

PART 2015 - INFORMATION

Subpart H – Subpoenas or Legal Demands for Testimony or Production of Official Information

TABLE OF CONTENTS

| | |
|--|---|
| § 2015.351 Purpose. | 1 |
| § 2015.352 Definitions. | 2 |
| § 2015.353 Authority and Responsibility. | 3 |
| § 2015.354 Policies in response to a subpoena or legal demand. | 4 |
| § 2015.355 Information to be included in a subpoena or legal demand. | 4 |
| § 2015.356 Time and filing requirements. | 5 |
| § 2015.357 Charging of fees. | 5 |
| § 2015.358 Consideration requirements. | 5 |
| § 2015.359 Consideration factors. | 6 |
| § 2015.360 Conditions or restrictions that may be imposed. | 7 |
| § 2015.361 Responsibilities of Agency employees. | 8 |
| §§ 2015.362 - 2015.400 [RESERVED] | 8 |

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PART 2015 - INFORMATION

Subpart H - Subpoenas or Legal Demands for Testimony or Production of Official Information

§ 2015.351 Purpose.

(a) This subpart sets forth procedures to be followed with respect to:

- (1) Service of a subpoena, summons, order, or warrant (collectively, “legal demands”) directed to Rural Development (the “Agency”) or to any Agency employee or former employee in connection with Federal or state litigation arising out of or involving the performance of official activities of the Agency.
- (2) The oral or written disclosure, in response to subpoenas, or legal demands of Federal or state judicial or quasi-judicial or administrative authorities, as well as state legislative authorities, whether civil or criminal in nature, or in response to legal demands for production of records, testimony, depositions, affidavits, admissions, responses to interrogatories, interviews, or other litigation-related matters, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules, of any material contained in the records of the Agency.
- (3) All questions or concerns regarding this Instruction or any other matters concerning subpoenas, legal demands, testimony, depositions, or production of official information should be referred to the Rural Development, Business Center, Enterprise Office, Records and Information Management Division, Information Management Branch by sending an email to RD.Demands@usda.gov or by visiting Information Management Branch - Subpoena & Demands.

(b) This subpart does not apply to:

- (1) Congressional requests or subpoenas for official information or testimony relating to official information.
- (2) Federal court civil proceedings in which the United States is a party.
- (3) Federal administrative proceedings in which the Department is a party.

(4) Information or testimony provided to other Federal agencies, including United States Department of Justice attorneys, in connection with a legal proceeding conducted on behalf of or in defense of the United States or a legal proceeding in which the United States has an interest.

(5) Employees who testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Department (e.g. private matters).

§ 2015.352 Definitions.

Agency. An executive branch, administration, bureau, or other establishment within the Federal Government with regulatory or oversight authority.

Decision. The Agency's official determination in response to a subpoena or demand.

Demand. Any effort or attempt to obtain for use in a legal proceeding; official information or testimony relating to official information; including any request, order, subpoena, or other command; as well as any information or other attempt (by any method) to obtain official information, or testimony relating to official information, by an attorney, investigator, or others.

Department. The United States Department of Agriculture, its constituent agencies, and Department officials authorized to decide whether to allow disclosures of official information or testimony relating to official information in response to demands.

Employee. All employees or officers of the Agency; including individuals who are or have been appointed by the Agency or the Department; or who are or have been subject to the Agency's supervision, jurisdiction, or control, including:

(1) individuals hired through contractual agreements by or on behalf of the Agency, or

(2) performing services under such agreements for the Agency, such as consultants, contractors, subcontractors, and their employees or other personnel. Also, includes former Agency employees where the subpoena or demand seeks testimony or deposition relating to official information acquired while the person was an employee of the Agency.

Legal Proceeding. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated; judicial or administrative actions, hearings, investigations, or similar proceedings; before courts, commissions, boards, grand juries, or other tribunals; also includes all phases of discovery as well as formal or information requests by attorneys or others involved in legal proceedings.

Official Information. All information of any kind, however stored; in the custody and control of the Agency; or relates to information in the custody and control of the Agency; or information or knowledge acquired by an Agency employee as part of their official duties or because of their official status with the Agency.

Subpoena. A subpoena is a demand to produce documents or to appear in court or other legal proceeding that requires a person to do something, such as testify or present information that may help support the facts that are at issue in a pending lawsuit.

Testimony. Any written or oral statement by an employee, including personal appearances in court or at depositions, interviews, or informal inquiries in person or by telephone; responses to written interrogatories or other written statements such as reports, declarations, or affidavits; or any response involving more than the delivery of documents.

§ 2015.353 Authority and Responsibility.

(a) Authority. The statutory authority requiring this Instruction is 7 CFR Part 1, Subpart K §§ 1.210 - 1.224.

(b) Responsibility. The following are delegated authority to administer all subpoenas and legal demands on behalf of the Agency.

(1) the Freedom of Information Act (FOIA) Officer and Government Information Specialists in the Information Management Branch shall adjudicate all subpoenas and legal demands and prepare responsive decisions.

(2) the Appropriate Department Official for the Agency is the Chief Enterprise Officer in the National Office and shall sign responsive decisions.

§ 2015.354 Policies in response to a subpoena or legal demand.

- (a) It is the Agency's general policy not to allow its employees to provide official information or testimony relating to official information in response to a subpoena or legal demand.
- (b) The Agency will consider a subpoena or legal demand submitted in accordance with this subpart and issue a decision to grant or deny the subpoena or legal demand.
- (c) No employee may provide official information or testimony relating to official information in response to a subpoena or legal demand unless authorized by the Agency, in accordance with this subpart. Any employee who fails to comply may be subject to disciplinary action up to and including removal.

§ 2015.355 Information to be included in a subpoena or legal demand.

- (a) If the demand seeks records or other materials to be obtained or inspected, it must include a description of the official information and the relevance to the legal proceeding underlying the subpoena or legal demand.
- (b) It must show that the desired official information or testimony is not reasonably available from any other source, including a showing that no document could be provided and used in lieu of testimony.
- (c) It must provide an explanation of how each of the Department's considerations set forth in 7 CFR § 1.220(a) applies to the subpoena or legal demand.
- (d) If a subpoena is served, including a subpoena *duces tecum*, information in accordance with 7 CFR § 1.214 must also be submitted together with the subpoena.
- (e) If a subpoena is served before submitting information in accordance with 7 CFR § 1.214, the Agency may oppose subpoena on grounds that requirements of subpart were not followed.
- (f) The subpoena shall be served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedure, as appropriate, per 7 CFR § 1.216.

§ 2015.356 Time and filing requirements.

- (a) Subpoenas and legal demands must be submitted at least 14 calendar days before the date when the official information or testimony relating to official information is needed.
- (b) Except for subpoenas served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable state procedure as appropriate.
- (c) Demands, including all information required by 7 CFR § 1.214 of this subpart, must be sent to:
 - (1) The Information Management Branch, Rural Development, at 1400 Independence Avenue SW, Washington, DC 20250, Attention: "FOIA Officer," or by electronic mail to RD.Demands@usda.gov; and
 - (2) The Office of the General Counsel (OGC) at 1400 Independence Avenue SW, Washington, DC 20250, Attention: "Touhy Demands," or by electronic mail to OGC-Touhy-Demands@usda.gov.

§ 2015.357 Charging of fees.

When a subpoena or legal demand is granted to produce documents, any record type, or other official information, the fees to be charged and paid prior to production shall be calculated as provided in the Department regulations implementing the fee provisions of the Freedom of Information Act.

§ 2015.358 Consideration requirements.

- (a) The Information Management Branch or an OGC attorney may negotiate with the legal representative to refine or limit the subpoena or legal demand.
- (b) Additional information may be required if it's determined that the subpoena or legal demand is not complete.
- (c) If the subpoena or legal demand is complete, the Information Management Branch will consider it and decide whether to grant or deny it by applying the criteria under 7 CFR § 1.220.

(d) All decisions granting or denying a subpoena or legal demand, along with a completed Touhy Authorization OGC Form, must be in writing and must receive OGC concurrence prior to issuance. Absent OGC concurrence, a decision cannot be issued.

(e) All decisions responding to a subpoena or legal demand shall be for the Chief Enterprise Officer's signature.

(f) If a subpoena or legal demand is denied, the decision shall state that the Agency or employee is not authorized to provide official information or testimony and, if applicable, will not personally appear in response to the subpoena or legal demand.

§ 2015.359 Consideration factors.

(a) In deciding whether to grant or deny a subpoena or legal demand, the following factors will be considered:

(1) Whether compliance would be unduly burdensome, disproportionate to the needs of the case, or otherwise inappropriate under the applicable rules of discovery or rules of procedure governing the legal proceeding underlying the subpoena or legal demand.

(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 and expense of Agency employees for the conduct of official business.

(5) The need to avoid spending the time and money of the United States for non-Federal Government purposes.

(6) The need to maintain impartiality between private litigants in cases in which a substantial Agency interest is not implicated.

(7) Whether compliance would have an adverse effect on the Agency's mission and duties.

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

(9) Any other factor the Agency determines to be relevant to the interests of the Department.

(b) A subpoena or legal demand will not be granted if the disclosure of official information or employee testimony relating to official information would:

(1) Violate a statute or a rule of procedure.

(2) Violate a regulation or executive order.

(3) Reveal information properly classified in the interest of national security.

(4) Reveal confidential commercial or financial information or trade secrets in the absence of the owner's consent.

(5) Reveal the internal deliberative processes of the Executive Branch or other privileged information.

(6) Potentially impede or prejudice an on-going law enforcement investigation.

§ 2015.360 Conditions or restrictions that may be imposed.

In responding to a subpoena or legal demand, the Agency may impose conditions or restrictions on the production of information or testimony, even if authorized. Such conditions or restrictions may include the following:

(a) Requirement that the parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access to, and limit any further disclosure of, official information or testimony provided.

(b) Limit the subject matter; and specify the time, location, and duration of any authorized testimony.

(c) Requirement that the parties agree that a transcript must be kept under seal or available only for the particular legal proceeding underlying the subpoena or legal demand.

(d) Requirement that the party issuing the subpoena or legal demand for information or testimony obtain an extra copy of the transcript of an employee's testimony from the court reporter and provide it to the Agency.

(e) Any other condition or restriction deemed to be in the best interests of the United States.

§ 2015.361 Responsibilities of Agency employees.

(a) If a subpoena or legal demand is received, the employee must notify their supervisor who must then notify:

(1) the Information Management Branch; and

(2) the Information Management Branch shall begin the concurrence process with OGC.

(b) If an employee becomes aware that a court or other authority has ordered compliance with a subpoena or legal demand, they must:

(1) promptly notify their supervisor; and

(2) who must in turn notify the Information Management Branch and OGC.

§§ 2015.362 - 2015.400 [RESERVED]

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