

(b)(5) [The text of proposed § 6404–4(b)(5) is the same as the text of § 301.6404–4T(b)(5) published elsewhere in this issue of the **Federal Register**].

(c) and (d) [Reserved].

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

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DEPARTMENT OF JUSTICE

28 CFR Part 16

[Docket No. OAG 106; A.G. Order No. 2884–2007]

RIN 1105–AB21

Office of the Attorney General; Production of Certain Information or Testimony by State or Local Law Enforcement or Prosecutive Officials Serving on a Department of Justice Task Force

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: The United States Department of Justice is proposing to amend its regulations concerning agency management. The production of certain information or testimony by Department officials in response to subpoenas or demands of courts or other authorities is governed by 28 CFR 16.21–16.29, often referred to as the Department’s *Touhy* regulations, *see United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The revision avoids any doubt that the *Touhy* regulations cover information acquired by a State or local law enforcement and prosecutive official while serving as a task force official on a Department of Justice task force.

DATES: Comments must be received on or before August 20, 2007.

ADDRESSES: To ensure proper handling of comments, please reference “Docket No. OAG 106” on all written and electronic correspondence. Written comments being sent via regular mail should be sent to Robert Hinchman, Senior Counsel, Office of Legal Policy, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530. Comments may be directly sent to the Office of Legal Policy (OLP) electronically by sending an electronic message to olpregs@usdoj.gov. Comments may also be sent electronically through www.regulations.gov using the electronic comment form provided on that site. An electronic copy of this

document is also available at the www.regulations.gov Web site. OLP will accept electronic comments containing MS Word, WordPerfect, Adobe PDF, or Excel files only. OLP will not accept any file format other than those specifically listed here.

FOR FURTHER INFORMATION CONTACT:

Robert Hinchman, Senior Counsel, Office of Legal Policy, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530; Telephone: (202) 514–8059.

SUPPLEMENTARY INFORMATION: State and local law enforcement and prosecutive personnel often participate voluntarily and cooperatively on Department of Justice task forces. The cohesive efforts of task force members serve to multiply the expertise of each participating law enforcement organization in pursuing its law enforcement mission. Examples of these mutually beneficial Department task forces include drug task forces, joint terrorism task forces, gun violence reduction task forces, and fugitive apprehension task forces. Depending upon operational needs, these task forces operate on an *ad hoc* basis or more formally, such as pursuant to written agreement, *see, e.g.*, 21 U.S.C. 873(a)(7); 31 U.S.C. 6305; 28 U.S.C. 566(c) and (c)(1)(B). When such Department task forces are established—whether on an *ad hoc* basis or under formal arrangements, involving, for example, a memorandum of understanding between the participating agencies or the deputation of the participating State and local law enforcement officials—State or local law enforcement and prosecutive officials are frequently provided access to sensitive Department information. The Department has always considered Special Deputy United States Marshals and Special Assistant United States Attorneys to be subject to the Attorney General’s direction with respect to carrying out their respective responsibilities. It is also recognized that although Department task force investigations generally will be prosecuted in Federal courts, there may be specific circumstances to indicate that prosecution should be made in State court, depending upon which method of prosecution will result in the greatest benefit to law enforcement and the public.

To clarify that the Department retains appropriate controls over the use and dissemination of such sensitive information by non-Department employees who acquire the information through service on Department task forces, this revision is being proposed to the Department’s *Touhy* regulations, Subpart B of part 16, chapter I, Title 28,

CFR, *i.e.*, 28 CFR 16.21–16.29. Those regulations take their name for *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), which held that the Attorney General could validly prescribe regulations regarding the release of government documents and witnesses.

The *Touhy* regulations set forth procedures to be followed for producing or disclosing Department materials or information in response to subpoenas or demands of courts or other authorities. The proposed revision of the regulations would make clear that the regulation now also covers any proceeding relating to a task force investigation where the Department has declined to exercise jurisdiction over a particular case or class of cases. The proposed rule defines the term “task force official” as meaning “an employee of a State or local law enforcement agency or prosecutive office serving on a Department of Justice task force established for a law enforcement or national security purpose under the authority of the Attorney General or one of the components of the Department of Justice.” In addition, the term “current and former task force official” would be inserted in appropriate parts of the regulation to ensure that such officials are subject to the same requirements with respect to responding to demands for information acquired through task force service as apply to current and former Department employees responding to requests for information acquired through their official status.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities because it pertains to personnel and administrative matters affecting the Department. The rule affects only State and local law enforcement and prosecutive officials voluntarily serving under *ad hoc* or formal arrangements on Department task forces and does not impose any economic impact on small entities.

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has not been

reviewed by the Office of Management and Budget.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The State or local law enforcement agencies and prosecutive offices affected by the rule are not mandated to serve on Department task forces, and the rule affects only officials in such agencies or offices who voluntarily serve on such task forces through *ad hoc* or formal arrangements with Department components. Therefore, in accordance with Executive Order 13132, Federalism, the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a "major rule" as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 16

Administrative practice and procedure, Courts, Freedom of Information, Privacy, Sunshine Act.

Accordingly, part 16 of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

1. The authority for citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

2. Revise paragraphs (a) and (b) of § 16.21 to read as follows:

§ 16.21 Purpose and scope.

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, any information acquired by any person while such person was an employee of the Department as part of the performance of that person's official status or because of that person's official status, or any information acquired by a State or local law enforcement or prosecutive official while serving *ad hoc* or formally as a task force official on a Department of Justice task force:

(1) In all Federal and State proceedings in which the United States is a party; and

(2) In all Federal and State proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity or any proceedings relating to a task force investigation in which the Department has declined to exercise jurisdiction over a particular case or class of cases, when a subpoena, order, or other demand (collectively, a "demand") of a court or other authority is issued for such material or information.

(b) For purpose of this subpart:

(1) The term *employee of the Department* includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including United States Attorneys, United States Marshals, U.S. Trustees, and members of the staffs of those officials; and

(2) The term *task force official* means an employee of a State or local law enforcement agency or prosecutive office serving on a Department of Justice task force established for a law enforcement or national security purpose under the authority of the Attorney General or one of the components of the Department of Justice.

* * * * *

3. Revise paragraphs (a), (b), and (c) of § 16.22 to read as follows:

§ 16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party.

(a) In any Federal or State case or matter in which the United States is not a party, no employee or former employee of the Department of Justice or present or former task force official shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status or because of that person's service on a Department of Justice task force without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee or a present or former task force official as described in paragraph (a) of this section, the employee or task force official shall immediately notify the United States Attorney for the district where the issuing authority is located. The responsible U.S. Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee or a present or former task force official of the Department shall be limited to the scope of the demand as summarized in such statement.

* * * * *

4. Revise paragraph (a) of § 16.23 to read as follows:

§ 16.23 General disclosure authority in Federal and State proceedings in which the United States is a party.

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the "originating component" as defined in paragraph 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during

or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, or task force official, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties, *provided*:

(1) Such an attorney shall consider, with respect to any disclosure, the factors set forth in paragraph 16.26(a) of this part; and

(2) An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney's judgment, any of the factors specified in paragraph 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees ("EOUST"), or such persons' designees.

* * * * *

5. Revise paragraphs (a), (b) introductory text, and (c) of § 16.24 to read as follows:

§ 16.24 Procedure in the event of a demand where disclosure is not otherwise authorized.

(a) Whenever a matter is referred under § 16.22 of this part to a U.S. Attorney or, under § 16.23 of this part, to an Assistant Attorney General, the Director of the EOUST, or their designees (collectively, "responsible official"), the responsible official shall immediately advise the official, or the official's designee, in charge of the bureau, division, office, or agency of the Department:

(1) That was responsible for the collection, assembly, or other preparation of the material demanded; or

(2) That, at the time the person whose testimony was demanded acquired the information in question:

(i) Employed such person; or

(ii) Designated such person as a task force official; (collectively, "originating component").

In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c) of this section, may authorize the appearance and testimony of a present or former Department employee or a present or former task force official, or the

production of material from Department files if:

(1) * * *

(2) * * *

(3) * * *

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee or a present or former task force official of the Department or the production of material from Department files without further authorization from Department officials whenever possible: provided, that, when information is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in § 16.26 of this part.

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Dated: June 15, 2007.

Alberto R. Gonzales,

Attorney General.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2007-0450; FRL-8329-6]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Open Burning

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Delaware. This SIP revision pertains to the amendments of Delaware's open burning regulation. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before July 23, 2007.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-

R03-OAR-2007-0450 by one of the following methods:

A. *www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. *E-mail*:

cripps.christopher@epa.gov.

C. *Mail*: EPA-R03-OAR-2007-0450, Christopher Cripps, Acting Chief, Air Quality Planning Branch, Mailcode 3AP21, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery*: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2007-0450. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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