2003, unless otherwise noted.

AUTHORITY: [Pub.L. 107-296](#), [116 Stat. 2135](#); ([6 U.S.C. 101 et seq.](#)); [5 U.S.C. 301](#). Subpart A also issued under [5 U.S.C. 552](#). Subpart B also issued under [5 U.S.C. 552a](#).

Current through Aug. 6, 2015; 80 FR 47386.

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6 C.F.R. § 5.44

§ 5.44 Testimony and production of documents prohibited  
unless approved by appropriate Department officials.

Currentness

(a) No employee, or former employee, of the Department shall, in response to a demand or request, including in connection with any litigation, provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any information acquired while such person is or was an employee of the Department as part of the performance of that person's official duties or by virtue of that person's official status, unless authorized to do so by the Office of the General Counsel, or as authorized in § 5.44(b).

(b) No employee, or former employee, shall, in response to a demand or request, including in connection with any litigation, produce any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Office of the General Counsel or the delegates thereof, as appropriate.

SOURCE: [68 FR 4056](#), Jan. 27, 2003; [68 FR 4070](#), Jan. 27, 2003, unless otherwise noted.

AUTHORITY: [Pub.L. 107-296](#), 116 Stat. 2135; ([6 U.S.C. 101 et seq.](#)); [5 U.S.C. 301](#). Subpart A also issued under [5 U.S.C. 552](#). Subpart B also issued under [5 U.S.C. 552a](#).

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6 C.F.R. § 5.45

§ 5.45 Procedure when testimony or production of documents is sought; general.

Currentness

<For statute(s) affecting validity, see: [5 USCA § 301](#); [6 USCA § 101 et seq.](#)>

(a) If official information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the General Counsel) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought. Where documents or other materials are sought, the party should provide a description using the types of identifying information suggested in [§ 5.3\(b\)](#). Subject to [§ 5.47](#), Department employees may only produce, disclose, release, comment upon, or testify concerning those matters which were specified in writing and properly approved by the appropriate Department official designated in [§ 5.44](#). See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The Office of the General Counsel may waive the requirement of this subsection in appropriate circumstances.

(b) To the extent it deems necessary or appropriate, the Department may also require from the party seeking such testimony or documents a plan of all reasonably foreseeable demands, including but not limited to the names of all employees and former employees from whom discovery will be sought, areas of inquiry, expected duration of proceedings requiring oral testimony, and identification of potentially relevant documents.

(c) The appropriate Department official designated in [§ 5.42](#) will notify the Department employee and such other persons as circumstances may warrant of its decision regarding compliance with the request or demand.

(d) The Office of the General Counsel will consult with the Department of Justice regarding legal representation for Department employees in appropriate cases.

SOURCE: [68 FR 4056](#), Jan. 27, 2003; [68 FR 4070](#), Jan. 27, 2003, unless otherwise noted.

AUTHORITY: [Pub.L. 107–296](#), 116 Stat. 2135; ([6 U.S.C. 101 et seq.](#)); [5 U.S.C. 301](#). Subpart A also issued under [5 U.S.C. 552](#). Subpart B also issued under [5 U.S.C. 552a](#).

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