of information unless it displays a currently valid OMB control number.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/FoodGuidances* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the draft guidance.

Dated: December 8, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–29968 Filed 12–13–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF DEFENSE

Department of the Army

32 CFR Part 516

[Docket No. USA–2015–0016]

RIN 0702–AA69

Release of Official Information and Appearance of Witnesses in Litigation

AGENCY: Department of the Army, DoD.

ACTION: Proposed rule.

SUMMARY: The Department of the Army proposes to amend its regulation concerning policies and procedures for release of official information and testimony of Army witnesses in federal and state courts where the Army or Department of Defense (DoD) has an interest in the matter. This regulation was last published in the **Federal Register** on July 29, 1994 (59 FR 38236). At that time, a complete Army Regulation was codified. This revision removes a large portion of the currently codified part that does not apply to the public, and is now included in DoD internal guidance. Army Regulation 27–40, *Litigation,* dated 19 September 1994, is the corresponding document where the internal guidance is located.

DATES: Consideration will be given to all comments received by: February 13, 2017.

ADDRESSES: You may submit comments, identified by 32 CFR part 516, Docket No. USA–2015–0016 and or RIN 0702–AA69, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, ATTN: Box 24, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Major Thomas S. Hong, (703) 693–1093; *thomas.s.hong.mil@mail.mil.*

SUPPLEMENTARY INFORMATION:

Executive Summary

The rule discusses departmental responsibilities, procedures for service of process, procedures for government officials sued in their official capacities, and procedures for requests for release of official information, to include witness testimony. The rule also discusses the release of official information and the appearance of present and former Army personnel as witnesses in response to requests for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings.

For the purposes of this rule, Army personnel include the following:

- Present, former and retired Army military personnel, including the U.S. Army Reserve, regardless of current status.
- Present, former and retired civilian employees of the U.S. Army, regardless of current status.
- Soldiers of the Army National Guard of the United States (Title 10, U.S.C.) and, when specified by statute or where a Federal interest is involved, Soldiers in the Army National Guard (Title 32, U.S.C.).
- Technicians under 32 U.S.C. 709.
- USMA cadets.
- Nonappropriated fund employees.
- Foreign nationals who perform services for the Army overseas.
- Other individuals hired by or for the Army, including individuals hired through contractual agreements by or on behalf of the Army.

Background

This regulation was most recently published in the **Federal Register** on July 29, 1994 (59 FR 38236). It implements 32 CFR part 97. Department of Defense Directive 5405.2, ''Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/540502p.pdf*) is where DoD's internal guidance that corresponds to 32 CFR part 97 is located. The proposed revision also removes a large portion of the currently codified part that does not apply to the public, such as items that solely deal with internal Army procedures and actions, *e.g.,* annual reporting requirements to Headquarters, Department of the Army.

Authority for This Action

Authorities for this rulemaking include the following:

- The Freedom of Information Act at 5 U.S.C. 552 which provides the public with a right to request access to federal agency records or information, except to the extent the records are protected from disclosure by any of nine exemptions or by one of three special law enforcement record exclusions.
- The Privacy Act of 1974 at 5 U.S.C. 552a, which establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that is maintained in systems of records by federal agencies.
- Confidentiality of records at 42 U.S.C. 290 which requires certain medical records shall be confidential and disclosed only for authorized purposes.
- Executive Order No. 12988, Civil Justice Reform (add a link to the E.O.) which establishes several requirements on Federal agencies involved in litigation or contemplating filing an action on behalf of the United States.

Costs and Benefits

The proposed revisions benefit the Department of the Army agencies, Army support to the Department of Justice, and interaction with state courts in affirmative and defensive litigation information. With the updates to the CFR for statutory and other changes since the document was published in 1994, Army's support of federal litigation and response to requests to support state and private litigation will be improved.

Although no formal study or collection of data are available, a review of the closed Touhy requests for FY 2016 shows that hundreds of hours were expended by Army personnel responding to these requests. Similar to costs in Freedom of Information Act processing, there are substantial costs for searching, reviewing, and producing Army records and personnel for depositions and trial.

This rule will be included in DoD's retrospective plan, completed in August 2011, and will be reported in future

status updates of DoD's retrospective review in accordance with the requirements in Executive Order 13563. DoD's full plan can be accessed at: *http://www.regulations.gov/#!docketDetail;D=DoD-2011-OS-0036.*

B. Regulatory Flexibility Act

The Department of the Army has determined that the Regulatory Flexibility Act does not apply because the proposed rule does not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

C. Unfunded Mandates Reform Act

The Department of the Army has determined that the Unfunded Mandates Reform Act does not apply because the proposed rule does not include a mandate that may result in estimated costs to State, local or tribal governments in the aggregate, or the private sector, of $100 million or more.

D. National Environmental Policy Act

The Department of the Army has determined that the National Environmental Policy Act does not apply because the proposed rule does not have an adverse impact on the environment.

E. Paperwork Reduction Act

This proposed rule does not impose any new recordkeeping, reporting, or other information collection requirements on the public. The proposed rule sets forth procedures by which litigants may serve summonses, complaints, subpoenas, and other legal process, demands, and requests upon the DA. The proposed rule imposes special procedural requirements for those who seek to serve third-party subpoenas upon the DA in accordance with *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). These requirements may increase the time and burden associated with obtaining records of the DA in response to such third-party subpoenas.

F. Executive Order 12630 (Government Actions and Interference With Constitutionally Protected Property Rights)

The Department of the Army has determined that Executive Order 12630 does not apply because the proposed rule does not impair private property rights.

G. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

The Department of the Army has determined that, although this rule is not ''economically significant'' because it does not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, it is ''other significant'' for raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders. For that reason, it has been reviewed by the Office of Management and Budget (OMB).

H. Executive Order 13045 (Protection of Children From Environmental Health Risk and Safety Risks)

The Department of the Army has determined that according to the criteria defined in Executive Order 13045. This proposed rule does not apply since it does not implement or require actions impacting environmental health or safety risks to children.

I. Executive Order 13132 (Federalism)

The Department of the Army has determined that according to the criteria defined in Executive Order 13132 this proposed rule does not apply because it will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government.

List of Subjects in 32 CFR Part 516

Litigation, Service of process, Witnesses, Official information, Discovery requests, Expert testimony.

■ For reasons stated in the preamble, the Department of the Army proposes to revise 32 CFR part 516 to read as follows:

PART 516—RELEASE OF OFFICIAL INFORMATION AND APPEARANCE OF WITNESSES IN LITIGATION

Sec.

516.1 General.
516.2 Release authority.
516.3 Release determination.
516.4 Requestor responsibilities.
516.5 Classified, Privacy Act Protected, Sensitive or Privileged Information.
516.6 Releasing official information to the Department of Justice.
516.7 Complying with requests for official information, subpoenas, and witness testimony.
516.8 Testimony in private civil litigation.
516.9 Department of Justice witness requests in litigation involving the United States.
516.10 Expert or opinion testimony by DA personnel.
516.11 Witnesses before foreign tribunals.
516.12 Fees and expenses.
516.13 News media and other inquiries.

Authority: 5 U.S.C. 552; 5 U.S.C. 552a; 42 U.S.C. 290; Executive Order No. 12988.

§ 516.1 General.

(a) *Responsibilities.*—(1) *Litigating Divisions.* (i) Chief, Litigation Division, United States Army Legal Services Agency (USALSA), is responsible for the following:

(A) Supervising litigation in which the Army has an interest, except as outlined in paragraphs (a)(1)(A)(ii)–(iv) of this section.

(B) Acting for The Judge Advocate General (TJAG) and the Secretary of the Army on litigation issues, including the authority to settle or compromise cases.

(C) Delegating responsibility for cases if appropriate.

(D) Serving as primary contact with the Department of Justice (DOJ) on litigation.

(E) Accepting service of process for the Department of the Army (DA) and for the Secretary of the Army in his or her official capacity. (See 32 CFR 257.5.)

(F) Approval of the appointment of Special Assistant United States Attorneys (SAUSAs) and DOJ special trial attorneys to represent the Army and DOD in civil litigation.

(ii) Chief, Contract and Fiscal Law Division, USALSA, is responsible for supervising Armed Services Board of Contract Appeals (ASBCA) and Government Accountability Office (GAO) litigation. The Chief Trial Attorney, attorneys assigned to the Contract and Fiscal Law Division, and attorneys designated by the Chief Trial Attorney, will represent DA before the ASBCA for contract appeals. They also represent DA before the GAO for bid protests in cases not falling under the purview of either the U.S. Army Corps of Engineers (USACE) or Army Materiel Command. They will maintain direct liaison with DOJ and represent DA in appeals from ASBCA decisions. The Chief Trial Attorney has designated USACE attorneys to act as trial attorneys in connection with USACE contract appeals.

(iii) Chief, Environmental Law Division, USALSA, is responsible for the following:

(A) Supervising defensive environmental civil litigation and administrative proceedings involving missions and functions of DA, its major and subordinate commands, and

installations currently or previously managed by DA in which the Army has an interest, except as otherwise specifically provided in this part.

(B) Supervising affirmative cost recovery actions, brought pursuant to Federal or State environmental laws, in which the Army has an interest.

(C) Acting for TJAG and the Secretary of the Army on the assertion and defense of Army water rights, and environmental litigation and affirmative cost recovery issues, including the authority to settle or compromise cases.

(D) Delegating responsibility for cases as appropriate.

(E) Serving as primary contact with DOJ on environmental litigation and cost recovery.

(iv) Chief, Regulatory Law and Intellectual Property (RL & IP) Division, USALSA, is responsible for the following:

(A) Supervising the attorneys assigned to the Regulatory Law and Intellectual Property Division (RL & IP) and other attorneys designated by the Chief, RL & IP, who represent DA consumer interests in regulatory matters before State and Federal administrative agencies and commissions, including but not limited to proceedings involving rates and conditions for the purchase of services for communications (except long-distance telephone), transportation, and utilities (gas, electric, water and sewer). Those attorneys will maintain direct liaison with DOJ for communications, transportation, and utilities litigation as authorized by the Chief, RL & IP.

(B) Supervising attorneys assigned to the RL & IP Division, and other attorneys designated by the Chief RL & IP who represent DA in matters pertaining to patents, copyrights, and trademarks. Those attorneys will maintain direct liaison with DOJ and represent the DA in intellectual property issues as authorized by the Chief, RL & IP.

(v) Chief, Procurement Fraud Division (PFD), is responsible for supervising all attorneys designated to represent the DA in all procurement fraud and corruption matters before the Army suspension and debarment authority and before any civil fraud recovery administrative body. Those attorneys will maintain liaison and coordinate remedies with DOJ and other agencies in matters of procurement fraud and corruption.

(vi) Legal Representatives of the Chief of Engineers. The U.S. Army Corps of Engineers (USACE) Office of Chief Counsel, attorneys assigned thereto, and other attorneys designated by the Chief Counsel will maintain direct liaison with DOJ and represent DA in litigation and administrative proceedings arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, real property functions of the (USACE).

(b) *Applicability.* (1) This part implements 32 CFR part 97 as further implemented by DOD Directive 5405.2, ''Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/540502p.pdf*). It governs the release of official information and the appearance of present and former DA personnel as witnesses in response to requests for interviews, notices of depositions, subpoenas, and other requests or orders related to judicial or quasi-judicial proceedings (*e.g.,* a proceeding conducted by an administrative or executive official that is similar to a trial, like a hearing.). Army's internal guidance for this part is available in Army Regulation 27–40 *Litigation,* dated 19 September 1994 (available at *http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchForm.aspx?x=AR*). The Army observes a policy of strict neutrality in all private litigation unless the United States has an interest. This part pertains to any request for witnesses, documents, or information for all types of litigation, including requests by private litigants, requests by State or U.S. attorneys, requests by foreign officials or tribunals. This part also pertains to subpoenas for records or testimony, notices of depositions, and interview requests all stemming from civil or criminal proceedings or any litigation in which the United States has an interest.

(2) This part does not apply to releasing official information or testimony by Army personnel in the following situations:

(i) Before courts-martial convened by military departments or in administrative proceedings conducted by or on behalf of a DOD component.

(ii) In administrative proceedings for:

(A) The Equal Employment Opportunity Commission.

(B) The Merit Systems Protection Board.

(C) The Federal Labor Relations Authority.

(D) A negotiated grievance procedure under a collective bargaining agreement to which the government is a party.

(iii) In response to requests by Federal Government counsel in litigation conducted on behalf of the United States.

(iv) Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

(b) *Policy.* Official information generally should be made reasonably available for use in federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. Current or former DA personnel must receive approval from the local SJA, legal advisor, or Litigation Division prior to disclosing official information in response to subpoenas, court orders, or requests. The local SJA or legal advisor should seek to resolve all requests for official information at their level. In complex cases, responding offices should consult with the appropriate litigating division. If questions arise, refer the matter to the appropriate litigating division as described in § 516.1(d). All other matters, including cases involving classified information will be referred to the General Litigation Branch, Litigation Division.

(c) *Definitions.* (1) *Official information.* Official information includes all information of any kind, however stored, that is in the custody and control of the Department of the Army, relates to information in the custody and control of the Department, or was acquired by DA personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the US Army. Official Information that is the property of the Army but is in the possession, custody or control of another Federal, State, or local agency or a Government contractor is also included in this definition. Generally, official information includes, but is not limited to paper, photographic or electronic records obtained, generated, or maintained for the Army, to include the personal observations and testimony of any kind by Army personnel, about:

(i) Classified or sensitive information of any kind;

(ii) Privileged information of any kind;

(iii) The acquisition, funding, construction, operation, maintenance, physical condition or readiness, as applicable, of DOD, Army, or other Federal government programs, systems, properties, facilities, equipment, data management systems or personnel;

(iv) Unit records, training records, individual personnel or medical records, investigative reports of any kind, scientific or financial data, official Army publications, and records

generated during military operations; and

(v) Army personnel, their family members, contractors, and other related third parties.

(2) *Litigation.* Litigation includes all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other tribunals, foreign and domestic, and state legislative proceedings. This includes:

(i) Responses to discovery requests, depositions, and other pretrial proceedings.

(ii) Responses to formal or informal requests by attorneys or others in existing or reasonably anticipated litigation matters.

(3) *Private Litigation.* (i) In which the Army has no interest. Litigation in which neither the United States, nor an employee in an official capacity, is a party and in which the United States has no identifiable direct or indirect legal, contractual, financial, administrative, mission-related or other interest. Examples of litigation likely to be considered private include personal bankruptcy; civil consumer, divorce and custody proceedings; or landlord-tenant or similar litigation of individual Army civilian or military personnel, past or present. State or local criminal litigation not involving prosecution of Army personnel, contractors, or manufacturers of Army equipment or property may also qualify. The SJA or legal advisor will determine whether a particular case qualifies as private litigation where the Army has no interest.

(ii) In which the Army has an interest. In cases where the Army is not a named party, the Army may still have an interest. These may include: Cases where the Army may incur costs as a result of the litigation; cases where Army operations or policies are implicated; cases which could impact Army property or water rights; disclosure of information harmful to national security or otherwise protected from disclosure; litigation involving Army contractors or manufacturers of Army equipment and property; incidents arising from Department of Defense or Army activities; litigation involving the personal injury of Army personnel or family members, or the personal injury of third parties by Army personnel; the foreign or civilian criminal prosecution of Army personnel, family members, contractors, or manufacturers of Army equipment or property; or civil or family law litigation which may overlap or relate to the foreign or civilian criminal prosecution of Army personnel or family members. If an SJA or legal advisor cannot clearly determine whether Army interests are implicated in a particular case, consult with the appropriate litigating division.

(4) *DA Personnel.* DA Personnel includes the following:

(i) Present, former and retired Army military personnel, including the U.S. Army Reserve, regardless of current status.

(ii) Present, former and retired civilian employees of the U.S. Army, regardless of current status.

(iii) Soldiers of the Army National Guard of the United States (title 10 U.S.C.) and, when specified by statute or where a Federal interest is involved, Soldiers in the Army National Guard (title 32, U.S.C.). It also includes technicians under 32 U.S.C. 709.

(iv) USMA cadets.

(v) Nonappropriated fund employees.

(vi) Foreign nationals who perform services for DA overseas.

(vii) Other individuals hired by or for the Army, including individuals hired through contractual agreements by or on behalf of the Army.

(5) Demand. Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, to produce, disclose, or release official Army information (or other official federal agency information subject to release under this chapter) or which require that DA Personnel testify or appear as witnesses.

§ 516.2 Release authority.

(a) *Release Authorities for Official Information.* The following personnel are the release authorities for official Army information in the following litigation situations (See figure 1):

(1) United States is a party or has an interest. The appropriate litigating division is the release authority for all official, unclassified Army information in cases in which the United States is a party or has a direct interest; they also make all such release decisions for cases in which the information could be used in a claim or litigation against the United States. If uncertainty exists as to whether a given situation constitutes private litigation, forward the request to the appropriate litigating division (See § 516.1(d)).

(2) Non-classified information where the United States has no interest. SJAs and legal advisors are the release authorities for official, unclassified factual information held by their respective commands or organizations in cases of private litigation.

(3) Classified information. Litigation Division is the release authority for official information or appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, intelligence sources and methods, or involving records otherwise privileged from release, including classified information. Refer any requests involving such information to the General Litigation Branch, Litigation Division.

(4) Medical treatment records. Army Medical Center or Command Judge Advocates or supporting SJAs are the release authorities for official, unclassified factual information in private litigation which involves the release of medical and other records and information within the custody, control or knowledge of the Center or Command Judge Advocates' or supporting SJAs'permanent station hospital and its personnel. Medical records may only be released in compliance with the Health Insurance Portability and Accountability Act (HIPAA) regulations published at 45 CFR parts 160, 162, and 164. Upon court order or subpoena, if appropriate under §§ 516.3–4 (Release Determination and Requestor Responsibilities), and if compliant under the HIPAA regulations, Center or Command Judge Advocates, SJAs and legal advisors may furnish to the attorney for the injured party or the tortfeasor's attorney or insurance company a copy of the narrative summary of medical care that relates to a claim initiated by the United States for recovery of costs for medical care or property claims, pursuant to the Federal Medical Care Recovery Act (42 U.S.C. 2651), the Federal Claims Collection Act (31 U.S.C. 3711), the Third Party Collection Program (10 U.S.C. 1095), or Executive Order No. 12988, Civil Justice Reform. If additional medical records are requested by subpoena or court order, only those that are relevant and necessary to the litigation or pending action will be furnished. If furnishing copies of medical records would prejudice the cause of action, the matter will be reported to Litigation Division.

(5) Substance abuse treatment records. Subpoenas for alcohol abuse or drug abuse treatment records must be processed under 42 U.S.C. 290dd–3 and 290ee–3, and Public Health Service regulations published at 42 CFR 2.1–2.67.

(6) Armed Services Board of Contract Appeals cases. Contracting officers, in consultation with the appropriate servicing SJA, are authorized to release official information to be used in litigation before the Armed Services Board of Contract Appeals, per the Federal Acquisition Regulation (FAR), subpart 5.4., and applicable DOD directives and Army instructions.

Responses to such requests must be coordinated with the assigned trial attorney at the USALSA Contract and Fiscal Law Division.

(b) *Approval Authorities for Witness Testimony.* The following personnel are the approval authorities for witness testimony by former, retired and current Army personnel in the following litigation situations:

(1) Cases where the United States has an interest. The appropriate litigating division, as identified in § 516.1, is the approval authority for personnel who may appear and testify as witnesses in contemplated or pending litigation where the United States is a party or has an interest.

(2) Classified, sensitive, or privileged information. Litigation Division is the approval authority for the appearance of DA personnel as witnesses in litigation involving terrorism, espionage, nuclear weapons, intelligence sources and methods, or involving records otherwise privileged from release, including classified information. (See § 516.1(b)). Refer any requests involving such information to the General Litigation Branch, Litigation Division.

(3) Non-classified Information where the United States has no interest. SJAs, Chief Counsel, or their equivalent, are the approval authorities for individuals within their organizations or commands who may appear for witness testimony, depositions, or interviews or make declarations on factual matters within their personal knowledge when it involves private litigation where the United States has no interest.

(4) Medical Information. Commanders of Medical Commands, in consultation with their legal advisors, are the approval authorities for medical providers and other hospital personnel assigned to their command. This includes witness testimony, depositions, interviews or declarations on factual matters within their personal knowledge when it involves private litigation where the United States has no interest.

(5) Expert testimony. Litigation Division is the approval authority for expert testimony. (See § 516.10).

(6) Former and Retired DA Personnel. The appropriate litigating division is the approval authority for witness testimony relating to official information. (See § 516.2).

(c) *Referral to the Appropriate Litigating Division.* When the local Release Authority does not have the authority to resolve the matter, it will be referred to the appropriate litigating division. (See § 516.1a.).

(1) *Nature of the Request.* (i) Refer affirmative litigation initiated by the United States for recovery of costs for medical care or property claims (*e.g.,* medical care recovery or Army property damage or loss cases) to the Tort Litigation Branch, Litigation Division.

(ii) Refer matters concerning patents, copyrights, trade secrets, or trademarks to the Regulatory Law and Intellectual Property Division.

(iii) Refer taxation matters to the Contract and Fiscal Law Division.

(iv) Refer matters concerning communication, transportation, or utility service proceedings to the Regulatory Law and Intellectual Property Division.

(v) Refer environmental matters, to include water rights and affirmative environmental cost recovery to the Environmental Law Division.

(vi) Refer matters arising from the navigation, civil works, Clean Water Act 404 permit authority, environmental response activities, and real property functions of the U.S. Army Corps of Engineers (USACE) Office of Chief Counsel.

(vii) Refer all bid protests, and contract appeals cases before the ASBCA and GAO to the Contract and Fiscal Law Division.

(viii) Refer procurement fraud matters, including *qui tam* cases, to the Procurement Fraud Division, OTJAG.

(ix) Refer all other matters to the General Litigation Branch, Litigation Division.

(2) Information to Submit with Referrals. Provide the following data when referring matters pursuant to § 516.2(c):

(i) Copy of the request for official information and all available relevant pleadings (*e.g.,* complaint, motions, court rulings).

(ii) Parties (named or prospective) to the proceeding, their attorneys, and case number.

(iii) Party making the request (if a subpoena, indicate moving party) and his or her attorney.

(iv) Name of tribunal in which the proceeding is pending.

(v) Nature of the proceeding.

(vi) Date of receipt of request or date and place of service of subpoena.

(vii) Name, grade, position, and organization of person receiving request or served with subpoena.

(viii) Date, time, and place designated in request or subpoena for production of information or appearance of witness.

(xi) Nature of information sought or document requested, and place where document is maintained.

(x) A copy of each document requested. Contact the appropriate litigating division if this would be burdensome and unnecessary to a decision whether to release, redact, or withhold a particular document.

(xi) Name of requested witness, expected testimony, requested appearance time and date, and whether witness is reasonably available.

(xii) Analysis of the request with recommendations.

FIGURE 1

RELEASE AUTHORITIES FOR OFFICIAL ARMY INFORMATION IN PRIVATE LITIGATION

United States and Army are NOT a party and have NO interest in the litigation

Local SJA/Legal Advisor	• Unclassified/Non-medicalDocuments • Unclassified/Non-medical testimony by current DA personnel
Commanders of Medical Commands	• Official, unclassified factual information which involves the release of medical and other records and information within the custody and control of their station hospital and its personnel
U.S. Army Litigation Division	• Testimony or documents that are classified, sensitive, privileged, or related to terrorism, espionage, nuclear weapons, and intelligence sources and methods • All expert testimony • All fact testimony by former/retired DA personnel

United States and Army are NOT a party BUT DO HAVE an interest in the litigation

Appropriate USALSA Litigating Division	• Unclassified/Non-medical Documents • Unclassified/Non-medical Testimony by current DA personnel • Non-expert testimony by current DA personnel
U.S. Army Litigation Division	• All expert testimony • All fact testimony by former/retired DA personnel • Testimony or documents that are classified, sensitive, privileged, or related to terrorism, espionage, nuclear weapons, and intelligence sources and methods

§ 516.3 Release determination.

(a) Release authorities must ensure requestors state in writing the nature and relevance of the official information they want and include the documentation required by § 516.4. The appropriate release authority should evaluate the request in light of 32 CFR part 97 and *United States, ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951) and other relevant case law. Release authorities must consider the following factors when determining whether to approve or deny a request for official information:

(1) Whether the request is unduly burdensome, inappropriate under the applicable court rules or otherwise irrelevant. Considerations include the size and scope of the request; amount of preparation and transportation time for the witness; mission impact of requiring the witness to be pulled away from current duties to participate; mission impact of requiring responding office personnel to be pulled away from their current assignments to respond to document search, review and production requests; and the potential cumulative burden upon the agency in granting similar requests.

(2) Whether the disclosure is inappropriate under the rules of procedure governing the matter in which the request arose.

(3) Whether the disclosure violates a statute, executive order, regulation, or directive.

(4) Whether the disclosure (including release *in camera*) is inappropriate under the relevant substantive law concerning privilege.

(5) Whether the disclosure reveals information properly classified pursuant to the DOD Information Security Program under AR 380–5, unclassified technical data withheld from public release pursuant to 32 CFR 250 and DOD Directive 5230.25 or other sensitive or privileged information exempt from disclosure.

(6) Whether the disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or confidential, commercial, or financial information, or would otherwise be inappropriate under the circumstances.

(7) Whether disclosure violates any person's expectation of confidentiality or privacy.

(8) Whether any other factor or consideration relevant to the circumstances warrants approving or denying the request.

§ 516.4 Requestor responsibilities.

(a) Individuals seeking official information must submit, at least 14 days before the desired date of production, a detailed written request setting forth the nature and relevance to the litigation or proceeding of the official information sought. Requests for official information involving an employee's appearance and/or production of documents must comply with 32 CFR part 97 and this part. At a minimum, requests must include:

(1) Copy of the complaint or criminal charges and relevant pleadings;

(2) Date of the requested appearance or production;

(3) Party for whom the request is made;

(4) Reason why official information sought is relevant and necessary to requestor and litigation;

(5) For witness requests, name, grade, position, and organization of the witness if known, and substance of the expected testimony. Requestors should not contact potential witnesses without first coordinating with the witness' SJA or legal advisor, or the appropriate litigating division.

(b) Requests from DOJ for DA personnel as witnesses need not follow the requirements above. See § 516.6 for the witness request procedures for DOJ.

§ 516.5 Classified, Privacy Act Protected, Sensitive or Privileged Information.

(a) *Classified information.* Only Litigation Division may authorize the release of information or appearance of DA personnel as witnesses in litigation involving classified matters. Refer any requests involving such information to the General Litigation Branch, Litigation Division.

(b) *Information Protected by the Privacy Act.*

(1) Privacy Act (5 U.S.C. 552a) records include any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

(2) A demand (see definition in *§ 516.1)* signed by an attorney or clerk of court for records protected by the Privacy Act, 5 U.S.C. 552a, does not justify the release of the protected records. This includes a subpoena issued on behalf of a Federal or State Grand Jury. The release authority should explain to the requestor that the Privacy Act precludes disclosure of records in a system of records without the written consent of the subject of the records or ''pursuant to the order of a court of competent jurisdiction'' (See fig 7–2 and fig 7–3 Sample *Touhy* Compliance response).

(3) In connection with discovery in federal or state litigation, Privacy Act records will only be released with consent of the individual or under a court order specifically signed by a judge or magistrate of a court of competent jurisdiction. (*See* 5 U.S.C. 552a(b)(11); *Doe* v. *DiGenova,* 779 F.2d 74 (DC Cir 1985); *Bosaw* v. *NTEU,* 887 F. Supp. 1199 (S.D. Ind. 1995); and *Boron Oil Co.* v. *Downie,* 873 F. 2d 67 (4th Cir. 1989).) More specifically, unclassified Privacy Act records otherwise protected from release, may be released under the following conditions:

(i) Release by Court Order. The court order must state that the court finds that the law authorizes release of the records and the records should be released. If the order or subpoena does not contain these findings the release authority may release the records to a clerk of the court empowered by local statute or practice to receive the records under seal subject to the release authority's request that the clerk of court withhold the records from the parties until the court issues an order determining that the records should be released.

(ii) Release to the Requestor. Privacy Act records may be released to the requestor if a valid Privacy Act consent waiver from the individual to whom the record(s) pertain is submitted with the request. Otherwise, Privacy Act records should only be released pursuant to court order as set forth in (i) above.

(c) *Inspector General (IG) records or testimony.* IG records, and information obtained through performance of IG duties, are official information under the exclusive control of the Secretary of the Army. (see AR 20–1, Chapter 3.) IG records frequently contain sensitive official information that may be classified or obtained under guarantees of confidentiality. Army personnel will not release IG records or disclose information obtained through performance of IG duties without the approval of the Secretary of the Army, The Inspector General (TIG), TIG Legal Advisor, or the Chief, Litigation Division.

(d) *Safety records, information, and witnesses.* Safety records and information produced by commands, installation safety offices, and the U.S. Army Combat Readiness Command and Safety Center (USACRC) (and other DOD Service Components) may contain ''privileged safety information.'' See

DOD Instruction 6055.07 and AR 385–10.

(1) Litigation Division and the USACRC Command Judge Advocate will consult with the appropriate United States Attorney's Office regarding assertion of appropriate privileges. To assess the appropriate privilege, safety reports and records will be provided to Litigation Division in complete unredacted form along with a separate copy reflecting identification of all privileged portions.

(2) When requested, contact information for safety personnel witnesses and technical experts will be provided to Litigation Division. As needed, Litigation Division will provide safety records, information, and witness contact information to the U.S. Attorney's Office for evaluation.

(3) Providing safety records, information, and access to safety personnel to Litigation Division or the U.S. Attorney's Office is not considered a ''release,'' under DOD safety regulations.

(4) All parties handling privileged safety information are obligated to observe confidentiality, protected safety-use requirements, and all other privileges against public disclosure. Privileged safety reports, records, information, or testimony will not be used in litigation without appropriate disclosure safeguards, such as a protective order, agreement, or order to seal.

(e) *Technical Data.* Commands should refer requests for unclassified technical data with military or space application which should be withheld from public release pursuant to 32 CFR 250 and DOD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure, November 6, 1984 (including Change 1, August 18, 1995) to the General Litigation Branch, Litigation Division.

(f) *Other privileged information.* Unless otherwise specified, all questions and issues regarding privileged information will be referred for consultation to General Litigation Branch, Litigation Division.

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FIGURE 2 (Sample subpoena duces tecum Response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 2, 2017

Administrative Law Branch

Ms. Shelly Baltimore
Attorney At Law
300 H Street
Coldfront, ND 84167

Dear Ms. Baltimore:

We are in receipt of your subpoena *duces tecum* dated January 1, 2017, demanding the production of documents for use in the case of *Jones v. Jones*, currently filed in state court. **[*Include the subject matter of the subpoena or request.*]** Your request is denied because your subpoena does not meet the regulatory requirements discussed below.*

[If there are Privacy Act issues include the paragraph below]

Further, the requested documents contain information protected by the Privacy Act, 5 U.S.C. § 552a. To comply with the Privacy Act, you must provide either a written release authorization signed by the individual to whom the documents pertain or a court ordered release signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985).

In order to obtain official information you must submit a request that complies with Department of Defense Directives found at *32 C.F.R. § 97* and Army Regulations found at *32 C.F.R. § 516.* We must receive your request at least 14 days before the desired date of production. The request must set forth the nature of the proceeding and the nature and relevance of the official information sought. We will act on your request once we receive the required information. *See United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951); *Boron Oil Co. v. Downie,* 873 F.2d 67 (4th Cir. 1989); *United States v. Bizzard,* 674 F.2d 1382 (11th Cir. 1982); *United States v. Marino,* 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen,* 554 F.2d 398 (10th Cir 1977).

[If the requestors indicate that they will file a motion to compel production without submitting a Touhy request or before the Army can respond to the Touhy request insert the following.]

** SJAs and legal advisors should keep in mind that the Army should never ignore subpoenas.*

Please be advised that should you seek to enforce this subpoena (without first submitting a Touhy request) this office may request that the Department of Justice inform the court or tribunal that you have not complied with the applicable law and regulations and seek to stay or quash the subpoena in federal court.

In accordance with the authorities set forth in 32 C.F.R. §516, you must confirm your willingness to pay reasonable fees and set the maximum fee that you are willing to pay for the time and resources necessary to process this request. A copy of the fee schedule can be found in 32 C.F.R. §204. Our response will include the actual cost. The fee is payable regardless of the decision or availability of the requested material or witness.**

If you have any questions, please call Captain Clayton at xxx-xxx-xxxx.

Sincerely,

(Signature)

Robert A. Black
Lieutenant Colonel, U.S. Army
Chief, Administrative Law

CF:
Litigation Division

*** Requestor should make checks payable to the U.S. Treasury. Upon receipt of the funds forward them to DFAS Vendor Pay Army-Indianapolis, Department 3400, 8899 East 56th Street, Indianapolis, IN 46249-3800.*

FIGURE 3 (Sample *Touhy* Compliance Response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 3, 2017

Administrative Law Branch

Ms. T. Hudson Taylor
Attorney At Law
300 H Street
Coldfront, ND 84167

Dear Ms. Taylor:

We are in receipt of your subpoena dated January 2, 2017, for Major Keme Wills to testify and produce documents at a deposition in the case of *Jones v. Jones*, currently filed in state court. **[*Include the subject matter of the subpoena or request.*]** Your request is denied because your subpoena **[*or request*]** does not meet the regulatory requirements discussed below.

The Army must authorize the appearance of its personnel or the production of official documents in private litigation. To obtain authorization, you must make a written request in accordance with applicable Department of Defense Directives found at *32 C.F.R. § 97* and Army Regulations found at *32 C.F.R. § 516*. The request must include the nature of the proceeding, and the nature and relevance of the official information sought. We will act on your request once we receive the required information. *See United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951); *Boron Oil Co. v. Downie,* 873 F.2d 67 (4th Cir. 1989); *United States v. Bizzard,* 674 F.2d 1382 (11th Cir. 1982); *United States v. Marino,* 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen,* 554 F.2d 398 (10th Cir 1977).

In accordance with the authorities set forth in 32 C.F.R. §516, you must confirm your willingness to pay reasonable fees and set the maximum fee which you are willing to pay for the time and resources necessary to process this request. A copy of the fee schedule can be found in 32 C.F.R. §204. Our response will include the actual cost. The fee is payable regardless of the decision or availability of the requested material or witness.*

[If there are Privacy Act issues include the paragraph below]

Further, the requested documents contain information protected by the Privacy Act, 5 U.S.C. § 552a. To comply with the Privacy Act, you must provide either a written release authorization signed by the individual to whom the documents pertain or a court order signed by a judge of a court of competent jurisdiction. A subpoena signed by a clerk of court, notary, or other official is insufficient. *See Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir. 1985).

** Requestor should make checks payable to the U.S. Treasury. Upon receipt of the funds forward them to DFAS Vendor Pay Army-Indianapolis, Department 3400, 8899 East 56th Street, Indianapolis, IN 46249-3800.*

-2-

[If there are attorney-client privilege issues include the paragraph below]

It appears that an attorney-client relationship exists between Major Wills and Staff Sergeant Jones. Major Wills may not divulge such information without Staff Sergeant Jones' consent. *See*, Army Regulation 27-26, Rule of Professional Conduct for Army Lawyers 1.6(a). This privilege protects both documents and testimony.

If you have any questions, please call Captain Clayton at xxx-xxx-xxxx.

Sincerely,

(***Signature)***

Robert A. Black
Lieutenant Colonel, U.S. Army
Chief, Administrative Law

CF:
Litigation Division

BILLING CODE 5001–03–C

§ 516.6 Releasing official information to the Department of Justice.

In routine cases where the Department of the Army is neither a party nor has an interest in the litigation, SJAs may release unclassified and unprivileged official information to DOJ or the U.S. Attorney's Office on request. In connection with any such release, DOJ or the U.S. Attorney's Office must be provided sufficient information to determine whether the requested information is classified, privileged or protected by the Privacy Act or other applicable confidentiality laws, to ensure for its proper handling. DOJ or U.S. Attorney requests for classified information will be coordinated through Litigation Division prior to action. Prior to pursuing declassification of official information, Litigation Division will coordinate with the requesting DOJ attorney to determine whether declassification of the information is appropriate or advisable under the circumstances.

§ 516.7 Complying with requests or demands for official information, subpoenas, and witness testimony.

(a) Request or demand for official information and witness testimony will be resolved by the SJA or legal advisor pursuant to this subpart. The appropriate litigating division will be

consulted on issues that cannot be resolved by the SJA or legal advisor or when multiple release authorities are involved.

(b) Local SJAs and command legal advisors will assist DA personnel within their commands and in their geographic area regarding compliance with subpoenas for official information and witness testimony. Such assistance should include providing advice and attending interviews, depositions, and trial testimony.

(c) Where an immediate response is required. A demand, including a subpoena or court order, should never be ignored. If a response to a subpoena or court order is required before a release determination can be made, the SJA or legal advisor will do the following:

(1) Attempt to resolve the issue through informal efforts. Inform the requestor that the demand is under review and, if applicable, that the requestor must provide additional information in accordance with this part in order for a release determination to be made. Seek additional time to respond to the demand and to have the requestor voluntarily withdraw the subpoena or stay the court order.

(2) If informal efforts to resolve the issue are unsuccessful or if time does not permit attempting informal efforts, contact the appropriate litigating division. When the appropriate litigating division is not available, contact the appropriate USAO directly. Request that the USAO seek to stay the subpoena or court order pending the requestor's compliance with this part.

(3) If efforts to stay the subpoena or court order are unsuccessful, seek to quash the subpoena or court order through coordination with the appropriate litigating division or USAO.

(4) If the USAO is challenging the subpoena or court order, the SJA or legal advisor will direct the affected personnel to respectfully decline to comply with the subpoena or court order pending resolution of the challenge.

(d) Subpoenas seeking protected or privileged information. When privilege, statute, or regulation prohibits releasing the subpoenaed information, the SJA or legal advisor should attempt to resolve the matter with the requestor, or, after consultation with the appropriate litigating division and with the assistance of the local U.S. Attorney's Office, appear through counsel and explain the matter to the court. To resolve the matter, SJAs or legal advisors should:

(1) Communicate with the counsel requesting the subpoena. (See sample letter at fig 7–3).

(2) Explain the restrictions on release.

(3) Provide any releasable information.

(4) Suggest withdrawing the subpoena.

(e) Coordination with the US Attorney concerning subpoenas for protected or privileged information. If informal efforts to resolve the situation are unsuccessful, the appropriate litigating division may ask the local U.S. Attorney's Office to file a motion to quash or a motion for a protective order or other appropriate legal recourse. The records privileged or otherwise protected from release should be retained by the custodian pending the court's ruling.

(f) Release of Information through Witness Testimony. If the approval authority determines that the official information may be released, DA personnel may be interviewed, deposed, or appear as a witness in court provided such interview or appearance is consistent with the requirements of this subpart. An Army attorney should ordinarily be present, as the legal representative of the Army, during any interview or testimony. If a question seeks information not previously authorized for release, the legal representative will advise the witness not to answer. If necessary to avoid release of the information, the legal representative will advise the witness to terminate the interview or deposition, or by the Assistant U.S. Attorney in the case of testimony in court, advise the judge that DOD directives and Army regulations preclude the witness from answering without approval from the appropriate litigating division. Every effort should be made, however, to substitute releasable information and to continue the interview or testimony.

(1) If the absence of a witness from duty will interfere seriously with the accomplishment of a military mission, the SJA or legal advisor will advise the requesting party and attempt to make alternative arrangements. If these efforts fail, the SJA or legal advisor will consult on the matter with appropriate litigating division.

(2) When requested by the U.S. Attorney's Office, the SJA or legal advisor will ensure that no witnesses involved in litigation are reassigned from the judicial district without first advising the U.S. Attorney's Office. If this is not feasible, or if a satisfactory arrangement cannot be reached with the U.S. Attorney's Office, the SJA or legal advisor should notify the Litigation Division.

(g) Release of Records. If the Release Authority, after considering the factors set forth in § 516.3, determines that all or part of requested official records are releasable, copies of the records should be furnished to the requestor. In absence of a protective order issued by a court of competent jurisdiction, records protected by the Privacy Act should only be released to the court issuing the applicable subpoena or order, or pursuant to a signed Privacy Act Waiver from the individual to whom the records pertain. (See § 516.5(b))

(h) Authenticating Records. Records custodians should authenticate official Army documents for civil litigation through written certification, rather than personally appearing and testifying. DA personnel will submit authenticated copies rather than originals of documents or records for use in legal proceedings, unless directed otherwise by the appropriate litigating division (See 28 U.S.C. 1733.) The DA Form 4, Department of the Army Certification for Authentication of Records is used to authenticate Army records or documents. (See Figure 5). Documents attached to a properly prepared and sealed DA Form 4 are self-authenticating. (See Fed. R. Evid. 902). A DA Form 4 need not be prepared until the trial attorney presenting the Government's case identifies documents maintained at the installation level that he or she will need at trial. Once documents are identified, the custodian of the documents will execute his or her portion of the DA Form 4. The custodian certifies that the documents attached to the DA Form 4 are true copies of official documents. Documents attached to each form should be identified generally; each document need not be mentioned specifically. Only the upper portion of the form should be executed at the local level. Upon receipt of the DA Form 4 with documents attached thereto, HQDA will affix a ribbon and seal and deliver it to The Office of The Administrative Assistant to The Secretary of the Army or the Chief, Litigation Division. Either The Office of The Administrative Assistant to The Secretary of the Army or the Chief, Litigation Division will place the official Army seal on the packet. Use the simplest authentication procedure permissible, including any suitable alternative suggested by the court.

(i) SJAs or legal advisors should promptly report any subpoenas from foreign courts requiring records, files, or documents to Litigation Division, and comply with the guidance in § 516.7.

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FIGURE 4 (Sample deposition witness approval response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 4, 2017

SUBJECT: Request for depositions of John Smith and Jane Jackson, in the case of *Plaintiff v. Defendant*, Civil Action File No.: XXX, Superior Court of Fulton County, Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

This letter responds to your letter of January 3, 2017, requesting the deposition testimony of John Smith and Jane Jackson in the above-referenced case. Subject to the following conditions, your request to depose these individuals is approved. Pursuant to 32 C.F.R. § 516, these individuals may provide official information during a deposition. Based on your request, they may release official information regarding their personal knowledge in the following general areas, subject to the caveats that follow:

Caveats and Reservations: The Deponents may only provide factual information related to their involvement in the events that gave rise to the present litigation. They may not be qualified as expert witnesses or be asked for personal opinions relating to official information. *See* 32 C.F.R. § 516. Deponents are prohibited from offering testimony that falls into the following general, non-exhaustive, areas:

a. Any information that is classified, privileged, or otherwise protected from public disclosure. 32 C.F.R. § 516.

b. Any information the disclosure of which would violate the Privacy Act, absent a written release authorization signed by the individual to whom the information pertains or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC § 552a.

c. Any information the disclosure of which would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances. 32 C.F.R. § 516. *See, e.g., Am. Mgmt. Servs., LLC v. Dep't of*

the Army, 703 F.3d 724, 729 (4th Cir. 2013) *cert. denied*, 12-1233, 2013 WL 1499158 (U.S. Oct. 7, 2013).

d. Information that is protected by the deliberative process privilege; that relates to the process by which policies are formulated; and/or is or was at the time predecisional in nature. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (stating that "[t]he cases uniformly rest the [deliberative process] privilege on the policy of protecting the 'decision making processes of government agencies'" (quoting *Tennessean Newspapers, Inc. v. FHA*, 464 F.2d 657, 660 (6th Cir. 1972))); *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

The following conditions apply to this authorization. First, an Army-designated attorney must be present during the deposition. 32 C.F.R. § 516. Second, the witnesses' participation must be at no expense to the United States. 32 C.F.R. § 516. Third, the Army must be provided a copy of the deposition transcript at no expense to the United States. 32 C.F.R. § 516. Finally, this approval is limited to the requested deposition and subject areas and does not extend to any other forum or format. If the testimony of any of the individuals is later requested for trial, a new *Touhy* request must be submitted.

Our sole concern in this matter is to protect the interests of the United States Army. The Army will not block access to witnesses or documents to which you are lawfully entitled. We look forward to working with you to find mutually acceptable dates for the testimony of the individuals. If you should have any questions, please feel free to contact me at (xxx) xxx-xxx or xxx.mil@mail.mil.

Sincerely,

(Signature)

W.J. Brennan Jr.
Major, U.S. Army
Administrative Law Attorney

FIGURE 5 (Sample DA Form 4)

United States of America

DEPARTMENT OF THE ARMY

Washington, DC — PLACE
1 July 2012 — DATE

I HEREBY CERTIFY that
the attached constitute true and accurate copies of files pertaining to John Doe, a former member of the United States Army. Copies of the Official Military Personnel File (OMPF) are maintained by the U.S. Army Human Resources Command, Fort Knox, Kentucky; copies of documents from the Army Board for Correction of Military Records are maintained in Arlington, Virginia. The original personnel records and copies of other records are in the official temporary custody of the Military Personnel Litigation Branch, Litigation Division, Office of The Judge Advocate General of the Army.

JANE E. DOE
Lieutenant Colonel, U.S. Army
Chief, Military Personnel Litigation Branch

I HEREBY CERTIFY that Lieutenant Colonel Jane E. Doe, who signed the foregoing certificate, is the Chief of the Military Personnel Branch, Litigation Division, Office of The Judge Advocate General of the Army, and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, John H. Smith,
The Administrative Assistant to the Secretary of the Army,
have hereunto caused the seal of the Department of the
Army to be affixed this 1st day of
July, 2012

By DIGITAL SIGNATURE 123456789
Administrative Assistant

DA FORM 4, FEB 1998 EDITION OF 1 MAR 66 IS OBSOLETE APD PE v1.10

SAMPLE

BILLING CODE 5001–03–C

§ 516.8 Testimony in private civil litigation.

(a) *Capacity.* Funding and duty status are determined by the capacity in which the personnel testifies and whether the individual is a Soldier or a civilian employee.

(1) *Official capacity.* DA personnel testify in their official capacity when:

(i) They testify regarding their official duties or produce official records on behalf of the U.S.; or

(ii) They testify on matters that relate to their official duties or produce official records on behalf of a party other than the U.S.

(iii) They produce official records on behalf of a party other than the government.

(b) *Unofficial capacity.* DA personnel testify in an unofficial capacity when they testify on behalf of the U.S. or another party on a matter unrelated to their official duties.

(c) *Funding Availability.* 28 U.S.C. 1821, the Joint Ethics Regulation (JER), the Joint Travel Regulations (JTR), 28 CFR part 21, and Army regulations govern travel allowances for DA personnel appearing as witnesses in litigation. The general guidelines for funding witness travel are:

(1) DA personnel are entitled to government funded travel expenses when testifying in an official capacity on behalf of the U.S.

(2) DA personnel are entitled to government funded travel expenses when testifying in an unofficial capacity on behalf of the U.S.

(3) DA uniformed personnel are entitled to government funded travel expenses when testifying in an official capacity for non-federal government agencies when:

(i) The case is directly related to an agency or agency employee, and

(ii) The case is one in which the agency has a particularly strong, compelling and genuine interest.

(4) DA personnel are not entitled to government funded travel expenses when testifying in an official or unofficial capacity on behalf of a party other than the U.S.

(5) See the JTR for exceptions to these general guidelines and for current guidance regarding funding responsibilities for witness travel.

§ 516.9 Department of Justice witness request in litigation involving the United States.

(a) Department of Justice request for DA personnel as witnesses must be coordinated through the General Litigation Branch, Litigation Division. DA personnel receiving a subpoena or witness request from DOJ should contact the General Litigation Branch for assistance.

(b) Cases in which the Army is a party to the litigation. When DOJ requests current DA personnel to appear as witnesses and in cases involving an activity connected to their employment, the travel expenses are payable by the employing command or activity. (See 28 CFR 21.2).

(1) DOJ initiates a witness request by sending a subpoena and a Request for Personnel to Testify as Government Witness form to the General Litigation Branch. The notice should include the witness' name, social security number, residence or duty station address, phone number, email address or fax number, the location, hour and date of appearance, and number of days needed. DOJ should also include the purpose of the testimony.

(2) The General Litigation Branch will notify the witness and the SJA or legal advisor at the employing command or activity and provide them with travel instructions. If the case does not involve the employee's command or activity, the command or activity represented in the litigation will fund the travel expenses, issue a travel authorization/order for the required travel, and provide the necessary line of accounting. (28 CFR 21.2(d)(1) (JTR C4975–C4H–2)).

(c) Cases in which the Army is not a party to the litigation. When DOJ requests current DA personnel to appear as a witness on behalf of the U.S. in an unofficial capacity, the employee's travel expenses are payable by DOJ. The General Litigation Branch will coordinate with the witness and the witness' command or activity to provide travel instructions and DOJ's line of accounting.

(1) DOJ initiates a witness request by sending a subpoena and a Request for Personnel to Testify as Government Witness form to the General Litigation Branch. The notice should include the witnesses' name, social security number, residence or duty station address, phone number, email address or fax number, the location, hour and date of appearance, and number of days needed. The requestor should also include the purpose of the testimony.

(2) The General Litigation Branch will notify the witness and the SJA or legal advisor at the employing command or activity and provide them with travel instructions and a DOJ line of accounting. The witnesses' command prepares travel orders. Upon completion of the travel the witness will seek reimbursement from DOJ.

§ 516.10 Expert or opinion testimony by DA personnel.

(a) *General rule.* Former and current DA personnel will not provide, with or without compensation, opinion or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States. (See fig 7–6, Sample Expert Witness Denial Letter.) An SJA or legal advisor must coordinate all requests for expert testimony with the appropriate litigating division. The Chief, Litigation Division is the approval authority for all expert testimony requests.

(b) *Exception to the general prohibition.* If a requestor can show exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States, the Chief, Litigation Division, or designee, may grant special written authorization for current or former DA personnel to testify as expert or opinion witnesses at no expense to the United States. In no event may current or former DA personnel furnish expert or opinion testimony for a party whose interests are adverse to the interests of the United States in a case in which the United States has an interest.

(c) *AMEDD personnel.* Members of the Army medical department or other qualified specialists may testify in private litigation (see fig 7–7, Sample of Doctor Approval Letter) under the following conditions:

(1) The litigation involves patients they have treated, investigations they have made, laboratory tests they have conducted, or other actions they have taken in the regular course of their duties; and

(2) Written authorization is obtained under § 516.1(b). AMEDD personnel must limit their testimony to factual matters such as: Their observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment; and

(3) Their testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis not formed at the time of examination or treatment.

(d) *Court-ordered expert or opinion testimony.* If a court or other appropriate authority orders expert or opinion testimony, the witness will notify the appropriate litigating division immediately. If the appropriate litigating division determines it will not challenge the subpoena or order, the witness will comply with the subpoena or order. The appropriate litigating

division, through the local United States Attorney's Office, will immediately communicate with the court on the matter (See *United States ex. rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951)).

(e) *Expert witness fees.* Provisions of the Joint Ethics Regulation and Federal law may limit the ability of DA personnel to retain expert or opinion witness fees. As a general rule, all such fees tendered to DA personnel, to the extent they exceed actual witness travel, meals, and lodging expenses, will be remitted to the Treasurer of the United States.

(f) *Requests from DOJ.* Requests for present or former DA personnel as expert or opinion witnesses from DOJ or other attorneys representing the United States will be referred to Litigation Division unless the request involves a matter that has been delegated by the Litigation Division to an SJA or legal advisor. Current and former DA personnel may not furnish expert or opinion testimony for a party whose interests are adverse to the interests of the United States in a case in which the United States has an interest.

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FIGURE 6 (Sample expert witness response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 6, 2017

SUBJECT: Request for Expert Witness Major Shelly Gibson, in the case of *Plaintiff v. Defendant*, Civil Action File No.: XXX, Superior Court of Fulton County, Georgia

Ms. Sandy McAllister, Esquire
1400 U Blvd.
Fort Washington, MD 20744

Dear Ms. McAllister:

This letter responds to your request dated January 5, 2017, for Major Shelly Gibson to appear as an expert witness in the case of Plaintiff v. Defendant. Your request is denied for the reasons below.

Army Regulations prohibit Army personnel from providing opinion or expert testimony in private litigation, with or without compensation, except when there is an exceptional need or unique circumstance. See 32 C.F.R. § 516. Your request did not meet these requirements.

It is Army policy to exercise strict control over expert witness appearances. The Army observes a policy of strict neutrality in litigation in which the Army is not a party or in which the Army does not have an interest. When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary. Further, the Army seeks to prevent the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities.

If Army personnel testify as expert witnesses in private litigation, their official duties are invariably disrupted, often at the expense of the Army's mission and the federal taxpayer. Finally, the Army must guard against the potential for conflicts of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust and confidence in the integrity of our Government.

This case does not present the facts necessary to justify the requested expert's testimony.* You have not demonstrated an exceptional need or unique circumstance that warrants her appearance. The desired expert testimony can be secured from

** The SJA or legal advisor may deny requests for expert witness testimony; however, only the Chief, Litigation Division may approve requests for expert testimony.*

non-Army sources. Consequently, we are unable to grant an exception to the Army's policy.

Our sole concern in this matter is to protect the interests of the United States Army. If you should have any questions, please feel free to contact me at (xxx) xxx-xxx or xxx.mil@mail.mil.

Sincerely,

(***Signature)***

Robert A. Black
Colonel, U.S. Army
Staff Judge Advocate

FIGURE 7 (Sample doctor approval response)

DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
123 STANDARD STREET
FORT SMITH, NORTH DAKOTA 84165

January 7, 2017

SUBJECT: Request for Medical Personnel Witness Dr. (Major) John Rhule, in the case of *Plaintiff v. Defendant*, Civil Action File No.: XXX, Superior Court of Fulton County, Georgia

Ms. Janet Smith, Esquire
901 N Street
Roaming, WV 92121

Dear Ms. Smith:

This letter responds to your request, dated January 6, 2017, to depose Dr. (Major) John Rhule from the Fort Smith Medical Treatment Facility in the case of Plaintiff v. Defendant. Pursuant to 32 C.F.R. § 516, you may depose him subject to the conditions discussed below.*

He may testify about his treatment of his patient, Sergeant Ian Rock, and laboratory tests ordered or other actions he took in the regular course of his duties. He may testify about factual matters such as his observations of the patient, the treatment prescribed, the corrective actions taken, the recommended courses of recovery, the steps required for treatment of injuries suffered, or the contemplated future treatment.

He may not testify as an expert or provide opinion testimony. His testimony may not extend to hypothetical questions or to a prognosis. Department of Defense and Army policy prohibits present or former Army personnel from providing opinion or expert testimony concerning official information, subjects, or activities in private litigation. Furthermore, Dr. Rhule cannot provide official information that is classified, privileged, or otherwise protected from public disclosure. Finally, in order to protect the Army's interests, an Army attorney must be present for the deposition.

The decision to participate is within the witness' discretion, subject to supervisory approval. The witness' participation must be at no expense to the United States. See 32 C.F.R. § 516.

This authorization only extends to the deposition of Dr. Rhule. A subsequent request and approval is required for Dr. Rhule to appear at trial and provide testimony.

** The legal advisor may use this format to approve a request for trial testimony. Ensure that the request for trial testimony complies with the Army's requirements for release of official information in connection with litigation.*

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Our sole concern in this matter is to protect the interests of the United States Army. If you should have any questions, please feel free to contact me at (xxx) xxx-xxx or xxx.mil@mail.mil.

Sincerely,

(***Signature)***

Stephanie J. Dee
Lieutenant Colonel, U.S. Army
Command Judge Advocate

BILLING CODE 5001–03–C

§ 516.11 Witnesses before foreign tribunals.

(a) *Referral to the SJA.* Requests or subpoenas from a foreign government or tribunal for present DA personnel stationed or employed within that country to be interviewed or to appear as witnesses will be forwarded to the SJA of the command exercising general court-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The SJA will determine the following:

(1) Whether a consideration listed in §§ 516.3 (a)(1)–(7) above applies.

(2) Whether the information requested is releasable under the principles established in this subpart.

(3) Whether the approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity may be involved.

(4) Whether coordination with OTJAG International Law office is necessary to respond to the request.

(b) *United States has an interest in the litigation.* If the SJA determines that the United States has an interest in the litigation, the commander may authorize the interview or order the individual's attendance in a temporary duty status. The United States will be deemed to have an interest in the litigation if it is bound by treaty or other international agreement to ensure the attendance of such personnel.

(c) *United States has no interest in the litigation.* If the SJA determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness under the principles established in § 516.8.

(d) *Witnesses located outside the requestor's country.* If the requested witness is stationed in a country other than the requestor's, the matter will be referred to the General Litigation Branch, Litigation Division.

§ 516.12 Fees and expenses.

(a) *Fees and charges.* DA personnel who respond to requests for official information may collect fees from the requestor for the direct costs of the search, duplication, and review of responsive information pursuant to the authority granted in 31 U.S.C. 9701 and according to the fee schedule and processing guidance outlined in DOD Instruction 7000.14, *DOD Financial Management Policy and Procedures,* Volume 11, Chapter 4 of DOD 7000.14–R, Financial Management Regulation, OMB Circular A–25 ''User Charges'', and 32 CFR 204 ''User Fees.''

(b) *Fee estimate.* When a requestor is assessed fees for processing a request, the responding office must provide an estimate of assessable fees if requested.

(c) *Requestor.* Requestors should indicate a willingness to pay fees associated with the processing of their request before the responding office begins processing the request for official information. No work on a request for official information should begin if: A requestor is unwilling to pay fees associated with a request; the requestor is past due in the payment of fees from a previous request for official information; or the requestor disagrees with the fee estimate. If fees are assessed, responding offices should receive payment before releasing the documents.

(d) *Computation of fees.* The Schedule of Fees and Rates in 32 CFR 204.9 will be used to compute the direct costs of the search, review, and duplication associated with processing a given request for official information. Fees should reflect direct costs (*i.e.,* expenditures actually incurred) for search, review, and duplication of responsive documents. DA Personnel will ensure that no fee is assessed for the benefits listed in 32 CFR 204.8 or where otherwise prohibited.

(e) *Search.* The term ''search'' includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions *thereof* are responsive to the request. Responding offices should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the responding office and the requestor.

(f) *Review.* The term ''review'' refers to the process of examining documents located in response to a request for official information to determine whether release is appropriate under this subpart. It also includes processing the documents for disclosure, such as redaction prior to release. Review does not include the time spent resolving general legal or policy issues regarding the release determination.

(g) *Duplication.* The term ''duplication'' refers to the process of making a copy of a document in response to a request for official information. For duplication of electronic information for delivery in an electronic format, the actual cost, including the operator's time, will be charged, but not a ''per page'' charge unless hardcopy documents were duplicated and handled in order to reduce them to an electronic format for delivery.

(h) *Release of records of other agencies.* An individual requesting records originating in agencies outside DA (*e.g.,* FBI reports, local police reports, civilian hospital records) that are also included in Army records should be advised to direct his or her inquiry to the originating agency. Nevertheless, referring requesters to other agencies does not absolve DA personnel of the requirements to respond to court orders or subpoenas.

§ 516.13 News media and other inquiries.

News media inquiries regarding litigation or potential litigation will be referred to the appropriate public affairs office. DA personnel will not comment on any matter currently or potentially in litigation without proper clearance. Local public affairs officers will refer press inquiries to HQDA (SAPA–OSR), WASHINGTON, DC 20310–1500, with appropriate recommendations for review and approval by the Office of the Chief of Public Affairs. All releases of information regarding actual or potential litigation will be coordinated with Litigation Division prior to release. Normally, DOJ is responsible for responding to media inquiries regarding cases in federal litigation.

For the Judge Advocate General.

Francis P. King,

Colonel, Judge Advocate, Executive Officer.

[FR Doc. 2016–29835 Filed 12–13–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

East Pearl River, Within the Acoustic Buffer Area of the John C. Stennis Space Center, and Adjacent to Lands, in Hancock County, Mississippi; Danger Zone

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is proposing to revise the existing regulations for a danger zone at the Naval Special Warfare Center (NSWC) N31 Branch within the acoustic buffer of the John C. Stennis Space Center on the East Pearl River, in Hancock County, Mississippi. The Navy requested establishment of a danger zone on waterways and tributaries of the