

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

RIN 1601-AA01

Production or Disclosure of Official Information in Connection With Legal Proceedings

AGENCY: Office of the Secretary, Homeland Security.

ACTION: Interim final rule.

SUMMARY: This interim final rule establishes procedures for the public to obtain the production or disclosure of official information in connection with litigation, including litigation to which the Department of Homeland Security is not a party.

DATES: This interim final rule is effective January 27, 2003. Written comments may be submitted by February 26, 2003.

ADDRESSES: Submit written comments (preferably an original and three copies) to Associate General Counsel (General Law), Department of Homeland Security, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ellen McClain, (202) 612-1952, not a toll free call.

SUPPLEMENTARY INFORMATION:

I. Background

On November 25, 2002, the President signed into law the Homeland Security Act (Pub. L. 107-296), which created the new Department of Homeland Security (DHS). Pursuant to the provisions of the Act, the new Department came into existence on January 24, 2003.

In order to establish procedures to facilitate public interaction with DHS, DHS is issuing an initial series of proposed and interim final regulations.

II. The Interim Final Rule

This interim final rule establishes procedures governing the disclosure of information in connection with litigation and certain other types of proceedings.

III. Procedural Requirements

Because the DHS came into existence on January 24, 2003, it is necessary to promptly establish procedures to facilitate the interaction of the public with the Department. This interim final rule generally parallels the procedures concerning the disclosure of information in litigation currently used by other agencies. Accordingly, the

Department has determined that notice and public procedure are impracticable, unnecessary and contrary to the public interest pursuant to 5 U.S.C. 553(b)(B). For the same reasons, the Department has determined that this interim rule should be issued without a delayed effective date pursuant to 5 U.S.C. 553(d)(3).

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply.

It has been determined that this rulemaking is not a significant regulatory action for the purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

List of Subjects in 6 CFR Part 5

Classified information, Courts, Freedom of information, Government employees, Privacy.

Authority and Issuance

For the reasons set forth above, 6 CFR Part 5 is amended as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for part 5 continues to read as follows:

Authority: Pub. L. 107-296, 116 Stat. 2135 (6 U.S.C. 101 *et seq.*); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Part 5 is amended by adding subpart C (§§ 5.41 through 5.49) to read as follows:

Subpart C—Disclosure of Information in Litigation

Sec.

- 5.41 Purpose and scope; definitions.
- 5.42 Service of summonses and complaints.
- 5.43 Service of subpoenas, court orders, and other demands or requests for official information or action.
- 5.44 Testimony and production of documents prohibited unless approved by appropriate Department officials.
- 5.45 Procedure when testimony or production of documents is sought; general.
- 5.46 Procedure when response to demand is required prior to receiving instructions.
- 5.47 Procedure in the event of an adverse ruling.
- 5.48 Considerations in determining whether the Department will comply with a demand or request.
- 5.49 Prohibition on providing expert or opinion testimony.

§ 5.41 Purpose and scope; definitions.

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

(1) Service of summonses and complaints or other requests or demands directed to the Department of Homeland Security (Department) or to any Department employee or former employee in connection with federal or state litigation arising out of or involving the performance of official activities of the Department; and

(2) The oral or written disclosure, in response to subpoenas, orders, or other requests or demands of federal or state judicial or quasi-judicial or administrative authority as well as state legislative authorities (collectively, “demands”), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, responses to interrogatories, document production, interviews, or other litigation-related matters, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules (collectively, “requests”), of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the demand or request is or was employed by the Department, or served as Secretary of the Department, as part of the performance of that person’s duties or by virtue of that person’s official status.

(b) The provisions established by this subpart shall apply to all Department components that are transferred to the Department. Except to the extent a Department component has adopted separate guidance governing the subject matter of a provision of this subpart, the provisions of this subpart shall apply to each component of the Department. Departmental components may issue their own guidance under this subpart subject to the approval of the General Counsel of the Department.

(c) For purposes of this subpart, and except as the Department may otherwise determine in a particular case, the term employee includes all former Secretaries of Homeland Security and all employees of the Department of Homeland Security or other federal agencies who are or were appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of Homeland Security, whether residing or working in the United States or abroad, including United States nationals, foreign nationals, and contractors. The procedures established within this subpart also apply to former employees of the Department where specifically noted.

(d) For purposes of this subpart, the term litigation encompasses all pre-trial,