

**How To Subpoena A Government Agent:
Compliance With *Touhy* Regulations for ICE, CBP, DEA and FBI**

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If you seek the testimony of a government agent, whether Immigration and Customs Enforcement (“ICE”), Customs and Border Protection (Border Patrol) (“CBP”), Drug Enforcement Agency (“DEA”), or Federal Bureau of Investigation (“FBI”), you may soon find yourself up against so-called *Touhy* regulations. The purpose of this paper is to enable you to comply with those regulations, so that you may successfully subpoena a government agent when doing so would aid in the defense of your client. Alternatively, this paper provides arguments you can use to challenge the unfair application of *Touhy* regulations to your client’s case.

I. What are *Touhy* regulations?

The term “*Touhy* regulations” derives from the Supreme Court’s decision in *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951). In *Touhy*, an inmate of the Illinois State Penitentiary sought the testimony of the agent in charge of the FBI in Chicago, seeking evidence for use in a federal habeas corpus case that his criminal conviction had been obtained by fraud.¹ The agent refused to provide the information requested, citing an order promulgated by the Department of Justice under the authority of former 5 U.S.C. § 22 (now 5 U.S.C. § 301).² The Supreme Court held that the statute was constitutional, and that the regulation was therefore a proper exercise of executive authority.³

¹ 340 U.S. at 463-65.

² *Id.* at 465.

³ *Id.* at 469.

Following *Touhy*, the various executive agencies enacted regulations governing the release of information by subordinates, whether that information was sought in the form of testimony or documents, in response to a demand or subpoena in a court case. Each executive agency has its own set of regulations.⁴ Thus, the first thing you must determine is precisely which executive agency you are dealing with. The agencies you will most frequently seek testimony from will be DEA, FBI, ICE, and CBP. Each of these agencies is under the umbrella of a larger executive agency; the regulations pertinent to that agency will control how and from whom you make your demand.

II. How do you comply with *Touhy* regulations?

Although there are arguments you can make to object to *Touhy* regulations, often the most practical course will be simply to comply with them. Indeed, at least with respect to some arguments, an attempt at compliance may be necessary before your objections will be heard. Regulations for the agencies defense attorneys most frequently subpoena are appended to this paper; however, because the regulations are subject to frequent change, you should check the current regulations whenever you seek to subpoena or demand the testimony of a government agent.

A. Department of Justice regulations

The DEA and FBI both fall under the umbrella of the Department of Justice (“DOJ”).⁵ Disclosure of documents and testimony by DOJ employees is covered by 28 C.F.R. §§ 16.21-16.26,

⁴ For example: 17 C.F.R. §§ 200.301 *et seq.* (Securities and Exchange Commission); 26 C.F.R. §§ 301.9000-2 *et seq.* (Treasury (including IRS)); 32 C.F.R. §§ 97.3, 97.6 (Department of Defense); 24 C.F.R. §§ 15.201 *et seq.* (Housing and Urban Development); 7 C.F.R. §§ 1.210-1.219 (Department of Agriculture); 39 C.F.R. §§ 230.10 *et seq.* (United States Postal Service); 22 C.F.R. §§ 172.1 *et seq.* (State Department).

⁵ See Department of Justice Organization Chart, *available at* <http://www.justice.gov/agencies/index-org.html> (last visited March 15, 2011).

attached to this paper as Appendix A. Section 16.23 governs disclosure in cases where the United States is a party, which of course includes every criminal case. It provides that employees of the DOJ are authorized, after consultation with the “originating component” to “reveal and furnish to any person . . . such testimony, and relevant unclassified material, documents, or information secured by any attorney or investigator of the Department of Justice.”⁶ For a criminal case, the “originating component” is the Assistant Attorney General in charge of the Criminal Division.⁷ In deciding whether to make a disclosure, DOJ considers whether the disclosure is appropriate under the applicable rules of procedure and substantive law regarding privilege, and whether any of a number of special factors prohibiting disclosure are present in the case.⁸ When testimony is sought, “an affidavit, or if that is not feasible, a statement by the party seeking the testimony or by the party’s attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.”⁹

These regulations mean that, in order to obtain the testimony of a DEA or FBI agent, an attorney must make a demand to the Assistant Attorney General of the Criminal Division and provide a summary of the testimony sought to United States Attorney and to the Assistant United States Attorney handling the case. To satisfy this requirement, counsel should send a letter to the Assistant Attorney General, with copies to the United States Attorney and the Assistant United States

⁶ 28 C.F.R. § 16.23(a).

⁷ *See* 28 C.F.R. § 16.24.

⁸ 28 C.F.R. § 16.26(a), (b)

⁹ 28 C.F.R. § 16.23(c).

Attorney handling the case. The letter should contain a summary of the testimony that is being sought.¹⁰

B. Department of Homeland Security regulations

CBP and ICE both fall under the organizational umbrella of the Department of Homeland Security (“DHS”).¹¹ Testimony by DHS employees is governed by 6 C.F.R. §§ 5.41-5.45 (Attached to this paper as Appendix B). Section 5.43 provides that “only the Office of the General Counsel is authorized to receive and accept subpoenas, or other demands and requests directed to the Secretary, the Department, or any component thereof, or its employees, whether civil or criminal in nature.” Section 5.45 provides that “[i]f official information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must . . . set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought.” A demand for testimony by an ICE or CBP agent should therefore be addressed to the Office of General Counsel for DHS, with copies to the United States Attorney and the Assistant

¹⁰ The mailing address for the Assistant Attorney General for the Criminal Division is:

Mr. Lanny A. Breuer
Assistant Attorney General
Criminal Division
United States Department of Justice
Room 2107
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

¹¹ See Department of Homeland Security Organization Chart, *available at* http://www.dhs.gov/xabout/structure/editorial_0644.shtm (last visited March 15, 2011).

United States Attorney handling the case, and contain a summary setting forth the nature of the testimony sought and its relevance to the case.¹²

Note that, while the DOJ regulations provide that a request under *Touhy* regulations should be accompanied by a brief summary, the DHS regulations require that a demand for testimony “set forth . . . *with as much specificity as possible*, the nature and relevance of the testimony sought.” As a practical matter, it is best to first submit a summary of the testimony sought – i.e., enough to give the reader the general idea of what is sought, without giving away your defense. For example, if you expect the agent to provide an alibi for your client, you don’t have to say that. You can simply state that you expect the agent to testify as to the whereabouts of your client on the day in question. After submitting a summary, contact the agency to which you are addressing the demand for testimony, and ask whether you have sufficiently complied. If the agency feels you have not sufficiently complied, submit a more detailed summary. If you feel that you can’t be more detailed without giving away too much of your defense strategy, then it is probably time to object to the application of *Touhy* regulations in your case.

II. Can you object to *Touhy* regulations?

If the Government or court resists your request for witness testimony, or if compliance with *Touhy* regulations is not feasible, there are a few possible objections to the application of *Touhy* regulations. These include (a) that *Touhy* does not apply in criminal cases; (b) that *Touhy* regulations

¹² The mailing address for the Office of General Counsel for DHS is:

Mr. Ivan K. Fong
Office of General Counsel
U.S. Department of Homeland Security
Washington, D.C. 20528-1002

violate the right to compulsory process; and (c) that *Touhy* regulations violate the rules of reciprocal discovery. These arguments will be briefly laid out in the sections that follow. Whatever argument you may choose to make when the court excludes your witnesses based on *Touhy* regulations, remember to preserve the objection for appeal. In order to preserve an objection to the exclusion of witness testimony, you must not only state the basis for your objection, but also make an offer of proof regarding the expected testimony of the witness you expected to call.¹³

A. *Touhy* does not apply in criminal cases.

It may be possible to argue that *Touhy* regulations simply are not applicable in criminal cases. In *Alexander v. FBI*, District Judge Royce Lambreth of the District of Columbia concluded that “[t]he Supreme Court’s holding in *Touhy* is applicable only in cases where the United States is not a party to the original proceeding.”¹⁴ Judge Lambreth read *Touhy* narrowly, as “simply hold[ing] that a subordinate government official will not be compelled to testify or produce documents in private litigation.”¹⁵ In the judge’s view, *Touhy* was directed toward a concern about “private litigants seek[ing] to drag a witness employed by the federal government or one of its agencies into court to offer some testimony on a particular party’s behalf.”¹⁶ While Judge Lambreth’s view seems

¹³ See *United States v. Akpan*, 407 F.3d 360, 374 (5th Cir. 2005) (finding defendant properly preserved issue of exclusion where “counsel held a lengthy discussion with the district court in which he informed the court about the testimony of witnesses that he intended to call”); cf. *United States v. Triplett*, 922 F.2d 1174, 1183 (5th Cir. 1991) (finding error unpreserved where “[defendant] failed to make an offer of proof at trial setting forth the substance of questions and responses”). See generally, FED. R. EVID. 103(a)(2).

¹⁴ 186 F.R.D. 66, 70 (D.D.C. 1998).

¹⁵ *Id.*

¹⁶ *Id.* at 71.

persuasive, it is unlikely to gain much traction in the Fifth Circuit in light of circuit precedent applying *Touhy* in cases where the United States is a party (see below).

B. *Touhy* regulations violate the defendant’s right to compulsory process.

In *United States v. Wallace*,¹⁷ “the defendants contend[ed] that the trial court’s quashing of the subpoenas [to government agents] denied them a fair trial and the right to present evidence on their behalf and compel witnesses to testify.”¹⁸ The Fifth Circuit first held (citing a Tenth Circuit case) that “[t]he Department of Justice regulations for subpoenaing witnesses have been held to be valid and mandatory.”¹⁹ The court then declined to reach the constitutional questions because the defendants had failed to comply with the regulations,²⁰ but nevertheless “note[d] that the necessity or value of the two agents’ testimony was questionable.”²¹ The court therefore “h[e]ld, in the alternative[,], that the exclusion of the two witnesses may be upheld under the trial court’s power to control the trial and limit testimony that would be cumulative and marginally relevant.”²²

In a case dealing with Department of Homeland Security regulations, the Fourth Circuit concluded that neither the Department regulations nor 5 U.S.C. § 301 contained any limitation on the application of the Department’s *Touhy* regulations to criminal cases.²³ The court held that

¹⁷ 32 F.3d 921 (5th Cir. 1994).

¹⁸ *Id.* at 929.

¹⁹ *Id.* (citing *United States v. Allen*, 554 F.2d 398,406 (10th Cir. 1977))

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *United States v. Soriano-Jarquin*, 492 F.3d 495, 504 (4th Cir. 2007).

“[n]either the existence nor the application of the Touhy regulations deprived the defendant of any right.”²⁴ The court added that “the defendant made no attempt whatsoever to comply with the DHS regulations. Given this, he can hardly be heard to complain.”²⁵ Finally, the court concluded that the defendant’s constitutional claims were without merit; with respect to the compulsory process claim, the court concluded that the testimony sought was “wholly peripheral to the defendant’s case.”²⁶

These cases, while narrowing the argument, nevertheless leave open the possibility of raising a constitutional challenge where a defendant has attempted to comply with the regulations, but has his subpoena quashed because his attempt is in some way found deficient. There is also the possibility that the courts would look with more favor on a constitutional argument where the defendant’s rights are clearly prejudiced by the exclusion of the sought-after testimony.

C. *Touhy* regulations violate reciprocal discovery.

The Ninth Circuit has addressed another argument against the application of *Touhy* regulations in criminal cases. In *United States v. Bahamonde*,²⁷ the Ninth Circuit, relying on *Wardius v. Oregon*, 412 U.S. 470 (1973), held that the Department of Homeland Security regulations “violate[] due process by failing to provide reciprocal discovery.”²⁸ The court concluded that it was unfair to require the defendant “to state with specificity the testimony he expected from [the agent]” while “the government was not required at any time to produce the evidence it expected to offer in

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ 445 F.3d 1225 (9th Cir. 2006).

²⁸ *Id.* at 1229.

rebuttal, either from [the agent] or anyone else.”²⁹ It does not appear that any other circuit has addressed the argument that reciprocal discovery should limit the application of *Touhy* regulations in criminal cases. Accordingly, this issue remains open in the Fifth Circuit.

Finally, remember that the Government must object to a federal-agency-witness subpoena that does not comply with *Touhy*. Federal Rule of Criminal Procedure 17 controls the issuance of subpoenas in federal criminal cases. Subsection (a) requires the clerk to issue subpoenas to any requesting party, and subsection (b) requires the court to order that a subpoena be issued without cost, on an *ex parte* application, if the witness is necessary to the defense and the defendant is unable to pay the witness fees. Subsection authorizes the quashing or modification of a subpoena, but only (1) on the motion of a party, (2) made promptly, (3) showing that compliance would be unreasonable or oppressive. Make sure that the Government has met these requirements if it seeks to resist a subpoena for a government agent.

²⁹ *Id.*

APPENDIX A: DOJ Regulations

28 C.F.R. § 16.21

1. Code of Federal Regulations [Currentness](#)

Title 28. Judicial Administration

Chapter I. Department of Justice

[Part 16](#). Production or Disclosure of Material or Information ([Refs & Annos](#))

[Subpart B](#). Production or Disclosure in Federal and State Proceedings ([Refs & Annos](#))

§ 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure 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 by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a “demand”) of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term employee of the Department includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

© Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

28 C.F.R. § 16.22

1. Code of Federal Regulations [Currentness](#)

Title 28. Judicial Administration

Chapter I. Department of Justice

[Part 16](#). Production or Disclosure of Material or Information ([Refs & Annos](#))

[Subpart B](#). Production or Disclosure in Federal and State Proceedings ([Refs & Annos](#))

§ 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with [§§ 16.24](#) and [16.25](#) of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in [§ 16.24](#) of this part.

© If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by

his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

28 C.F.R. § 16.23

1. Code of Federal Regulations [Currentness](#)

Title 28. Judicial Administration

Chapter I. Department of Justice

[Part 16](#). Production or Disclosure of Material or Information ([Refs & Annos](#))

[Subpart B](#). Production or Disclosure in Federal and State Proceedings ([Refs & Annos](#))

§ 16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the “originating component” as defined in [§ 16.24\(a\)](#) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties: *Provided*, Such an attorney shall consider, with respect to any disclosure, the factors set forth in [§ 16.26\(a\)](#) of this part: *And further provided*, An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in [§ 16.26\(b\)](#) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as “the EOUST”), or such persons' designees.

(b) An attorney may seek higher level review at any stage of a proceeding, including prior to the issuance of a court order, when the attorney determines that a factor specified in [§ 16.26\(b\)](#) exists

or foresees that higher level approval will be required before disclosure of the information or testimony in question. Upon referral of a matter under this subsection, the responsible Assistant Attorney General, the Director of EOUST, or their designees shall follow procedures set forth in [§ 16.24](#) of this part.

(c) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.

28 C.F.R. § 16.24

1. Code of Federal Regulations [Currentness](#)

Title 28. Judicial Administration

Chapter I. Department of Justice

[Part 16](#). Production or Disclosure of Material or Information ([Refs & Annos](#))

[Subpart B](#). Production or Disclosure in Federal and State Proceedings ([Refs & Annos](#))

§ 16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.

(a) Whenever a matter is referred under [§ 16.22](#) of this part to a U.S. Attorney or, under [§ 16.23](#) of this part, to an Assistant Attorney General, the Director of the EOUST, or their designees (hereinafter collectively referred to as the “responsible official”), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as the “originating component”), or that official's designee. In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c) of this section, may authorize the appearance and testimony of a present or former Department employee, or the production of material from Department files if:

(1) There is no objection after inquiry of the originating component;

(2) The demanded disclosure, in the judgment of the responsible official, is appropriate under the factors specified in [§ 16.26\(a\)](#) of this part; and

(3) None of the factors specified in [§ 16.26\(b\)](#) of this part exists with respect to the demanded disclosure.

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee of the Department or the production of material from Department files without further authorization from Department officials whenever possible: *Provided*, That, when information is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in [§ 16.26](#) of this part.

(d)(1) In a case in which the United States is not a party, if the responsible U.S. attorney and the originating component disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department or the EOUST. If so, the U.S. attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in [§ 16.26\(a\)](#) of this part, and none of the factors specified in [§ 16.26\(b\)](#) of this part exists with respect to the demanded disclosure;

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary, appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in [§ 16.26](#) of this part, and otherwise

to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General, for final resolution to the Deputy or Associate Attorney General, as indicated in [§ 16.25](#) of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the responsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in [§ 16.25](#) of this part. If the originating component determines that disclosure would not be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant General or the Director of the EOUST responsible for the case or matter, or such persons' designees, are authorized, after consultation with the originating component, to exercise the authorities specified in paragraph (d)(1)(i) through (iii) of this section: *Provided*, That if a demand involves information that was collected, assembled, or prepared originally in connection with litigation or an investigation supervised by another unit of the Department, the responsible official shall notify the other division or the EOUST concerning the demand and the anticipated response. If two litigating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement, or the Director of the EOUST and the appropriate Assistant Attorney General, may refer the matter to the Deputy or Associate Attorney General, as indicated in [§ 16.25\(b\)](#) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would not be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were so to require, no Department attorney responding to the demand should make any representation that implies that the Department would, in fact, comply with the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General, as indicated in [§ 16.25](#) of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim of privilege, the responsible official may consult with the Attorney General and proceed in accord

with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

28 C.F.R. § 16.25

1. Code of Federal Regulations [Currentness](#)

Title 28. Judicial Administration

Chapter I. Department of Justice

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§ 16.25 Final action by the Deputy or Associate Attorney General.

(a) Unless otherwise indicated, all matters to be referred under [§ 16.24](#) by an Assistant Attorney General, the Director of the EOUST, or such person's designees to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the matter is referred personally by or through the designee of an Assistant Attorney General who is within the general supervision of the Deputy Attorney General, or (2) to the Associate Attorney General, in all other cases.

(b) All other matters to be referred under [§ 16.24](#) to the Deputy or Associate Attorney General shall be referred (1) to the Deputy Attorney General, if the originating component is within the supervision of the Deputy Attorney General or is an independent agency that, for administrative purposes, is within the Department of Justice, or (2) to the Associate Attorney General, if the originating component is within the supervision of the Associate Attorney General.

(c) Upon referral, the Deputy or Associate Attorney General shall make the final decision and give notice thereof to the responsible official and such other persons as circumstances may warrant.

28 C.F.R. § 16.26

1. Code of Federal Regulations [Currentness](#)

Title 28. Judicial Administration

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[Subpart B](#). Production or Disclosure in Federal and State Proceedings ([Refs & Annos](#))

§ 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a statute, such as the income tax laws, [26 U.S.C. 6103](#) and [7213](#), or a rule of procedure, such as the grand jury secrecy rule, [F.R.Cr.P., Rule 6\(e\)](#),

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

(4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(6) Disclosure would improperly reveal trade secrets without the owner's consent.

(c) In all cases not involving considerations specified in paragraphs (b)(1) through (b)(6) of this section, the Deputy or Associate Attorney General will authorize disclosure unless, in that person's judgment, after considering paragraph (a) of this section, disclosure is unwarranted. The Deputy or Associate Attorney General will not approve disclosure if the circumstances specified in paragraphs (b)(1) through (b)(3) of this section exist. The Deputy or Associate Attorney General will not approve disclosure if any of the conditions in paragraphs (b)(4) through (b)(6) of this section exist, unless the Deputy or Associate Attorney General determines that the administration of justice requires disclosure. In this regard, if disclosure is necessary to pursue a civil or criminal prosecution or affirmative relief, such as an injunction, consideration shall be given to:

(1) The seriousness of the violation or crime involved,

(2) The past history or criminal record of the violator or accused,

(3) The importance of the relief sought,

(4) The importance of the legal issues presented,

(5) Other matters brought to the attention of the Deputy or Associate Attorney General.

(d) Assistant Attorneys General, U.S. Attorneys, the Director of the EOUST, U.S. Trustees, and their designees, are authorized to issue instructions to attorneys and to adopt supervisory practices, consistent with this subpart, in order to help foster consistent application of the foregoing standards and the requirements of this subpart.

APPENDIX B: DHS Regulations

6 C.F.R. § 5.41

1. Code of Federal Regulations [Currentness](#)

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](#))

§ 5.41 Purpose and scope; definitions.

(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.

6 C.F.R. § 5.42

1. Code of Federal Regulations [Currentness](#)

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 [\(Refs & Annos\)](#)

§ 5.42 Service of summonses and complaints.

(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.

6 C.F.R. § 5.43

1. Code of Federal Regulations [Currentness](#)

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](#))

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

(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.

6 C.F.R. § 5.44

1. Code of Federal Regulations [Currentness](#)

Title 6. Domestic Security ([Refs & Annos](#))

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

(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.

6 C.F.R. § 5.45

1. Code of Federal Regulations [Currentness](#)

Title 6. Domestic Security ([Refs & Annos](#))

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[Subpart C. Disclosure of Information in Litigation \(Refs & Annos\)](#)

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

<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.