



DoD INSTRUCTION 5405.02

RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND PRESENTATION OF WITNESS TESTIMONY BY DoD PERSONNEL (*TOUHY* REGULATION)

Originating Component: Office of the General Counsel of the Department of Defense

Effective: May 17, 2024

Releasability: Cleared for public release. Available on the Directives Division Website at <https://www.esd.whs.mil/DD/>.

Reissues and Cancels: DoD Instruction 5405.02, "Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses," July 23, 1985

Approved by: Caroline Krass, General Counsel of the Department of Defense

Purpose: In accordance with the authority in DoD Directive 5145.01, this issuance establishes policy, assigns responsibilities, and prescribes procedures for the release of official information in litigation and the presentation of witness testimony by DoD personnel pursuant to Section 301 of Title 5, United States Code, and the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

TABLE OF CONTENTS

| | |
|---|----|
| SECTION 1: GENERAL ISSUANCE INFORMATION | 3 |
| 1.1. Applicability. | 3 |
| 1.2. Policy. | 4 |
| SECTION 2: RESPONSIBILITIES | 5 |
| 2.1. General Counsel of the Department of Defense (GC DoD). | 5 |
| 2.2. DoD Component Heads. | 5 |
| SECTION 3: PROCEDURES | 6 |
| 3.1. Authorities..... | 6 |
| 3.2. Factors to Consider. | 6 |
| 3.3. Requirements and Determinations..... | 7 |
| 3.4. Fees. | 8 |
| 3.5. Expert or Opinion Testimony. | 8 |
| APPENDIX 3A: LITIGATION REQUESTS AND DEMANDS TO THE DEPARTMENT OF THE ARMY (DA). | 9 |
| APPENDIX 3B: LITIGATION REQUESTS AND DEMANDS TO THE DEPARTMENT OF THE NAVY | 11 |
| APPENDIX 3C: LITIGATION REQUESTS AND DEMANDS TO THE DEPARTMENT OF THE AIR FORCE. | 12 |
| GLOSSARY | 13 |
| G.1. Acronyms..... | 13 |
| G.2. Definitions..... | 13 |
| REFERENCES | 15 |

SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY.

This issuance:

a. Applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General (IG) of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this issuance as the “DoD Components”).

b. Is intended only to provide guidance for the internal operations of the DoD, without displacing the responsibility of the Department of Justice to represent the United States in litigation.

c. Does not preclude official comments on matters in litigation.

d. Does not apply to the release of official information or the presentation of witness testimony in connection with:

(1) Courts-martial convened by the authority of a Military Department.

(2) Administrative proceedings or investigations conducted by or for a DoD Component.

(3) Security-clearance adjudicative proceedings, including those conducted pursuant to DoD Directive 5220.6.

(4) Administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.

(5) Negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.

(6) Requests by government counsel representing the United States or a Federal agency in litigation.

(7) Disclosures to Federal, State, local, or foreign authorities related to investigations or other law-enforcement activities conducted by a DoD law-enforcement officer, agent, or organization.

e. Does not affect in any way existing laws or DoD programs governing:

(1) The release of official information or the presentation of witness testimony in grand jury proceedings.

(2) Freedom of Information Act requests submitted pursuant to DoD Manual 5400.07, even if the records sought are related to litigation.

(3) Privacy Act requests submitted pursuant to DoD 5400.11-R, even if the records sought are related to litigation.

(4) The release of official information outside of litigation.

f. Does not create any right or benefit (substantive or procedural) enforceable at law against the DoD or the United States.

1.2. POLICY.

The DoD generally should make official information reasonably available for use in Federal, State, and foreign courts and other adjudicative bodies if the information is not classified, privileged, or otherwise protected from public disclosure.

SECTION 2: RESPONSIBILITIES

2.1. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (GC DOD).

The GC DoD has overall responsibility for the policy in this issuance, oversees the implementation of its procedures throughout the DoD, and provides supplemental guidance as appropriate.

2.2. DOD COMPONENT HEADS.

The DoD Component heads:

- a. Implement the policy and procedures in this issuance and, through their chief legal advisors, provide guidance for their respective components.
- b. Must issue or update, as appropriate, their respective components' implementing regulations within 180 days of this issuance's effective date.

SECTION 3: PROCEDURES

3.1. AUTHORITIES.

a. In response to a litigation request or demand, and after any required coordination with the Department of Justice, the chief legal advisors (see Glossary) are authorized to:

(1) Determine whether their respective DoD Components may release official information originated by or in the custody of such components.

(2) Determine whether personnel assigned to, detailed to, or affiliated with their respective DoD Components may be contacted, interviewed, or used as witnesses concerning official information or, in exceptional circumstances, as expert witnesses.

(3) Impose conditions or limitations on disclosures approved pursuant to this paragraph (e.g., approve the release of official information only to a Federal judge for in camera review).

(4) Assert claims of privilege or protection before any court or adjudicative body.

b. The GC DoD may assume primary responsibility for responding to any litigation request or demand.

3.2. FACTORS TO CONSIDER.

In making a determination pursuant to Paragraph 3.1.a., the chief legal advisors will consider whether:

a. The litigation request or demand is overbroad, unduly burdensome, or otherwise inappropriate under applicable law or court rules.

b. The disclosure would be improper (e.g., the information is irrelevant, cumulative, or disproportional to the needs of the case) under the rules of procedure governing the litigation from which the request or demand arose.

c. The official information or witness testimony is privileged or otherwise protected from disclosure under applicable law.

d. The disclosure would violate a statute, Executive order, regulation, or policy.

e. The disclosure would reveal:

(1) Information properly classified pursuant to Volume 1 of DoD Manual 5200.01.

(2) Controlled unclassified information pursuant to DoD Instruction 5200.48.

(3) Technical data withheld pursuant to DoD Directive 5230.25.

(4) Information protected by the Privacy Act, which may not be disclosed in the absence of written consent, a routine use, or other authority listed in Section 552a(b) of Title 5, United States Code.

(5) Information otherwise exempt from unrestricted disclosure.

f. The disclosure would:

(1) Interfere with an ongoing enforcement proceeding.

(2) Compromise a constitutional right.

(3) Expose an intelligence source or confidential informant.

(4) Divulge a trade secret or similar confidential information.

(5) Be otherwise inappropriate.

3.3. REQUIREMENTS AND DETERMINATIONS.

a. A litigation request or demand must describe, in writing and with specificity, the nature of the official information or witness testimony sought, its relevance to the litigation, and other pertinent details addressing the factors in Paragraph 3.2.

b. Personnel who receive a litigation request or demand must notify their DoD Component's chief legal advisor immediately. Former personnel (e.g., retired Service members, separated employees, past contractors) must notify the chief legal advisor of the component to which they were last assigned.

c. If another DoD Component or Federal agency originated the responsive information or otherwise has the primary equity with respect to that information, the chief legal advisor will:

(1) Transfer the litigation request or demand (or the appropriate portions) to such other component or agency for action.

(2) Inform the requesting party or issuing court.

(3) In case of conflict, elevate to the GC DoD for resolution.

d. If the litigation request or demand requires a response before a determination can be made, the chief legal advisor will inform the requesting party or the issuing court that the request or demand is still under consideration. The chief legal advisor also may seek a stay from the court in question until a final determination is made.

e. Upon making a final determination pursuant to Paragraph 3.1.a., the chief legal advisor will inform the requesting party or issuing court.

f. If the chief legal advisor approves the release of official information or the presentation of witness testimony, personnel will limit the disclosure to those matters specified in the litigation request or demand, subject to any conditions imposed by the chief legal advisor. Personnel may not release, produce, comment on, or testify about any official information without the chief legal advisor's prior written approval.

g. If a court orders a disclosure that the chief legal advisor previously disapproved or has yet to approve, personnel must respectfully decline to comply with the court's order unless the chief legal advisor directs otherwise.

3.4. FEES.

Parties seeking official information by litigation request or demand may be charged reasonable fees in accordance with Volume 11A, Chapter 4 of DoD 7000.14-R to reimburse expenses associated with the government's response. These reimbursable expenses may include the cost of:

- a. Materials and equipment used to search for, copy, and produce responsive information.
- b. Personnel time spent processing and responding to the request or demand.
- c. Attorney time spent assisting with the government's response, to include reviewing the request or demand and the potentially responsive information.

3.5. EXPERT OR OPINION TESTIMONY.

a. Personnel may not present expert or opinion testimony involving official information, except when:

(1) The testimony is presented on behalf of the United States, a Federal agency, or any party represented by the Department of Justice.

(2) The chief legal advisor of the DoD Component with primary equity has granted special written approval upon a showing of exceptional need or unique circumstances, but only if the anticipated testimony is not adverse to the interests of the DoD or the United States and is presented at no expense to the government.

b. If a court orders the presentation of testimony disallowed by Paragraph 3.5.a., personnel must respectfully decline to comply with the court's order unless the chief legal advisor directs otherwise.

APPENDIX 3A: LITIGATION REQUESTS AND DEMANDS TO THE DEPARTMENT OF THE ARMY (DA)

A litigation request or demand to the DA must be submitted at least 14 days before the desired date to the appropriate disclosure authority:

a. Staff judge advocates (SJAs), chief counsel, and legal advisors are the disclosure authorities for requests and demands involving unclassified information within the custody, control, or knowledge of their respective organizations when the United States has no interest in the litigation. Requests and demands will be processed by local legal offices (in consultation with Litigation Division as needed) subject to the limitations in Appendix 3A.

b. The General Litigation Branch, Litigation Division, U.S. Army Legal Services Agency (USALSA), 9275 Gunston Road, Fort Belvoir, VA 22060, is the disclosure authority or may delegate disclosure authority for requests and demands involving:

- (1) Terrorism, espionage, nuclear weapons, or intelligence sources and methods.
- (2) Classified information.
- (3) Privileged information.
- (4) Technical data pursuant to DoD Directive 5230.25.
- (5) Safety records and information produced by commands, installation safety offices, or the U.S. Army Combat Readiness Command and Safety Center.
- (6) Expert testimony.
- (7) All other matters not listed in this appendix.

c. Army medical center and command judge advocates and supporting SJAs (in consultation with the Defense Health Agency as needed) are the disclosure authorities for requests and demands involving medical records or other information within the custody, control, or knowledge of their respective permanent station hospitals. For requests and demands involving factual testimony by medical providers, commanders (in consultation with their legal advisors) are the disclosure authorities for their respective medical commands when the United States has no interest in the litigation.

d. The Contract Litigation and Intellectual Property Division, USALSA, 9275 Gunston Road, Fort Belvoir, VA 22060, is the disclosure authority for requests and demands involving:

- (1) Patents, copyrights, trade secrets, or trademarks.
- (2) Taxation matters.
- (3) Bid protests or contract appeals before the Armed Services Board of Contract Appeals or the Government Accountability Office, except that contracting officers (in

coordination with their servicing SJAs and the division-assigned trial attorney) may release official information for use in litigation before the Armed Services Board of Contract Appeals, pursuant to Subpart 5.4. of the Federal Acquisition Regulation.

e. The Procurement Fraud Division, USALSA, 9275 Gunston Road, Fort Belvoir, VA 22060, is the disclosure authority for requests and demands involving procurement fraud matters, including *qui tam* actions.

f. The Environmental Law Division, USALSA, 9275 Gunston Road, Fort Belvoir, VA 22060, is the disclosure authority for requests and demands involving:

(1) Energy, communication, transportation, or utility service proceedings.

(2) Environmental or natural resources matters, to include water rights and affirmative environmental cost recovery.

g. The Tort Litigation Branch, Litigation Division, USALSA, 9275 Gunston Road, Fort Belvoir, VA 22060, is the disclosure authority for requests and demands involving medical care cost recovery or property claims brought by the United States.

h. The Office of the Chief Counsel, U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC, 20314-1000, is the disclosure authority for requests and demands involving U.S. Army Corps of Engineers navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, or real property functions.

i. DA personnel may not release IG records or present testimony involving information obtained through the performance of IG duties, except with the approval of the Secretary of the Army, the IG of the Army, the IG Legal Advisor, or the Chief, Litigation Division.

APPENDIX 3B: LITIGATION REQUESTS AND DEMANDS TO THE DEPARTMENT OF THE NAVY

3B.1. A litigation request to the Department of the Navy must be submitted to the appropriate determining authority as defined in Secretary of the Navy Instruction 5820.8.

3B.2. As with all service of process on the Department of the Navy, a demand (subpoena or court order) must be delivered to the Naval Litigation Office using registered or certified mail, a commercial courier service, or a process server. The address for all service of process is:

General Counsel of the Department of the Navy
Naval Litigation Office
720 Kennon St. SE
Room 233
Washington Navy Yard, DC 20374-5013

3B.3. Answers to frequently asked questions on Touhy requests are available at https://www.jag.navy.mil/organization/documents/Touhy_Requests.pdf. Contact the Office of the General Counsel at 202-685-7039 or the Office of the Judge Advocate General at 202-685-5450 with any additional questions.

APPENDIX 3C: LITIGATION REQUESTS AND DEMANDS TO THE DEPARTMENT OF THE AIR FORCE

3C.1. A litigation request or demand to the Department of the Air Force must be submitted to the base-level or servicing SJA for the installation or organization where the official information or witness is located.

3C.2. Should the information or witness be located in a headquarters-level office, the request or demand must be submitted to the:

a. Commercial Litigation Field Support Center (for matters involving contracts, acquisition, and procurement):

Commercial Litigation Field Support Center
AFLOA/JAQC
1500 W. Perimeter Rd.
Suite 4100
Joint Base Andrews, MD 20762

b. Air Force General Litigation Division (for all other matters):

Air Force General Litigation Division
AFLOA/JACL
1500 W. Perimeter Rd.
Suite 1370
1st Floor
Joint Base Andrews, MD 20762

GLOSSARY

G.1. ACRONYMS.

| ACRONYM | MEANING |
|---------|--|
| DA | Department of the Army |
| GC DoD | General Counsel of the Department of Defense |
| IG | inspector general |
| SJA | staff judge advocate |
| USALSA | U.S. Army Legal Services Agency |

G.2. DEFINITIONS.

These terms and their definitions are for the purpose of this issuance.

| TERM | DEFINITION |
|----------------------------|--|
| chief legal advisor | The GC DoD. The General Counsel of a Military Department. The Legal Counsel to the Chairman of the Joint Chiefs of Staff. The Judge Advocate General of a Military Service. The SJA to the Commandant of the Marine Corps. The SJA to a Combatant Commander. The General Counsel to the IG of the Department of Defense. The General Counsel of a Defense Agency. The General Counsel of a DoD Field Activity. The chief legal advisor of any other organizational entity within the DoD. |

| TERM | DEFINITION |
|-----------------------------|--|
| court | A Federal, State, or local court, tribunal, commission, board, or other adjudicative body of competent jurisdiction. |
| demand | An order or subpoena by a court of competent jurisdiction for the production or release of official information or for the presentation of witness testimony by DoD personnel at deposition or trial. |
| disclosure | The release of official information in litigation or the presentation of witness testimony by DoD personnel. |
| litigation | All pretrial (e.g., discovery), trial, and post-trial stages of existing judicial or administrative actions, hearings, investigations, or similar proceedings before a civilian court, whether foreign or domestic. |
| litigation request | Any written request by a party in litigation or the party's attorney for the production or release of official information or for the presentation of witness testimony by DoD personnel at deposition, trial, or similar proceeding. |
| official information | All information of any kind and however stored that is in the custody and control of the DoD, relates to information in the custody and control of the DoD, or was acquired by DoD personnel due to their official duties or status. |
| personnel | <p>Present and former (e.g., retired, separated) Service members, including Service academy cadets and midshipmen.</p> <p>Present and former (e.g., retired, separated) civilian employees of a DoD Component, including non-appropriated fund activity employees.</p> <p>Present and former (e.g., retired, separated) employees of another Federal agency assigned to, detailed to, or otherwise affiliated with a DoD Component.</p> <p>Non-U.S. nationals who perform or have performed services overseas for any of the Military Services in accordance with a status of forces agreement.</p> <p>Any individuals presently or formerly performed services for a DoD Component through a contractual arrangement.</p> |

REFERENCES

- DoD 5400.11-R, “Department of Defense Privacy Program,” May 14, 2007
- DoD 7000.14-R, Volume 11A, Chapter 4, “Department of Defense Financial Management Regulation: Reimbursable Operations Policy: User Fees,” October 2023
- DoD Directive 5145.01, “General Counsel of the Department of Defense (GC DoD),” December 2, 2013, as amended
- DoD Directive 5220.6, “Defense Industrial Personnel Security Clearance Review Program,” January 2, 1992, as amended
- DoD Directive 5230.25, “Withholding of Unclassified Technical Data from Public Disclosure,” November 6, 1984, as amended
- DoD Instruction 5200.48, “Controlled Unclassified Information (CUI),” March 6, 2020
- DoD Manual 5200.01, Volume 1, “DoD Information Security Program: Overview, Classification, and Declassification,” February 24, 2012, as amended
- DoD Manual 5400.07, “DoD Freedom of Information Act (FOIA) Program,” January 25, 2017
- Federal Acquisition Regulation, Subpart 5.4., current edition
- Secretary of the Navy Instruction 5820.8, “Release of Official Information for Litigation Purposes and Testimony by Department of the Navy (DON) Personnel,” January 10, 2005, as amended
- United States Code, Title 5
- United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)