

## United States Postal Service

## § 265.12

court order must meet with the approval of the attorneys for each side. In addition, such records may be released if authorized in writing by the employee.

(3) If the subpoena involves a job-connected injury, the records are under the exclusive jurisdiction of the Office of Workers' Compensation Programs, Department of Labor. Requests for authorization to produce these records shall be addressed to: Office of Workers' Compensation Programs, U.S. Department of Labor, Washington, DC 20210-0001. Also notify the attorney responsible for the issuance of the subpoena or court order.

(4) Employee medical records are primarily under the exclusive jurisdiction of the U.S. Civil Service Commission. The Commission has delegated authority to the Postal Service and to the Commission's Regional Directors to release medical information, in response to proper requests and upon competent medical advice, in accordance with the following criteria:

(i) Except in response to a subpoena or court order, do not release any medical information about an employee to any non-Federal entity or individual without authorization from the employee.

(ii) With authorization from the employee, the Area, Information Systems Service Center, or Chief Field Counsel will respond as follows to a request from a non-Federal source for medical information:

(a) If, in the opinion of a Federal medical officer, the medical information indicates the existence of a malignancy, a mental condition, or other condition about which a prudent physician would hesitate to inform a person suffering from such a condition as to its exact nature and probable outcome, do not release the medical information to the employee or to any individual designated by him, except to a physician, designated by the employee in writing. If a subpoena or court order was issued, the responding official shall caution the moving party as to the possible dangers involved if the medical information is divulged.

(b) If, in the opinion of a Federal medical officer, the medical information does not indicate the presence of

any condition which would cause a prudent physician to hesitate to inform a person of the exact nature and probable outcome of his condition, release it in response to a subpoena or court order, or to the employee or to any person, firm, or organization he authorizes in writing.

(c) If a Federal medical officer is not available, refer the request to the Civil Service Commission regional office with the medical certificates or other medical reports concerned.

(5) Do not release any records containing information as to the employee's security or loyalty.

(6) Honor subpoenas or court orders only when disclosure is authorized.

(7) When authorized to comply with a subpoena duces tecum, do not leave the original records with the court.

(b) [Reserved]

[40 FR 7331, Feb. 19, 1975, as amended at 51 FR 26386, July 23, 1986; 56 FR 55824, Oct. 30, 1991. Redesignated at 56 FR 56934, Nov. 7, 1991; 60 FR 36712, July 18, 1995; 60 FR 57345, Nov. 15, 1995]

### **§ 265.12 Demands for testimony or records in certain legal proceedings.**

(a) *Scope and applicability of this section.* (1) This section establishes procedures to be followed if the Postal Service or any Postal Service employee receives a demand for testimony concerning or disclosure of:

(i) Records contained in the files of the Postal Service;

(ii) Information relating to records contained in the files of the Postal Service; or

(iii) Information or records acquired or produced by the employee in the course of his or her official duties or because of the employee's official status.

(2) This section does not create any right or benefit, substantive or procedural, enforceable by any person against the Postal Service.

(3) This section does not apply to any of the following:

(i) Any legal proceeding in which the United States is a party;

(ii) A demand for testimony or records made by either House of Congress or, to the extent of matter within

§ 265.12

39 CFR Ch. I (7-1-11 Edition)

its jurisdiction, any committee or subcommittee of Congress;

(iii) An appearance by an employee in his or her private capacity in a legal proceeding in which the employee's testimony does not relate to the employee's official duties or the functions of the Postal Service; or

(iv) A demand for testimony or records submitted to the Postal Inspection Service (a demand for Inspection Service records or testimony will be handled in accordance with rules in § 265.11).

(4) This section does not exempt a request from applicable confidentiality requirements, including the requirements of the Privacy Act, 5 U.S.C. 552a.

(b) *Definitions.* The following definitions apply to this section:

(1) *Adjudicative authority* includes, but is not limited to, the following:

(i) A court of law or other judicial forums, whether local, state, or federal; and

(ii) Mediation, arbitration, or other forums for dispute resolution.

(2) *Demand* includes a subpoena, subpoena duces tecum, request, order, or other notice for testimony or records arising in a legal proceeding.

(3) *Employee* means a current employee or official of the Postal Service.

(4) *General Counsel* means the General Counsel of the United States Postal Service, the Chief Field Counsels, or an employee of the Postal Service acting for the General Counsel under a delegation of authority.

(5) *Legal proceeding means:*

(i) A proceeding before an adjudicative authority;

(ii) A legislative proceeding, except for a proceeding before either House of Congress or before any committee or subcommittee of Congress; or

(iii) An administrative proceeding.

(6) *Private litigation* means a legal proceeding to which the United States is not a party.

(7) *Records custodian* means the employee who maintains a requested record. For assistance in identifying the custodian of a specific record, contact the Manager, Records Office, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260, telephone (202) 268-2608.

(8) *Testimony* means statements made in connection with a legal proceeding, including but not limited to statements in court or other forums, depositions, declarations, affidavits, or responses to interrogatories.

(9) *United States* means the federal government of the United States and any of its agencies, establishments, or instrumentalities, including the United States Postal Service.

(c) *Requirements for submitting a demand for testimony or records.* (1) Ordinarily, a party seeking to obtain records from the Postal Service should submit a request in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Postal Service's regulations implementing the FOIA at 39 CFR 265.1 through 265.9 or the Privacy Act, 5 U.S.C. 552a and the Postal Service's regulations implementing the Privacy Act at 39 CFR 266.1 through 266.9.

(2) A demand for testimony or records issued pursuant to the rules governing the legal proceeding in which the demand arises must:

(i) Be in writing;

(ii) Identify the requested record and/or state the nature of the requested testimony, describe the relevance of the record or testimony to the proceeding, and why the information sought is unavailable by any other means; and

(iii) If testimony is requested, contain a summary of the requested testimony and a showing that no document could be provided and used in lieu of testimony.

(3) Procedures for service of demand are made as follows:

(i) Service of a demand for testimony or records (including, but not limited to, personnel or payroll information) relating to a current or former employee must be made in accordance with the applicable rules of civil procedure on the employee whose testimony is requested or the records custodian. The requester also shall deliver a copy of the demand to the District Manager, Customer Services and Sales, for all current employees whose work location is within the geographic boundaries of the manager's district, and any former employee whose last position was within the geographic boundaries of the

## United States Postal Service

## § 265.12

manager's district. A demand for testimony or records must be received by the employee whose testimony is requested and the appropriate District Manager, Customer Services and Sales, at least ten (10) working days before the date the testimony or records are needed.

(ii) Service of a demand for testimony or records other than those described in paragraph (c)(3)(i) of this section must be made in accordance with the applicable rules of civil procedure on the employee whose testimony is requested or the records custodian. The requester also shall deliver a copy of the demand to the General Counsel, United States Postal Service, 475 L'Enfant Plaza, SW, Washington DC 20260-1100, or the Chief Field Counsel. A demand for testimony or records must be received by the employee and the General Counsel or Chief Field Counsel at least ten (10) working days before the date testimony or records are needed.

(d) *Procedures followed in response to a demand for testimony or records.* (1) After an employee receives a demand for testimony or records, the employee shall immediately notify the General Counsel or Chief Field Counsel and request instructions.

(2) An employee may not give testimony or produce records without the prior authorization of the General Counsel.

(3)(i) The General Counsel may allow an employee to testify or produce records if the General Counsel determines that granting permission:

(A) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, privileges, rules, authority, and regulations; and

(B) Would not be contrary to the interest of the United States. The interest of the United States includes, but is not limited to, furthering a public interest of the Postal Service and protecting the human and financial resources of the United States.

(ii) An employee's testimony shall be limited to the information set forth in the statement described at paragraph (c)(2) of this section or to such portions thereof as the General Counsel determines are not subject to objection. An

employee's testimony shall be limited to facts within the personal knowledge of the employee. A Postal Service employee authorized to give testimony under this rule is prohibited from giving expert or opinion testimony, answering hypothetical or speculative questions, or giving testimony with respect to privileged subject matter. The General Counsel may waive the prohibition of expert testimony under this paragraph only upon application and showing of exceptional circumstances and the request substantially meets the requirements of this section.

(4) The General Counsel may establish conditions under which the employee may testify. If the General Counsel authorizes the testimony of an employee, the party seeking testimony shall make arrangements for the taking of testimony by those methods that, in the General Counsel's view, will least disrupt the employee's official duties. For example, at the General Counsel's discretion, testimony may be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law.

(5) If a response to a demand for testimony or records is required before the General Counsel determines whether to allow an employee to testify, the employee or counsel for the employee shall do the following:

(i) Inform the court or other authority of the regulations in this section; and

(ii) Request that the demand be stayed pending the employee's receipt of the General Counsel's instructions.

(6) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the General Counsel's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and the regulations in this section.

(7) The General Counsel may request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Postal Service and the employee.

§ 265.13

39 CFR Ch. I (7-1-11 Edition)

(8) At his or her discretion, the General Counsel may grant a waiver of any procedure described by this section, where waiver is considered necessary to promote a significant interest of the United States or for other good cause.

(9) If it otherwise is permissible, the records custodian may authenticate, upon the request of the party seeking disclosure, copies of the records. No employee of the Postal Service shall respond in strict compliance with the terms of a subpoena duces tecum unless specifically authorized by the General Counsel.

(e) *Postal Service employees as expert witnesses.* No Postal Service employee may 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 Postal Service, for any party other than the United States, except that in extraordinary circumstances, the General Counsel may approve such expert testimony in private litigation. A Postal Service employee may not testify as such an expert witness without the express authorization of the General Counsel. A litigant must obtain authorization of the General Counsel before designating a Postal Service employee as an expert witness.

(f) *Substitution of Postal Service employees.* Although a demand for testimony may be directed to a named Postal Service employee, the General Counsel, where appropriate, may designate another Postal Service employee to give testimony. Upon request and for good cause shown (for example, when a particular Postal Service employee has direct knowledge of a material fact not known to the substitute employee designated by the Postal Service), the General Counsel may permit testimony by a named Postal Service employee.

(g) *Fees and costs.* (1) The Postal Service may charge fees, not to exceed actual costs, to private litigants seeking testimony or records by request or demand. The fees, which are to be calculated to reimburse fully the Postal Service for processing the demand and providing the witness or records, may include, among others:

(i) Costs of time spent by employees, including attorneys, of the Postal

Service to process and respond to the demand;

(ii) Costs of attendance of the employee and agency attorney at any deposition, hearing, or trial;

(iii) Travel costs of the employee and agency attorney;

(iv) Costs of materials and equipment used to search for, process, and make available information.

(2) All costs for employee time shall be calculated on the hourly pay of the employee (including all pay, allowance, and benefits) and shall include the hourly fee for each hour, or portion of each hour, when the employee is in travel, in attendance at a deposition, hearing, or trial, or is processing or responding to a request or demand.

(3) At the discretion of the Postal Service, where appropriate, costs may be estimated and collected before testimony is given.

(h) *Acceptance of service.* This section does not in any way abrogate or modify the requirements of the Federal Rules of Civil Procedure (28 U.S.C. Appendix) regarding service of process.

[60 FR 17224, Apr. 5, 1995, as amended at 60 FR 57345, Nov. 15, 1995; 64 FR 41291, July 30, 1999; 68 FR 56559, Oct. 1, 2003]

**§ 265.13 Compliance with subpoenas, summonses, and court orders by postal employees within the Inspection Service where the Postal Service, the United States, or any other federal agency is not a party.**

(a) *Applicability of this section.* The rules in this section apply to all federal, state, and local court proceedings, as well as administrative and legislative proceedings, other than:

(1) Proceedings where the United States, the Postal Service, or any other federal agency is a party;

(2) Congressional requests or subpoenas for testimony or documents;

(3) Consultative services and technical assistance rendered by the Inspection Service in executing its normal functions;

(4) Employees serving as expert witnesses in connection with professional and consultative services under 5 CFR part 7001, provided that employees acting in this capacity must state for the record that their testimony reflects their personal opinions and should not