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OFFICE OF SPECIAL COUNSEL

5 CFR Part 1820

**Revision of Regulations Governing Freedom of Information Act Requests and Appeals, and
Revision of Touhy Regulations Governing Release of Information in Response to Legal
Proceedings**

AGENCY: U.S. Office of Special Counsel.

ACTION: Final rule.

SUMMARY: Final rule.

This final rule updates and clarifies the procedures for submitting Freedom of Information Act (FOIA) requests and appeals to the U.S. Office of Special Counsel (OSC). The rule describes additional methods for submitting FOIA requests and appeals. It also promotes efficiency in FOIA administration by enhancing OSC's ability to respond to certain requests on an expedited basis. The final rule makes minor technical revisions to the name of an OSC unit and to OSC's Internet, fax, and physical address information. The rule also establishes procedures that requesters must follow when making demands on or requests to an OSC employee to produce

official records or provide testimony relating to official information in connection with a legal proceeding in which the OSC is not a party.

DATES: This final rule is effective [Insert Date of Publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT:

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I. SUPPLEMENTARY INFORMATION:

OSC published a proposed rule on May 5, 2015, FR Doc No: 2016-09799 and solicited public comment on that rule. OSC has considered the comments and is issuing this final rule in due course.

Background

FOIA Regulations. The U.S. Office of Special Counsel (OSC) revises its FOIA regulations to account for the additional electronic methods by which requesters may submit FOIA requests and appeals, and modifies the manner by which requests qualify for expedited processing. OSC also makes minor technical revisions to the name of an OSC unit and to OSC's Internet, fax, and physical address information.

The existing language of 5 CFR 1820.2 and 1820.6 describes regular mail and fax as the methods by which to submit FOIA requests and appeals. The final rule adds e-mail or other electronic submission methods.

The existing language of 5 CFR 1820.1 refers to the main OSC Internet and FOIA page addresses. The final rule describes Internet access to OSC FOIA resources through the main

OSC Internet address. The first commenter suggested that subsection (a)(1) identify OSC's fax number and email address. At the risk of the contact information later being changed, OSC considered and adopted the suggested change to subsection (a)(1). The commenter also suggested a minor grammatical change to subsection (c), which OSC also considered and adopted. The first commenter also proposed changes to Section 1820.3 regarding whether OSC may consult with entities the commenter argues are not "agencies" for FOIA purposes. OSC is postponing consideration of this suggested change pending its mandated update to the regulation required by the recently enacted FOIA Improvement Act of 2016, Pub.L. 114-185.

The existing language of 5 CFR 1820.2 and 1820.6 regarding OSC's physical address would be modified in a minor, technical manner. The first commenter also suggested that subsection (a)(3) allow requesters to submit appeals by email in addition to "other electronic means." OSC has accepted email requests and appeals for several years, so OSC adopts the suggested change both to conform the rule to OSC's current practice and to specify that OSC accepts email submissions. The commenter also urged OSC to notify requesters of the mediation services offered by the Office of Government Information Services and to add that OSC will respond to administrative appeals within the statutory deadline. OSC has already adopted this practice pursuant to the recently enacted FOIA Improvement Act of 2016, Pub.L. 114-185. OSC has also begun to notify new requesters as of June 30, 2016 that they have 90 days to appeal an adverse determination and will revise the regulation to reflect this, and other updated practices, when it issues its mandated update to the regulation required by the recently enacted FOIA Improvement Act of 2016, Pub.L. 114-185. The existing language of 5 CFR 1820.6 refers to an OSC unit as the "Legal Counsel and Policy Division." The name of that unit is updated in the final rule to the "Office of General Counsel."

The existing language of 5 CFR 1820.4(c)(1)(iii) discusses one of the three criteria under which a FOIA request can be processed out of order of receipt and addressed on an expedited basis. That language provides, in part, expedited treatment of a FOIA request when the requested records relate to “an appeal that is pending before, or that the requester faces an imminent deadline for filing with” another administrative or judicial tribunal, “seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to title 38 of the U.S. Code.”

The final rule clarifies that the criteria discussed at 5 CFR 1820.4(c)(1)(iii) applies only when the requested records relate to an appeal for which the requester faces an imminent deadline for filing with another administrative or judicial tribunal. In addition, the final rule specifies that a grant of expedited treatment applies only to the following requested records: letters sent to a complainant by OSC, and the official complaint form submitted to OSC by the complainant or the original referred complaint if referred to OSC pursuant to title 38 of the U.S. Code. All other requested records would be processed according to the order in which OSC received the request.

By narrowing the focus of expedited status to certain records that are of interest to complainant-requesters, and are typically readily available for disclosure to the complainant-requesters, OSC is able to process and respond to expedited requests more efficiently. Any other requested records will generally be processed in the order OSC received the request.

Touhy Regulations. OSC also revises its regulations relating to the release of information in response to requests made in connection with legal proceedings, such as summonses, complaints, subpoenas, and other litigation-related requests or demands for OSC’s records or official information. These regulations are often referred to as Touhy regulations.

Federal agencies often receive demands consisting of informal requests for production of records, information, or testimony in judicial, legislative, or administrative proceedings in which the agency is not a named party. OSC revises its regulation to improve its evaluation and processing of such requests.

The United States Supreme Court upheld this type of regulation in United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), holding that provisions in the federal “housekeeping” statute authorize agencies to promulgate rules governing record production and employee testimony. See 5 U.S.C. 301.

The prior language of 5 CFR1820.10 referred to the “[p]roduction of official records or testimony in legal proceedings.” This revision provides the agency with more clearly delineated standards for releasing information or witness testimony. Generally, this revision re-establishes that no OSC employee or former employee shall release official information or records without the prior approval of the Special Counsel or the Special Counsel’s duly authorized designee.

Under this final rule, OSC establishes procedural requirements for the form and content of requests for official OSC information made through a litigation request or demand, as well as establishing procedures for responding to the requests. This final rule also states the factors that OSC will consider in determining whether to authorize a release of official information in response to a request.

II. Overview of Comments Received.

In response to the proposed rule, OSC received two comment letters regarding the proposed changes to the FOIA regulation, including suggestions for changing additional sections of the regulation. The first commenter suggested that OSC include additional contact details within the

text of the FOIA regulation, that OSC amend the section governing consultations and referrals, and that OSC make additional changes as to the appeals process. The second commenter suggested changes regarding the definition of “representative of the news media,” fees, records preservation, and records management. OSC will postpone consideration of several of the proposed changes pending its mandated update to the regulation required by the recently enacted FOIA Improvement Act of 2016l, Pub.L. 114-185.

OSC did not receive any comments concerning its *Touhy* regulation. Accordingly, OSC will issue the final rule without modification to the *Touhy* provisions.

In section IV below, OSC set forth its final rule, a section by section summary of the two comments it received to the proposed final rule, and OSC’s responses to these comments.

Subpart A, Sections 1820.10, 11, and 12

III. Procedural Determinations

Administrative Procedure Act (APA): This action is taken under the Special Counsel’s authority at 5 U.S.C. 1212(e) to publish regulations in the Federal Register.

Executive Order 12866 (Regulatory Planning and Review): OSC does not anticipate that this final rule will have significant economic impact, raise novel issues, and/or have any other significant impacts. Thus this final rule is not a significant regulatory action under 3(f) of

Executive Order 12866 and does not require an assessment of potential costs and benefits under 6(a)(3) of the Order.

Congressional Review Act (CRA): OSC has determined that this final rule is not a major rule under the Congressional Review Act, as it is unlikely to result in an annual effect on the economy of \$100 million or more; is unlikely to result in a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies or geographic regions; and is unlikely to have a significant adverse effect on competition, employment, investment, productivity, or innovation, or on the ability of U.S.-based enterprises to compete in domestic and export markets.

Regulatory Flexibility Act (RFA): The Regulatory Flexibility Act does not apply, even though this final rule was offered for notice and comment procedures under the APA. This final rule will not directly regulate small entities. OSC therefore need not perform a regulatory flexibility analysis of small entity impacts.

Unfunded Mandates Reform Act (UMRA): This revision does not impose any federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

National Environmental Policy Act (NEPA): This final rule will have no physical impact upon the environment and therefore will not require any further review under NEPA.

Paperwork Reduction Act (PRA): This final rule does not impose any new recordkeeping, reporting, or other information collection requirements on the public.

The final rule sets forth procedures by which litigants may serve summonses, complaints, subpoenas, and other legal process, demands, and requests upon the OSC. The final rule imposes special procedural requirements for those who seek to serve third-party subpoenas upon

the OSC in accordance with United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). These requirements may increase the time and burden associated with obtaining records of the OSC in response to such third-party subpoenas.

Executive Order 13132 (Federalism): This final revision does not have new federalism implications under Executive Order 13132.

Executive Order 12988 (Civil Justice Reform): This final rule meets applicable standards of 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 5 CFR Part 1820

Administrative practice and procedure, Freedom of Information, Government employees, Touhy regulations.

IV. Authority and Issuance

For the reasons stated in the preamble, OSC revises 5 CFR part 1820 as follows:

PART 1820 – FREEDOM OF INFORMATION ACT REQUESTS; PRODUCTION OF RECORDS OR TESTIMONY

1. The authority citation for 5 CFR part 1820 continues to read as follows:

Authority: 5 U.S.C. 552 and 1212(e); Executive Order No. 12600, 52 FR 23781.

2. Revise § 1820.1 to read as follows:

§ 1820.1 General provisions.

This part contains rules and procedures followed by the U.S. Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), as amended, at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA, which provides additional information about access to agency records. Further information about the FOIA and access to OSC records is available on the FOIA page of OSC's Web site (<https://www.osc.gov>). Information routinely provided to the public as part of a regular OSC activity – for example, forms, press releases issued by the public affairs officer, records published on the agency's Web site, or public lists maintained at OSC headquarter offices pursuant to 5 U.S.C. 1219 – may be requested and provided to the public without following this part. This part also addresses responses to demands by a court or other authority to an employee for production of official records or testimony in legal proceedings.

3. Revise § 1820.2 to read as follows:

§ 1820.2 Requirements for making FOIA requests.

(a) Submission of requests. (1) A request for OSC records under the FOIA must be made in writing. The request must be sent by:

(i) Regular mail addressed to: FOIA Officer, U.S. Office of Special Counsel, 1730 M Street, N.W., Suite 218, Washington, DC 20036–4505; or

(ii) By fax sent to the FOIA Officer at 202-254-3711, the number provided on the FOIA page of OSC's Web site (<https://osc.gov/Pages/FOIA-Resources.aspx>)(<https://www.osc.gov>); or

(iii) By e-mail to foiarequest@osc.gov or other electronic means as described on the FOIA page of OSC's Web site, <https://osc.gov/Pages/FOIA-Resources.aspx>.

(2) For the quickest handling, both the request letter and envelope or any fax cover sheet or e-mail subject line should be clearly marked "FOIA Request." Whether sent by mail, fax, e-mail, or other prescribed electronic method, a FOIA request will not be considered to have been received by OSC until it reaches the FOIA office.

(b) Description of records sought. Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. When requesting records about an OSC case file, the case file number, name, and type (for example, prohibited personnel practice, Hatch Act, USERRA or other complaint; Hatch Act advisory opinion; or whistleblower disclosure) should be provided, if known. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.

(c) Agreement to pay fees. Making a FOIA request shall be considered an agreement by the requester to pay all applicable fees chargeable under § 1820.7, up to and including the amount of \$25.00, unless the requester asks for a waiver of fees or specifies a willingness to pay a greater or lesser amount.

4. Revise § 1820.4 to read as follows:

§ 1820.4 Timing of responses to requests.

(a) In general. OSC ordinarily will respond to FOIA requests according to their order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession as of the date on which it begins its search for them. If any other date is used, OSC will inform the requester of that date.

(b) Multitrack processing. (1) OSC may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request.

(2) When using multitrack processing, OSC may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the faster track(s).

(c) Expedited processing. (1) Requests and appeals will be taken out of order and given expedited treatment whenever OSC has established to its satisfaction that:

(i) Failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) With respect to a request made by a person primarily engaged in disseminating information, an urgency exists to inform the public about an actual or alleged federal government activity; or

(iii) The requested records relate to an appeal for which the requester faces an imminent deadline for filing with the Merit Systems Protection Board or other administrative tribunal or a court of law, seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to title 38 of the U.S. Code. Expedited status granted under this provision will apply only to the following requested records: letters sent to the complainant by OSC; and the official complaint form submitted to OSC by the complainant or the original referred complaint if referred to OSC pursuant to title 38 of the U.S. Code. All other requested records will be processed according to the order in which OSC received the request.

(2) A request for expedited processing must be made in writing and sent to OSC's FOIA Officer. Such a request will not be considered to have been received until it reaches the FOIA Officer.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. The formality of certification may be waived as a matter of OSC's administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requester of its decision within 10 calendar days of the FOIA Officer's receipt of the request. If the request for expedited processing is granted, the request for records shall be processed as soon as practicable. If a request for expedited processing is denied, any administrative appeal of that decision shall be acted on expeditiously.

(d) Aggregated requests. OSC may aggregate multiple requests by the same requester, or by a group of requesters acting in concert, if it reasonably believes that such requests constitute a single request involving unusual circumstances, as defined by the FOIA, supporting an extension of time to respond, and the requests involve clearly related matters.

5. Revise § 1820.6 to read as follows:

§ 1820.6 Appeals.

(a) Appeals of adverse determinations. A requester may appeal an adverse determination denying a FOIA request in any respect to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M Street, N.W., Suite 218, Washington, DC 20036–4505. The appeal must be in writing, and must be submitted either by:

(1) Regular mail sent to the address listed in this subsection, above; or

(2) By fax sent to the FOIA Officer at, (202)-254-3711, the number provided on the FOIA page of OSC's Web site <https://osc.gov/Pages/FOIA-Resources.aspx>; or

(3) By e-mail to foiaappeal@osc.gov, or other electronic means as described on the FOIA page of OSC's Web site, <https://osc.gov/Pages/FOIA-Resources.aspx>.

(b) Submission and content. The appeal must be received by the Office of General Counsel within 45 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet should be clearly marked "FOIA Appeal." The appeal letter must clearly identify the OSC determination (including the assigned FOIA request number, if known) being appealed. An appeal ordinarily will not be acted on if the request becomes a matter of FOIA litigation.

(c) Responses to appeals. The agency decision on an appeal will be made in writing. A decision affirming an adverse determination in whole or in part shall inform the requester of the provisions for judicial review of that decision. If the adverse determination is reversed or modified on appeal, in whole or in part, the requester will be notified in a written decision and the request will be reprocessed in accordance with that appeal decision.

6. Add a new heading for subpart A before § 1820.10 as set forth below.

7. Revise § 1820.10 and add §§ 1820.11 and 1820.12 to subpart A to read as follows:

Subpart A— Touhy Regulations General Provisions

1820.10 Scope and purpose.

1820.11 Applicability.

1820.12 Definitions.

§ 1820.10 Scope and purpose.

(a) This part establishes policy, assigns responsibilities and prescribes procedures with respect to:

(1) The production or disclosure of official information or records by current and former OSC employees, and contractors; and

(2) The testimony of current and former OSC employees, advisors, and consultants relating to official information, official duties, or the OSC's records, in connection with federal or state litigation or administrative proceedings in which the OSC is not a party.

(b) The OSC intends this part to:

(1) Conserve the time of OSC employees for conducting official business;

(2) Minimize the involvement of OSC employees in issues unrelated to OSC's mission;

(3) Maintain the impartiality of OSC employees in disputes between private litigants; and

(4) Protect sensitive, confidential information and the deliberative processes of the OSC.

(c) In providing for these requirements, the OSC does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of OSC. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 1820.11 Applicability.

This part applies to demands and requests to current and former employees, and contractors, for factual or expert testimony relating to official information or official duties or for production of official records or information, in legal proceedings in which the OSC is not a named party. This part does not apply to:

(a) Demands upon or requests for current or former OSC employees or contractors to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the OSC;

(b) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

(c) Congressional demands and requests for testimony, records or information.

§1820.12 Definitions.

The following definitions apply to this part.

Demand means an order, subpoena, or other command of a court or other competent authority for the production, disclosure, or release of records or for the appearance and testimony of an OSC employee in a legal proceeding.

General Counsel means the General Counsel of the OSC or a person to whom the General Counsel has delegated authority under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

OSC means the U.S. Office of Special Counsel.

OSC employee or employee means:

(1)(i) Any current or former employee of the OSC; and

(ii) Any other individual hired through contractual agreement by or on behalf of the OSC or who has performed or is performing services under such an agreement for the OSC.

(2) This definition does not include persons who are no longer employed by the OSC and who agree to testify about matters available to the public.

Records or official records and information means all information in the custody and control of the OSC, relating to information in the custody and control of the OSC, or acquired by an OSC employee in the performance of his or her official duties or because of his or her official status, while the individual was employee by or on behalf of the OSC.

Request means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court of other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

8. Add subpart B to read as follows:

Subpart B—Demands or Requests for Testimony and Production of Documents

Sec.

1820.13 General prohibition.

1820.14 Factors the OSC will consider.

1820.15 Filing requirements for litigants.

1820.16 Service of requests or demands.

1820.17 Processing requests or demands.

1820.18 Final determinations.

1820.19 Restrictions that apply to testimony.

1820.20 Restrictions that apply to released records.

1820.21 Procedure when a decision is not made prior to the time a response is required.

1820.22 Procedure in the event of an adverse ruling.

§ 1820.13 General prohibition.

No employee of OSC may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior written approval of the General Counsel.

§ 1820.14 Factors the OSC will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (c) Allowing such testimony or production of records would assist or hinder the OSC in performing its statutory duties;
- (d) Allowing such testimony or production of records would be in the best interest of the OSC or the United States;
- (e) The records or testimony can be obtained from other sources;
- (f) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rule of procedure governing the case or matter in which the demand or request arose;
- (g) Disclosure would violate a statute, Executive Order or regulation;

(h) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(i) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;

(j) Disclosure would result in the OSC appearing to favor one litigant over another;

(k) A substantial government interest is implicated;

(l) The demand or request is within the authority of the party making it; and

(m) The demand or request is sufficiently specific to be answered.

§ 1820.15 Filing requirements for litigants seeking documents or testimony.

A litigant must comply with the following requirements when filing a request for official records and information or testimony under this part. A request should be filed before a demand is issued.

(a) The request must be in writing and must be submitted to the General Counsel.

(b) The written request must contain the following information:

(1) The caption of the legal or administrative proceeding, docket number, and name and address of the court or other administrative or regulatory authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal or administrative proceeding, and a specific description of the substance of the testimony or records sought;

- (4) A statement as to how the need for the information outweighs any need to maintain the confidentiality of the information and outweighs the burden on the OSC to produce the records or provide testimony;
 - (5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OSC employee, such as a retained expert;
 - (6) If testimony is requested, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;
 - (7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;
 - (8) The name, address, and telephone number of counsel to each party in the case; and
 - (9) An estimate of the amount of time that the requester and other parties will require of each OSC employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.
- (c) The OSC reserves the right to require additional information to complete the request where appropriate.
- (d) The request should be submitted at least 30 days before the date that records or testimony is required. Requests submitted in less than 30 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.
- (e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

(f) The request should state that the requester will provide a copy of the OSC employee's statement free of charge and that the requester will permit the OSC to have a representative present during the employee's testimony.

§ 1820.16 Service of requests or demands.

Requests or demands for official records or information or testimony under this subpart must be served by mail or hand delivery to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M. St, N.W., Suite 213, Washington, DC 20036; or sent by fax to 202-254-3711.

§ 1820.17 Processing requests or demands.

(a) After receiving service of a request or demand for testimony, the General Counsel will review the request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) Absent exigent circumstances, the OSC will issue a determination within 30 days from the date the request is received.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of the OSC or the United States, or for other good cause.

(d) Certification (authentication) of copies of records. The OSC may certify that records are true copies in order to facilitate their use as evidence. If a requester seeks certification, the requester must request certified copies from the OSC at least 30 days before the date they will be needed.

§ 1820.18 Final determination.

The General Counsel makes the final determination regarding requests to employees for production of official records and information or testimony in litigation in which the OSC is not

a party. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and, when appropriate, the court or other competent authority of the final determination, the reasons for the grant or denial of the request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an OSC employee. The General Counsel's decision exhausts administrative remedies for purposes of disclosure of the information.

§ 1820.19 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of OSC employees including, for example:

- (1) Limiting the areas of testimony;
- (2) Requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;
- (3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The OSC may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not;

- (1) Disclose confidential or privileged information; or
- (2) For a current OSC employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the OSC unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to the OSC's approval.

§ 1820.20 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the OSC may condition the release of official records and information on an amendment to the existing protective order (subject to court approval) or confidentiality agreement.

(b) If the General Counsel so determines, original OSC records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official OSC records, nor may they be marked or altered. In lieu of the original records, certified copies may be presented for evidentiary purposes.

§ 1820.21 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination referred to in §1820.28, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the request is being reviewed, provide an estimate as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

§ 1820.22 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay a demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

9. Add subpart C, consisting of § 1820.23, to read as follows:

Subpart C—Schedule of Fees

§1820.23 Fees.

(a) Generally. The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the OSC.

(b) Fees for records. Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowances, and benefits). Fees for duplication will be the same as those charged by the OSC in its Freedom of Information Act regulations at § 1820.7.

(c) Witness fees. Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the federal district closest to the location where the witness will appear and on 28 U.S.C. 1821, as applicable. Such fees will include cost of time spent by the witness to prepare for testimony, in travel and for attendance in the legal proceeding, plus travel costs.

(d) Payment of fees. A requester must pay witness fees for current OSC employees and any record certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the United States Department of Treasury. In the case of testimony of former OSC employees, the requester must pay applicable fees directly to the former OSC employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) Waiver or reduction of fees. The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(f) De minimis fees. Fees will not be assessed if the total charge would be \$10.00 or less.

10. Add subpart D, consisting of § 1820.24, to read as follows:

Subpart D—Penalties

§ 1820.24 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the OSC, or as ordered by a federal court after the OSC has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OSC employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OSC employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

11. Add subpart E, consisting of § 1820.25, to read as follows:

Subpart E—Conformity with Other Laws

§1820.25 Conformity with other laws.

This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13).

Dated: September 21, 2016

Lisa V. Terry

General Counsel

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