

Election Assistance Commission

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(e) A 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.

(f) 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 a request.

(g) Notification to the General Counsel:

(1) Employees shall immediately refer all inquiries and demands made on the Commission to the General Counsel.

(2) An employee who receives a subpoena shall immediately forward the subpoena to the General Counsel. The General Counsel will determine the manner in which to respond to the subpoena.

[73 FR 54271, Sept. 18, 2008, as amended at 75 FR 49814, Aug. 16, 2010]

§ 9409.6 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005.

[73 FR 54271, Sept. 18, 2008, as amended at 75 FR 49814, Aug. 16, 2010]

§ 9409.7 Factors to be considered by the General Counsel.

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 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) The Commission 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 the Commission in performing its statutory duties or use Commission resources where responding to the demand or request will interfere with the ability of Commission employees to do their work;

(e) Allowing such testimony or production of records would be in the best interest of the Commission 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 information which 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 the Commission appearing to favor one litigant over another;

(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; and

(o) The demand or request is sufficiently specific to be answered.

§ 9409.8 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 part, 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) The Commission will process requests in the order in which they are

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received. Absent exigent or unusual circumstances, the Commission will respond within 45 days from the date a request is received. 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 part where a waiver is considered necessary to promote a significant interest of the Commission or the United States or for other good cause.

§ 9409.9 Final determination.

The General Counsel will make 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 information, or on the testimony of a Commission employee.

§ 9409.10 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of Commission employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available 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 Commission may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify under 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 Commission employee, testify as an expert or opinion

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witness with regard to any matter arising out of the employee's official duties or the functions of the Commission unless testimony is being given on behalf of the United States.

§ 9409.11 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 confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the Commission 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 Commission records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official Commission records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

§ 9409.12 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's decision is received, a U.S. attorney or a Commission attorney designated for the purpose shall appear with the employee or former employee of the Commission upon whom the demand has been made and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Commission official and shall