

## § 295.201

## 5 CFR Ch. I (1–1–11 Edition)

*Records or official records and information* mean:

- (1) All documents and materials which are OPM agency records under the Freedom of Information Act, 5 U.S.C. 552;
- (2) All other documents and materials contained in OPM files; and
- (3) All other information or materials acquired by an OPM employee in the performance of his or her official duties or because of his or her official status.

*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.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

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

#### § 295.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

#### § 295.202 Factors OPM 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 response to an appropriate 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) OPM has an interest in the decision that may be rendered in the legal proceeding;
- (d) Allowing such testimony or production of records would assist or hinder OPM in performing its statutory duties or use OPM resources in a way that will interfere with the ability

of OPM employees to do their regular work;

- (e) Allowing such testimony or production of records would be in the best interest of OPM or the United States;
- (f) The records or testimony can be obtained from other sources;
- (g) 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;
- (h) Disclosure would violate a statute, Executive order or regulation;
- (i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or would otherwise be inappropriate for release;
- (j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;
- (k) Disclosure would result in OPM appearing to favor one private litigant over another private litigant;
- (l) Disclosure relates to documents that were produced by another agency;
- (m) A substantial Government interest is implicated;
- (n) The demand or request is within the authority of the party making it;
- (o) The demand improperly seeks to compel an OPM employee to serve as an expert witness for a private interest;
- (p) The demand improperly seeks to compel an OPM employee to testify as to a matter of law;
- (q) The demand or request is sufficiently specific to be answered.

#### § 295.203 Filing requirements for demands or requests for documents or testimony.

You must comply with the following requirements whenever you issue demands or requests to an OPM employee for official records and information or testimony.

- (a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on OPM or an OPM employee before submitting a written request and receiving a final determination, OPM will oppose

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the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your 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 the need to maintain any confidentiality of the information and outweighs the burden on OPM 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 OPM employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired 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 with each OPM employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Office of Personnel Management reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 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 your request.

### § 295.204 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

### § 295.205 Processing demands or requests.

(a) After service of a demand or request to testify, the General Counsel will review the demand or 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) OPM will process requests in the order in which they are received. Absent exigent or unusual circumstances, OPM will respond within 45 days from the date that we receive it. The time for response will depend upon the scope of the request.

(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 OPM or the United States or for other good cause.

### § 295.206 Final determination.

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or