



United States Department of Agriculture  
Rural Development  
Pennsylvania State Office  
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TO WHOM IT MAY CONCERN

RE: Memorandum of Law Regarding Subpoenas for Testimony or Records from an Employee of the Department of Agriculture

The purpose of this memorandum is to inform the counsel for private litigants, and where appropriate, State court judges, of the restrictions on testimony by employees of USDA, and on the production by such employees of official records in their custody.

Pursuant to regulations published by the Secretary of Agriculture at 55 Fed. Reg. 42347 (October 19, 1990), (as amended 58 FR 62495, Nov. 29, 1993; 58 FR 64353, Dec. 6, 1993), and codified at 7 CFR 1.210, Subpart K, employees of the Department may not make an appearance nor produce records in response to subpoenas in cases in which the United States is not a party, unless specifically authorized to do so by the head of the specific agency of the Department by which they are employed. The term "appearance" as used in these regulations includes an affidavit, deposition, interrogatory, or other required written submission.

It is provided at 5 U.S.C. § 301 that the head of an Executive department may prescribe regulations for the government of his/her department, the conduct of its employees, and the custody, use and preservation of its records, papers and property.

A State court subpoena directed to an employee of the United States, in the employee's official capacity, in an action in which the United States is not a party, whether or not also commanding production of documents, is an action against the United States and is, therefore, subject to the sovereign immunity of the United States, except to the extent such immunity has been waived. Exxon Shipping v. Dept. of Interior, 34 F.3d 774 (9<sup>th</sup> Cir. 1994); Boron Oil Co. v. Downie, 873 F.2d 67, 71 (4<sup>th</sup> Cir. 1989); Swett v. Sohenk, 792 F.2d 1447. See also Davis Enterprises v. U.S. E.P.A., 877 F.2d 1181, 1186-1188 (3<sup>rd</sup> Cir. 1989).

The primary case authority for the issuance of subpoena regulations is United States ex. rel. Touhy v. Ragen, 340 U.S. 462, 95 L. Ed. 417 (1951). In Touhy, the United States Supreme Court held that an agency has the authority to restrict, by regulations, the testimony of its employees, and that a Federal employee may not be compelled to obey a subpoena contrary to supervisor's instructions issued pursuant to valid agency regulations.

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A particularly thorough discussion of these principles, dealing with cases in which the United States is not a party, is found in Exxon Shipping v. Dept. of Interior, 34 F.3d 774; Boron Oil Co. v. Downie, 873 F.2d 67 (4<sup>th</sup> Cir. 1989).

Regulations identical or similar to those of the United States Department of Agriculture have also been published by the Departments of Justice, Labor and Health and Human Services, the Environmental Protection Agency, Nuclear Regulatory Commission, and the Small Business Administration.

In any case in which an employee of the Department of Agriculture is denied authority by the head of the employing agency to appear in response to a subpoena, the employee is prohibited, under penalty of disciplinary action, from testifying or producing records. See § 1.218 of the regulations.

If the subpoena in question also demands the production of records of the Department of Agriculture, that demand for records will be considered under Departmental regulations governing production of records under the Freedom of Information Act (FOIA), and will be produced promptly if permissible under the Act. See 7 CFR 1.215. If the records being sought are available under the terms of the FOIA, the custodian of those records may, upon request, certify their status as records maintained by the Department.

Should you have questions in regard to these issues, please contact the United States Attorney's Office for the District in which the action is pending, or the Office of General Counsel, USDA, 228 Walnut Street, P.O. Box 1134, Room 470, Harrisburg, PA 17109-1134. The phone number is (717) 221-3713.



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State Director