

§ 93.4

32 CFR Ch. I (7–1–00 Edition)

by attorneys or others in situations involving litigation.

(e) *Official information.* Is information of any kind, in any storage medium, whether or not classified or protected from disclosure by § 93.1(c) that:

(1) Is in the custody and control of NSA; or

(2) Relates to information in the custody and control of NSA; or

(3) Was acquired by NSA personnel as part of their official duties or because of their official status within NSA.

(f) *General Counsel.* Refers to the NSA General Counsel (GC), or in the GC's absence, the NSA Deputy GC, or in both of their absences, the NSA Assistant GC (Administration/Litigation).

(g) *NSA attorney.* Refers to an attorney in the NSA Office of General Counsel (OGC).

§ 93.4 Policy.

Official information that is not classified, privileged, or otherwise protected from public disclosure, should generally be made reasonably available for use in Federal and State courts and by other governmental bodies.

§ 93.5 Procedures.

(a) *Release of official information in litigation.* NSA personnel shall not produce, disclose, release, comment upon, or testify concerning any official information during litigation without the prior written approval of the GC. In exigent circumstances, the GC may issue oral approval, but a record of such approval will be made and retained in the OGC. NSA personnel shall not provide, with or without compensation, opinion or expert testimony concerning official NSA information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice (DoJ). Upon a showing by the requester of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the NSA or the United States, the GC may, in writing, grant special authorization for NSA personnel to appear and testify at no expense to the United States. Official information may be released in litigation only in compliance with the following procedures.

(1) If official information is sought, through testimony or otherwise, by a litigation demand, the individual 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. Subject to paragraph (a)(5) of this section, NSA personnel may only produce, disclose, release, comment upon or testify concerning those matters that were specified in writing and approved by the GC.

(2) Whenever a litigation demand is made upon NSA personnel for official information or for testimony concerning such information, the person upon whom the demand was made shall immediately notify the OGC. After consultation and coordination with the DoJ, if required, the GC shall determine whether the individual is required to comply with the demand and shall notify the requester or the court or other authority of that determination.

(3) If a litigation demand requires a response before instructions from the GC are received, the GC shall furnish the requester or the court or other authority with a copy of § 93.1(a) and this part 93. The GC shall also inform the requester or the court or other authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.

(4) If a court or other authority declines to stay the demand in response to action taken pursuant to paragraph 3 of this section, or if such court or other authority orders that the demand must be complied with notwithstanding the final decision of the GC, the NSA personnel upon whom the demand was made shall notify the GC of such ruling or order. If the GC determines that no further legal review of or challenge to the ruling or order will be sought, the affected NSA personnel shall comply with the demand or order. If directed by the GC, however, the affected NSA personnel must decline to provide the information.³ The NSA personnel shall state the following to the Court:

³ See United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951) wherein the Supreme Court held that a government employee could not be held in contempt for following an agency regulation requiring agency approval before