

## § 172.8

### § 172.8 Considerations in determining whether the Department will comply with a demand or request.

(a) In deciding whether to comply with a demand or request, Department officials and attorneys shall consider, among others:

(1) Whether such compliance would be 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 arose;

(2) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(3) The public interest;

(4) The need to conserve the time of Department employees for the conduct of official business;

(5) The need to avoid spending the time and money of the United States for private purposes;

(6) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;

(7) Whether compliance would have an adverse effect on performance by the Department of its mission and duties; and

(8) The need to avoid involving the Department in controversial issues not related to its mission.

(b) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which, *inter alia*, any of the following factors exist:

(1) Compliance would violate a statute or a rule of procedure;

(2) Compliance would violate a specific regulation or executive order;

(3) Compliance would reveal information properly classified in the interest of national security;

(4) Compliance would reveal confidential commercial or financial information or trade secrets without the owner's consent;

(5) Compliance would reveal the internal deliberative processes of the Executive Branch; or

(6) Compliance would potentially impede or prejudice an on-going law enforcement investigation.

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### § 172.9 Prohibition on providing expert or opinion testimony.

(a) Except as provided in this section, and subject to 5 CFR 2635.805, Department employees shall not provide opinion or expert testimony based upon information which they acquired in the scope and performance of their official Department duties, except on behalf of the United States or a party represented by the Department of Justice.

(b) Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States, the appropriate Department official designated in § 172.4 may, consistent with 5 CFR 2635.805, in their discretion and with the concurrence of the Office of the Legal Adviser, grant special, written authorization for Department employees to appear and testify as expert witnesses at no expense to the United States.

(c) If, despite the final determination of the appropriate Department official designated in § 172.4, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a Department employee, such employee shall immediately inform the Office of the Legal Adviser of such order. If the Office of the Legal Adviser determines that no further legal review of or challenge to the court's order will be made, the Department employee shall comply with the order. If so directed by the Office of the Legal Adviser, however, the employee shall respectfully decline to testify. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

## PART 173—AVAILABILITY OF PUBLIC DIPLOMACY PROGRAM MATERIAL IN THE UNITED STATES

Sec.

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AUTHORITY: The United States Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1461, *et seq.*); Section 1078 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239.

## Department of State

## § 173.3

SOURCE: 79 FR 22017, Apr. 21, 2014, unless otherwise noted.

### § 173.1 Purpose and scope.

This part contains the rules that the Department follows for responding to requests for the release within the United States of public diplomacy program material generated pursuant to the U.S. Information and Educational Exchange Act of 1948, as amended (22 U.S.C. 1431, *et seq.*; “the Smith-Mundt Act”). It is the Department’s policy to make its program material available on its public Web site or via third-party platforms whenever doing so is consistent with the Department’s mission and all statutory authorities, prohibitions, contractual obligations, principles, and standards. Requests for program material that is not available on the Department’s public Web site or via third-party platforms must be submitted under the Freedom of Information Act (the “FOIA”) pursuant to the FOIA provisions of 22 CFR part 171, subpart B.

### § 173.2 Definitions.

For the purposes of this part,

(a) *Program material* shall mean information about the United States, its people and policies, intended for foreign audiences abroad, that the Department prepares or assists in preparing using public diplomacy funds and disseminates to foreign audiences outside of the United States pursuant to the Smith-Mundt Act and Section 208 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (22 U.S.C. 1461–1a), as amended. Program Material includes, but is not limited to, electronic journals, pamphlets, books, maps, posters, videos, presentations, photos, games, curricula and other teaching materials, and certain social media and web-based interactive technology content produced in Washington, DC, as well as such materials and content produced at U.S. embassies abroad.

(b) *Request* shall mean any attempt to access the Department’s Program Material, including through the Department’s public Web sites and third-party platforms, or through a direct inquiry to a Department official in con-

nection with a speech or other engagement.

(c) *Requester* shall mean any private person or entity that requests that the Department make Program Material available within the United States.

### § 173.3 Availability of program material.

(a) The Department makes Program Material available to Requesters electronically through Department Web sites and/or various third-party platforms, where such material has been disseminated to audiences abroad. Once Program Material is published, it remains available in digital format until removed or archived by the Department at its discretion (*see* paragraph (c) of this section). For access to such Program Material, Requesters may visit [www.state.gov/r](http://www.state.gov/r).

(b) As a general matter, Program Material published both electronically and in hard copy will be made available electronically through Department Web sites and/or various third-party platforms, although the Department reserves the right to make Program Material available in hard copy at its sole discretion. To the extent a Requester seeks Program Material that is not made available online through Department Web sites or third-party platforms, such material must be requested under the FOIA pursuant to the procedures outlined at 22 CFR part 171, subpart B.

(c) The Department will remove Program Material from Department and third-party Web sites when it deems such material no longer relevant to the Department’s public diplomacy mission. The Department will also remove Program Material when required by licensing agreements with third-party copyright holders. To the extent a Requester seeks Program Material that has been removed for whatever reason, such material must be requested under the FOIA pursuant to the procedures outlined at 22 CFR part 171, Subpart B.

(d) Once Program Material has been removed from the Department’s Web site or third-party platforms, a determination will be made as to whether it is a permanent Department record under the Department’s applicable Records Disposition Schedule (“RDS”).

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Permanent records will be transferred in their entirety to the National Archives and Records Administration (“NARA”) according to the RDS; *see* 36 CFR 1256.98 for information about how to request Department Program Material that has been transferred to NARA. Material designated as “temporary” under the applicable RDS will be destroyed once it has been removed from the Department or third-party sites.

**§ 173.4 Terms of use and other compliance.**

Requesters and users of Department Web sites, or third-party Web sites containing Program Material, are responsible for complying with the Terms of

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Use applicable to any such site. Requesters are also solely responsible for complying with any applicable statutes governing the use of such material and securing appropriate licenses for use of such material, if required.

**§ 173.5 Fees.**

(a) The Department will make Program Material available online (*i.e.*, in digital format) at no cost.

(b) The Department may collect a fee for reimbursement of the reasonable costs incurred to fulfill requests for Program Material not available online. Such requests, including fees applicable thereto, shall be governed by part 171, subpart B of this subchapter.