

§ 5.46 Procedure when response to demand is required prior to receiving instructions.

(a) If a response to a demand is required before the appropriate Department official designated in § 5.44 renders a decision, the Department, if necessary, will request that the Department of Justice or the appropriate Department attorney take appropriate steps to stay, postpone, or obtain relief from the demand pending decision. If necessary, the attorney will:

- (1) Appear with the employee upon whom the demand has been made;
- (2) Furnish the court or other authority with a copy of the regulations contained in this subpart;
- (3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Department official; and
- (4) Respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

(b) In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of a Department of Justice or appropriate Department attorney on the employee's behalf, the employee, if necessary, shall respectfully request from the demanding court or authority for a reasonable stay of proceedings for the purpose of obtaining instructions from the Department.

§ 5.47 Procedure in the event of an adverse ruling.

If a stay of, or other relief from, the effect of the demand in response to a request made pursuant to § 5.46 is declined or not obtained, or if the court or other judicial or quasi-judicial authority declines to stay the effect of the demand in response to a request made pursuant to § 5.46, or if the court or other authority rules that the demand must be complied with irrespective of the Department's instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this subpart and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

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

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

- (1) Whether such compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose;
- (2) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;
- (3) The public interest;
- (4) The need to conserve the time of Department employees for the conduct of official business;
- (5) The need to avoid spending the time and money of the United States for private purposes;
- (6) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;
- (7) Whether compliance would have an adverse effect on performance by the Department of its mission and duties; and
- (8) The need to avoid involving the Department in controversial issues not related to its mission.

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

- (1) Compliance would violate a statute or a rule of procedure;
- (2) Compliance would violate a specific regulation or Executive order;
- (3) Compliance would reveal information properly classified in the interest of national security;
- (4) Compliance would reveal confidential commercial or financial information or trade secrets without the owner's consent;
- (5) Compliance would reveal the internal deliberative processes of the Executive Branch; or
- (6) Compliance would potentially impede or prejudice an on-going law enforcement investigation.