

public about actual or alleged Federal Government activity.

(3) *How to request expedited access.* We will be required to make factual and subjective judgments about the circumstances cited by requesters to qualify them for expedited processing. To request expedited access, your request must be in writing and it must explain in detail your basis for seeking expedited access. The categories for compelling need are intended to be narrowly applied:

(i) *A threat to an individual's life or physical safety.* A threat to an individual's life or physical safety should be imminent to qualify for expedited access to the records. You must include the reason why a delay in obtaining the information could reasonably be foreseen to cause significant adverse consequences to a recognized interest.

(ii) *Urgency to inform.* The information requested should pertain to a matter of a current exigency to the American public, where delay in response would compromise a significant recognized interest. The person requesting expedited access under an "urgency to inform," must be primarily engaged in the dissemination of information. This does not include individuals who are engaged only incidentally in the dissemination of information. "Primarily engaged" requires that information dissemination be the main activity of the requester. A requester only incidentally engaged in information dissemination, besides other activities, would not satisfy this requirement. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

(4) *Estimation of matter denied.* The agency will try to estimate the volume of any denied material and provide the estimate to the requester, unless doing so would harm an interest protected by an exemption.

(h) *Computer redaction.* The agency will identify the location of deletions in the released portion of the records, and where technologically possible, will show the deletion at the place on the record where the deletion was made, unless including that indication would harm an interest protected by an exemption.

(i) *Annual report on FOIA activities.* Reports on FOIA activities are submitted each fiscal year to the Department of Justice, and are due by February 1 of every year. The BBG's report will be available both in hard copy and through the Internet. The Department of Justice will also report all Federal agency FOIA activity through electronic means.

(j) *Reference materials and guides.* The agency has available in hard copy, and electronically through the Internet, a guide for requesting records under the FOIA, and an index and description of all major information systems of the agency. The guide is a simple explanation of what the FOIA is intended to do, and how you can use it to access BBG records. The Index explains the types of records that may be requested from the Agency through FOIA requests and why some records cannot, by law, be made available by the BBG.

## PART 504—TESTIMONY BY BBG EMPLOYEES, PRODUCTION OF OFFICIAL RECORDS, AND DISCLOSURE OF OFFICIAL INFORMATION IN LEGAL PROCEEDINGS

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### Subpart A—General Provisions

#### § 504.1 Scope and purpose.

(a) These regulations in this subpart establish policy, assign responsibilities and prescribe procedures with respect to:

(1) The production or disclosure of official information or records by BBG employees, and

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

(b) The BBG intends these provisions to:

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

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

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

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

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

(d) This part provides guidance for the internal operations of BBG. 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.

#### § 504.2 Applicability.

This part applies to demands and requests to current and former employees 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 BBG is not a named party. This part does not apply to:

(a) Demands upon or requests for a BBG employee 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 BBG;

(b) Demands upon or requests for a former BBG employee to testify as to matters in which the former employee was not directly or materially involved while at the BBG;

(c) 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

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

#### § 504.3 Definitions.

The following definitions apply to this part:

(a) 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 a BBG employee in a legal proceeding.

(b) General Counsel means the General Counsel of the BBG or a person to whom the General Counsel has delegated authority under this part.

(c) 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.

(d) BBG means the Broadcasting Board of Governors.

(e) BBG employee means:

(1) Any current or former employee of the BBG.

(2) This definition does not include persons who are no longer employed by the BBG and who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the BBG.

(f) Records or official records and information means all information in the custody and control of the BBG, relating to information in the custody and control of the BBG, or acquired by a BBG employee in the performance of his or her official duties or because of his or her official status, while the individual was employed by the BBG.

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(g) 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 or other competent authority.

(h) 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.

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

#### § 504.4 General prohibition.

(a) In any United States federal, state, and local proceeding or administrative action, or proceeding or administrative action conducted in a foreign country, in which the BBG is not a party, no BBG employee shall, in response to a demand or request for official records or information, furnish or produce documents or testimony as to any material contained in BBG files, any information relating to or based upon material contained in BBG files, or any information or material acquired as part of the performance of that person's official duties (or because of that person's official status) without the prior written approval of the General Counsel.

(b) Whenever a request or demand for information is made upon a BBG employee, the employee, wherever located, shall immediately prepare a report that specifically describes the testimony or documents sought and immediately notify the General Counsel. The BBG employee shall then await instructions from the General Counsel concerning a response to the request or demand. The failure of any BBG employee to follow the procedures specified in this subpart neither creates nor confers any rights, privileges, or benefits on any person or party.

#### § 504.5 Factors the BBG 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 re-

sponse 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 BBG in performing its statutory duties;

(d) Allowing such testimony or production of records would be in the best interest of the BBG 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 rules 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 BBG appearing to favor one litigant over another;

(k) The request was served before the demand;

(l) A substantial Government interest is implicated;

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

(n) The demand or request is sufficiently specific to be answered and/or can be limited to information to that which would be consistent with the factors specified herein.

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### § 504.6 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 subpart. A request should be filed before a demand.

(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 proceeding, docket number, and name and address of the court or other 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 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 BBG 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 BBG 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 for each BBG employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The BBG 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 BBG employee's statement free of charge and that the requester will permit the BBG to have a representative present during the employee's testimony.

### § 504.7 Service of requests or demands.

Requests or demands for official records or information or testimony under this Subpart must be served on the General Counsel, BBG, 330 Independence Ave., SW., Washington, DC 20237 by mail or fax at (202) 203-4585 and clearly marked "Part 504—Request for Testimony or Official Records in Legal Proceedings."

### § 504.8 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 BBG 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 BBG or the United States, or for other good cause.

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(d) Certification (authentication) of copies of records. The BBG 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 BBG at least 30 days before the date they will be needed. The request should be sent to the BBG General Counsel.

### § 504.9 Final determinations.

The General Counsel makes the final determination on demands or requests to employees for production of official records and information or testimony in litigation in which the BBG 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 BBG employee. The General Counsel's decision exhausts administrative remedies for discovery of the information.

### § 504.10 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of BBG 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 BBG 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 BBG 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 BBG 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 BBG's approval.

### § 504.11 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 BBG may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original BBG 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 BBG records, nor may they be marked or altered. In lieu of the original records, certified copies may be presented for evidentiary purposes.

### § 504.12 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 § 504.9, 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

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as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

### § 504.13 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).

## Subpart C—Schedule of Fees

### § 504.14 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 BBG.

(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 BBG in its Freedom of Information Act regulations at 22 CFR Part 503.

(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 court 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 BBG em-

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ployees and any record certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony of former BBG employees, the requester must pay applicable fees directly to the former BBG 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.

## Subpart D—Penalties

### § 504.15 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the BBG, or as ordered by a Federal court after the BBG has had the opportunity to be heard, may face penalties as provided in any applicable enforcement statute.

(b) A current BBG employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action and, if done for a valuable consideration, may subject that person to criminal prosecution.

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