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determines that all or part of requested official records are releasable, copies of the records should be furnished to the requester.

§516.46 Records determined not to be releasable.

(a) General. If the deciding official, after considering the factors in §516.44, determines that all or part of requested official records should not be released, he will promptly communicate directly with the attorney or individual who caused the issuance of the subpoena, order, or request and seek to resolve the matter informally. If the subpoena or order is invalid, he should explain the basis of the invalidity. The deciding official should also explain why the records requested are privileged from release. The deciding official should attempt to obtain the agreement of the requester to withdraw the subpoena, order, or request or to modify the subpoena, order, or request so that it pertains only to records which may be released. (See figure G–1, appendix G, of this part.)

(b) Information protected by the Privacy Act.

(1) A subpoena duces tecum or other legal process signed by an attorney or clerk of court for records protected by the Privacy Act, 5 U.S.C. 552a, does not justify the release of the protected records. The deciding official should explain to the requester that the Privacy Act precludes disclosure of records in a system of records without the written consent of the subject of the records or ''pursuant to the order of a court of competent jurisdiction.'' (See 5 U.S.C. 552a(b)(11)). An ''order of the court'' for the purpose of subsection 5 U.S.C. 552a(b)(11) is an order or writ requiring the production of the records, signed by a judge or magistrate.

(2) Unclassified records otherwise privileged from release under 5 U.S.C. 552a may be released to the court under either of the following conditions:

(i) The subpoena is accompanied by an order signed by a judge or magistrate, or such order is separately served, that orders the person to whom the records pertain to release the specific records, or that orders copies of the records be delivered to the clerk of court, and indicates that the court has determined the materiality of the records and the nonavailability of a claim of privilege.

(ii) The clerk of the court is empowered by local statute or practice to receive the records under seal subject to request that they be withheld from the parties until the court determines whether the records are material to the issues and until any question of privilege is resolved.

(iii) Subpoenas for alcohol abuse or drug abuse treatment records must be processed under 42 U.S.C. 290dd-3 and 290ee-3, and Public Health Service regulations published at 42 CFR 2.1—2.67.

(iv) Upon request, SJAs and legal advisers may furnish to the attorney for the injured party or the tortfeasor's attorney or insurance company a copy of the narrative summary of medical care that relates to a claim under subpart E of this part. If additional medical records are requested, only those that directly pertain to the pending action will be furnished. If furnishing copies of medical records would prejudice the cause of action, the matter will be reported to Litigation Division.

(c) Referral to Litigation Division. If the SJA or legal adviser is not able to resolve a request for Army records informally, he should contact Litigation Division.

(1) Litigation Division may respond to subpoenas or orders for records privileged from release by informing the local U.S. Attorney about the subpoena and requesting that office file a motion to quash the subpoena or a motion for a protective order. The records privileged from release should be retained by the custodian pending the court's ruling upon the government's motion.

(2) When a motion to quash or for a protective order is not filed, or the motion is unsuccessful, and the appropriate DA official has determined that no further efforts will be made to protect the records, copies of the records (authenticated if necessary) will be submitted to the court (or to the clerk of court) in response to the subpoena or order.

(d) Classified and privileged materials. Requests from DOJ, U.S. Attorneys, or attorneys for other governmental entities for records which are

classified or otherwise privileged from release will be referred to Litigation Division. (See § 516.41(g).

DA PERSONNEL AS WITNESSES IN PRIVATE LITIGATION

§ 516.47 Response to subpoenas, orders, or requests for witnesses.

(a) *Policy.* The involvement of present or former DA personnel in private litigation is solely a personal matter between the witness and the requesting party, unless one or more of the following conditions apply:

(1) The testimony involves official information. (See appendix F—Glossary to this part).

(2) The witness is to testify as an expert.

(3) The absence of the witness from duty will seriously interfere with the accomplishment of a military mission.

(b) *Former DA personnel.* Former DA personnel may freely respond to requests for interviews and subpoenas except in instances involving official information (paragraph (a)(1) of this section) or concerning expert testimony prohibited by § 516.49. In those instances, the subject of the request or subpoena should take the action specified in §§ 516.41(c) and 516.42.

(c) *Present DA personnel.* Present DA personnel will refer all requests for interviews and subpoenas for testimony in private litigation through their supervisor to the appropriate SJA or legal adviser.

(d) *Discretion to testify.* Any individual not wishing to grant an interview or to testify concerning private litigation may seek the advice of an Army attorney concerning the consequences, if any, of refusal. Any individual not authorized to consult with Army counsel should consult with private counsel, at no expense to the government.

§ 516.48 Official information.

(a) In instances involving § 516.47(a)(1), the matter will be referred to the SJA or legal adviser serving the organization of the individual whose testimony is requested, or to HQDA pursuant to § 516.47(a). The deciding official will determine whether to release the information sought under the principles established in § 516.44. If funding by the United States is requested, see § 516.55(d).

(b) If the deciding official determines that the information may be released, the individual will be permitted to be interviewed, deposed, or to appear as a witness in court provided such interview or appearance is consistent with the requirements of §§ 516.49 and 516.50. (See, for example, figure G–2, appendix G, to this part). A JA or DA civilian attorney should be present during any interview or testimony to act as legal representative of the Army. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without HQDA approval. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

§ 516.49 Expert witnesses.

(a) *General rule.* Present DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. Former DA personnel will not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See figure G–3, appendix G of this part). An SJA or legal adviser is authorized to deny a request for expert testimony, which decision may be appealed to Litigation Division.

(b) *Exception to the general prohibition.* If a requester can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, Litigation Division may grant special written authorization for present or former DA personnel to testify as expert or opinion witnesses at