

## § 615.1

## 45 CFR Ch. VI (10–1–10 Edition)

SOURCE: 59 FR 44056, Aug. 26, 1994, unless otherwise noted.

### § 615.1 Purpose.

(a) This part sets forth policies and procedures to be followed when, in connection with a legal proceeding, an NSF employee is issued a demand to provide testimony or produce official records and information.

(b) The provisions of this part are intended to promote economy and efficiency in NSF's programs and operations; minimize the possibility of involving NSF in controversial issues not related to its functions; maintain the impartiality of NSF among private litigants; and protect sensitive, confidential information and the deliberative process.

(c) This part is not intended to and does not waive the sovereign immunity of the United States.

(d) This part is intended only to provide guidance for the internal operations of NSF, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

### § 615.2 Applicability.

This part applies to demands and requests for factual or expert testimony or for official records or information in legal proceedings, whether or not the United States is a party, except that it does not apply to:

(a) Demands upon or requests for an NSF employee to testify as to facts or events that are in no way related to his or her official duties or to the functions of NSF,

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

(c) Demands upon or requests for an NSF reviewer to testify as to matters not directly related to that individual's employment by or service to NSF, and

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

### § 615.3 Definitions.

(a) *Demand*—A subpoena, order, or other demand of a court or other com-

petent authority for the production of records or for the appearance and testimony of an NSF employee, issued in a legal proceeding between private litigants.

(b) *Foundation or NSF* means the National Science Foundation.

(c) *General Counsel* means the General Counsel of the Foundation, or any person to whom the General Counsel has delegated authority under this part.

(d) *Legal proceeding* means any proceeding before a court of law, administrative board or commission, hearing officer, or other body conducting a legal or administrative proceeding.

(e) *Official records and information* means all documents and material which are records of the Foundation under the Freedom of Information Act, 5 U.S.C. 552; all other records contained in NSF's files; and all other information or material acquired by an NSF employee in the performance of his or her official duties or because of his or her official status.

(f) *NSF employee or employee* means any present or former officer or employee of NSF; any other individual hired through contractual agreement by or on behalf of NSF, or who has performed or is performing services under such an agreement for NSF; and any individual who served or is serving on any advisory committee or in any advisory capacity, whether formal or informal.

(g) *Request* means any informal request, by whatever method, for the production of official 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 statement by a witness, including depositions, answers to interrogatories, affidavits, declarations, and statements at a hearing or trial.

### § 615.4 Legal proceedings before NSF or in which the United States is a party.

In any legal proceeding before NSF or to which the United States is a party, the General Counsel shall arrange for a current employee to testify as a witness for the United States whenever the attorney representing

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the United States requests it. The employee may testify for the United States both as to facts within the employee's personal knowledge and as an expert or opinion witness. For any party other than the United States, the employee may testify only as to facts within his or her personal knowledge.

### § 615.5 Legal proceedings between private litigants: Testimony and production of documents.

(a) No employee may produce official records and information or provide any testimony in response to a demand or request unless authorized to do so by the General Counsel in accordance with this part.

(b) The General Counsel, in his or her discretion, may grant an employee permission to testify or produce official records and information in response to a demand or request. In making this decision, the General Counsel shall consider whether:

- (1) The purposes of this part are met;
- (2) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (3) NSF has an interest in the decision that may be rendered in the legal proceeding; and
- (4) Allowing such testimony or production of records would be in the best interest of NSF or the United States.

(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, shall not:

- (1) Disclose confidential or privileged information;
- (2) Testify as to facts when the General Counsel determines such testimony would not be in the best interest of the Foundation or the United States; or
- (3) 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 Foundation.

### § 615.6 Legal proceedings between private litigants: Procedure when demand is made.

(a) Whenever an employee is served with a demand to testify in his or her official capacity, or to produce official

records and information, the employee shall immediately notify the General Counsel.

(b) The General Counsel shall review the demand and, in accordance with the provisions of § 615.5, determine whether, or on what conditions, to authorize the employee to testify and/or produce official records and information.

(c) If a response to a demand is required before the General Counsel has made the determination referred to in § 615.6(b), the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a stay of the demand pending a final determination. If the court fails to stay the demand, the employee must appear at the stated time and place, produce a copy of this part, and respectfully decline to comply with the demand. "*United States ex rel Touhy v. Ragen*," 340 US 462 (1951).

(d) If a court or other competent authority orders that a demand be complied with notwithstanding a final decision by the General Counsel to the contrary, or at any other stage in the process, the General Counsel may take steps to arrange for legal representation for the employee, and shall advise the employee on how to respond to the demand.

### § 615.7 Legal proceedings between private litigants: Office of Inspector General employees.

Notwithstanding the requirements set forth in §§ 615.1 through 615.6, when an employee of the Office of Inspector General is issued a demand or receives a request to provide testimony or produce official records and information, the Inspector General or his or her designee shall be responsible for performing the functions assigned to the General Counsel with respect to such demand or request pursuant to the provisions of this part.

[73 FR 21549, Apr. 22, 2008]