

## Department of the Navy, DoD

## § 725.4

### § 725.1 Purpose.

This instruction implements 32 CFR part 97 regarding the release of official Department of the Navy (DON) information and provision of testimony by DON personnel for litigation purposes, and prescribes conduct of DON personnel in response to a litigation request or demand. It restates the information contained in Secretary of the Navy Instruction 5820.8A of 27 August 1991<sup>1</sup>, and is intended to conform in all respects with the requirements of that instruction.

### § 725.2 Policy.

(a) It is DON policy that official factual information, both testimonial and documentary, should be made reasonably available for use in Federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

(b) DON personnel, as defined in § 725.4(b), however, shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part.

(c) DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DON or Department of Defense (DOD) information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part.

(d) Section 725.2(b) and (c) constitute a regulatory general order, applicable to all DON personnel individually, and need no further implementation. A violation of those provisions is punishable under the Uniform Code of Military Justice for military personnel and is the basis for appropriate administrative procedures with respect to civilian employees. Moreover, violations of this instruction by DON personnel may, under certain circumstances, be actionable under 18 U.S.C. 207.

<sup>1</sup>Copies may be obtained, if needed, from the Naval Publications and Forms Directorate, Attn: Code 301, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

(e) Upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DON, DOD, or the United States, the General Counsel of the Navy, the Judge Advocate General of the Navy, or their respective delegates may, in their sole discretion, and pursuant to the guidance contained in this instruction, grant such written special authorization for DON personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

### § 725.3 Authority to act.

(a) The General Counsel of the Navy, the Judge Advocate General of the Navy, and their respective delegates [hereafter “determining authorities” described in § 725.4(a)], shall respond to litigation requests or demands for official DOD information or testimony by DON personnel as witnesses.

(b) If required by the scope of their respective delegations, determining authorities’ responses may include: consultation and coordination with the Department of Justice or the appropriate United States Attorney as required; referral of matters proprietary to another DOD component to that component; determination whether official information originated by the Navy may be released in litigation; and determination whether DOD personnel assigned to or affiliated with the Navy may be interviewed, contacted, or used as witnesses concerning official DOD information or as expert or opinion witnesses. Following coordination with the appropriate commander, a response may further include whether installations, facilities, ships, or aircraft may be visited or inspected; what, if any, conditions will be imposed upon any release, interview, contact, testimony, visit, or inspection; what, if any, fees shall be charged or waived for access under the fee assessment considerations set forth in § 725.11; and what, if any, claims of privilege, pursuant to this instruction, may be invoked before any tribunal.

### § 725.4 Definitions.

(a) *Determining authority.* The cognizant DON or DOD official designated

to grant or deny a litigation request. In all cases in which the United States is, or might reasonably become, a party, or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy, depending on the subject matter of the request, will act as determining authority. In all other cases, the responsibility to act as determining authority has been delegated to all officers exercising general court-martial convening authority, or to their subordinate commands, and to other commands and activities indicated in § 725.6.

(b) *DON personnel.* Active duty and former military personnel of the naval service including retirees; personnel of other DOD components serving with a DON component; Naval Academy midshipmen; present and former civilian employees of the DON including non-appropriated fund activity employees; non-U.S. nationals performing services overseas for the DON under provisions of status of forces agreements; and other specific individuals or entities hired through contractual agreements by or on behalf of DON, or performing services under such agreements for DON (e.g., consultants, contractors and their employees and personnel).

(c) *Factual and expert or opinion testimony.* DON policy favors disclosure of factual information if disclosure does not violate the criteria stated in § 725.8. The distinction between factual matters, and expert or opinion matters (where DON policy favors non-disclosure), is not always clear. The considerations set forth below pertain.

(1) Naval personnel may merely be percipient witnesses to an incident, in which event their testimony would be purely factual. On the other hand, they may be involved with the matter only through an after-the-event investigation (e.g., JAGMAN investigation). Describing the manner in which they conducted their investigation and asking them to identify factual conclusions in their report would likewise constitute factual matters to which they might testify. In contrast, asking them to adopt or reaffirm their findings of fact, opinions, and recommendations, or asking them to form or express any other opinion—particularly one based

upon matters submitted by counsel or going to the ultimate issue of causation or liability—would clearly constitute precluded testimony under the above policy.

(2) Naval personnel, by virtue of their training, often form opinions because they are required to do so in the course of their duties. If their opinions are formed prior to, or contemporaneously with, the matter in issue, and are routinely required of them in the course of the proper performance of their professional duties, they constitute essentially factual matters (*i.e.*, the opinion they previously held). Opinions formed after the event in question, including responses to hypothetical questions, generally constitute the sort of opinion or expert testimony which this instruction is intended to severely restrict.

(3) Characterization of expected testimony by a requester as fact, opinion, or expert is not binding on the determining authority. When there is doubt as to whether or not expert or opinion (as opposed to factual) testimony is being sought, advice may be obtained informally from, or the request forwarded, to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for resolution.

(d) *Litigation.* All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving, or reasonably anticipated to involve, civil or criminal litigation.

(e) *Official information.* All information of any kind, however stored, in the custody and control of the DOD and its components including the DON; relating to information in the custody and control of DOD or its components; or acquired by DOD personnel or its component personnel as part of their official duties or because of their official status within DOD or its components,

while such personnel were employed by or on behalf of the DOD or on active duty with the United States Armed Forces (determining whether “official information” is sought, as opposed to non-DOD information, rests with the determining authority identified in § 725.6, rather than the requester).

(f) *Request or demand (legal process).* Subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person (subject to the exceptions stated in § 725.5) for production, disclosure, or release of official DOD information or for appearance, deposition, or testimony of DON personnel as witnesses.

#### § 725.5 Applicability.

(a) This instruction applies to all present and former civilian and military personnel of the DON whether employed by, or assigned to, DON temporarily or permanently. Affected personnel are defined more fully in § 725.4(b).

(b) This instruction applies only to situations involving existing or reasonably anticipated litigation, as defined in § 725.4(d), when DOD information or witnesses are sought, whether or not the United States, the DOD, or its components are parties thereto. It does not apply to formal or informal requests for information in other situations.

(c) This instruction provides guidance only for DON operation and activities of its present and former personnel in responding to litigation requests. It is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law or equity against the United States, DOD, or DON.

(d) This instruction is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States.

(e) This instruction does not supersede or modify existing laws, DOD or DON regulations, directives, or instructions governing testimony of DON personnel or release of official DOD or DON information during grand jury proceedings.

(f) This instruction does not control release of official information in response to requests unrelated to litigation or under the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. This instruction does not preclude treating any written request for DON records as a request under the FOIA or Privacy Acts. Activities are encouraged to treat such requests for documents under the FOIA or the Privacy Act if they are invoked by the requestor either explicitly or by fair implication. See 32 CFR 701.3(a), 701.10(a). Activities are reminded that such treatment does not absolve them of the responsibility to respond in a timely fashion to legal process. In any event, if the official information requested pertains to a litigation matter which the United States is a present or potential party, the release authority should notify the delegate of the General Counsel or the Judge Advocate General, under § 725.6.

(g) This part does not apply to release of official information or testimony by DON personnel in the following situations:

(1) Before courts-martial convened by any DOD component, or in administrative proceedings conducted by, or on behalf of, such component;

(2) Under administrative proceedings conducted by, or on behalf of, the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority, the Federal Services Impasse Panel, or under a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(3) In response to requests by Federal Government counsel, or counsel representing the interests of the Federal Government, in litigation conducted, in whole or in part, on behalf of the United States (e.g., Medical Care Recovery Act claims, affirmative claims, or subpoenas issued by, or concurred in by, Government counsel when the United States is a party), but the regulation does apply to an action brought under the qui tam provisions of the False Claims Act in which a private party brings an action in the name of the United States but in which the Department of Justice either has not yet