



Architect of the Capitol
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Washington, DC 20515
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United States Government
ORDER 38-2

EFFECTIVE DATE: August 14, 2015

SUBJECT: AOC Official Information and Testimony in Third-Party Litigation

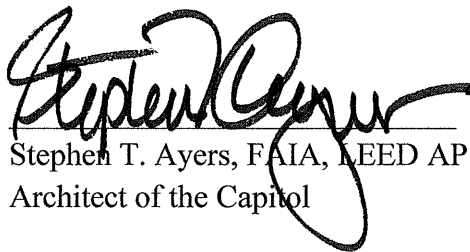
SERIES: Legal

DESCRIPTION: Explains Architect of the Capitol (AOC) procedures regarding the testimony of employees and former employees concerning information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, as witnesses in legal proceedings and the production or disclosure of information contained in AOC documents for use in legal proceedings where the AOC is not a party, pursuant to a demand.

SCOPE: It applies to all AOC organizations and employees.

OPR: Office of General Counsel

SUMMARY OF CHANGES: This order supersedes AOC Order 38-2, dated March 12, 2010. The revised policy updates the current policy format and clarifies language in the policy.



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Architect of the Capitol

ORDER OF THE ARCHITECT OF THE CAPITOL 38-2

AOC OFFICIAL INFORMATION AND TESTIMONY IN THIRD-PARTY LITIGATION

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Section A – General Provisions

1. Purpose

This policy sets forth Architect of the Capitol (AOC) procedures regarding the testimony of employees and former employees when the United States has no direct interest in the litigation. This policy covers when AOC is not a party and there is a request pursuant to a demand for information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, as witnesses in legal proceedings and the production or disclosure of information contained in AOC documents for use in a legal proceeding. The purposes of this policy are to:

- Ensure that employees' official time is used only for official purposes
- Maintain the AOC's impartiality among private litigants
- Ensure that public funds are not used for private purposes
- Protect Congress' interests
- Establish centralized procedures for deciding whether or not to approve testimony or document production

2. Policy

It is AOC policy to make official information of a factual nature, both testimonial and documentary, reasonably available for use in federal courts, state courts, foreign courts and other governmental proceedings unless that information is classified, privileged or otherwise protected from public disclosure. AOC employees shall not provide official information, testimony, or documents, submit to interview, or permit anyone to view such information or visit a site, without prior authorization as required by this policy.

3. Coverage

This policy applies to all AOC organizations and employees, unless otherwise stated. This policy applies to state and federal court proceedings (including grand jury proceedings) and state and local legislative and administrative provisions.

This policy is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases. This policy does not preclude official comment on matters in litigation in appropriate cases. This policy is intended only to provide guidance for the internal operations of the AOC and is not intended to, and does not, and may not, be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the AOC or the United States.

4. Exclusions

This policy does not apply to:

- Matters related solely to an employee's personal dealings.
- Congressional requests or subpoenas for testimony or documents.
- Any request or demand relating to activity within the scope of the Copyright Act and related regulations (Title 17 of the U.S. Code and Title 37, Part 205 of the Code of Federal Regulations), which are governed by Copyright Office regulations.
- Matters covered by contract claims brought pursuant to the Legislative Branch Contract Disputes Act.
- Matters brought pursuant to AOC Order 752-1 (Discipline).
- Matters brought under a negotiated grievance procedure under a collective bargaining agreement to which the government is a party.
- Matters brought under the Congressional Accountability Act.
- Requests by federal government counsel, or counsel representing federal government interests in litigation conducted on behalf of the United States.

5. Definitions

- 5.1. **AOC Employees:** All Architect of the Capitol management officials, supervisors and employees.
- 5.2. **Demand:** Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official AOC information or for the appearance and testimony of AOC employees as witnesses.
- 5.3. **Litigation:** All pre-trial, 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. This term includes responses to discovery requests, depositions and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.
- 5.4. **Management Official:** Management Official means an individual employed by the AOC in a position whose duties and responsibilities require or authorize the individual to formulate, determine or influence the policies of the agency.

5.5. Official Information: All information of any kind, however stored, that is in the custody and control of the AOC, relates to information in the custody and control of the AOC, or was acquired by AOC employees as part of their official duties or because of their official status within the AOC while such employees were employed by or on behalf of the AOC.

6. Authorities

- 6.1. *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951) – Held that a federal agency head may make a determination on their authority to produce documents, and to authorize or limit an employee’s testimony in response to a subpoena or other demand.
- 6.2. 2 U.S.C. §§ 1301, *et seq.* – The Congressional Accountability Act (CAA) applies employment, workplace safety and certain other laws to the legislative branch and its agencies, including the AOC, and lays out dispute resolution procedures for violations.
- 6.3. 28 U.S.C. § 1733 (2015) – Deals with requests for copies of authenticated government documents and the admissibility in court proceedings.
- 6.4. 41 U.S.C. § 7101, *et seq.*; P.L. 110-161 – The Legislative Branch Contract Disputes Act codifies claim and appeal procedures for AOC contracts.
- 6.5. 37 C.F.R. Part 205 – Lays out procedures for requests or demands relating to the Copyright Act.
- 6.6. AOC Order 752-1 (Discipline) – Governs the AOC internal procedures regarding discipline of non-bargaining unit AOC employees.

7. Roles and Responsibilities

7.1. AOC Employees

AOC employees must notify the Office of General Counsel when they receive a demand for documents or testimony in third-party litigation.

7.2. Management Officials

Management Officials are responsible for ensuring compliance with this policy and will provide, upon request, a copy of this policy to all AOC employees within their organizations.

7.3. Office of General Counsel (OGC)

- 7.3.1. The General Counsel is the AOC deciding official to determine when demands on AOC employees for testimony/documents shall be complied with.
- 7.3.2. The General Counsel will provide general policy and procedural guidance by issuing supplemental instruction or specific orders concerning the release of official AOC information and the testimony of AOC employees as witnesses during litigation.
- 7.3.3. The General Counsel will maintain the official file of copies of all demands served on the AOC and AOC responses to these demands.
- 7.3.4. The General Counsel will regularly, but not less than annually provide notice of this policy to all AOC employees.
- 7.3.5. The General Counsel is the designated agent for service of process for the AOC.

7.4. Office of Inspector General (OIG)

The Inspector General is the AOC deciding official to determine when demands on OIG employees for testimony/documents shall be complied with.

Section B – Procedures

8. AOC Employee Testimony

- 8.1. Whenever a litigation request or demand is made upon AOC employees for official AOC information or for testimony concerning such information, the employees shall immediately notify the General Counsel.
- 8.2. No AOC employee may provide testimony or produce documents in any proceeding to which this policy applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, unless authorized by the General Counsel or his/her designee, or the Architect of the Capitol with advice of the General Counsel, for records and testimony relating to the AOC's work for Congress or materials prepared for other federal agencies covered by evidentiary privileges.
- 8.3. When authorized by the General Counsel, AOC employees are permitted to give an interview or deposition, subject to the following limitations:
 - 8.3.1. AOC employees may discuss those factual matters within their personal knowledge.

- 8.3.2. AOC employees may not make statements regarding any opinions formed related to their official duties, unless required in the performance of their official duties to form and express those opinions.
- 8.3.3. AOC employees may not make statements regarding their interpretation of contract plans and specifications unless it was required in the performance of official duties to interpret those documents.
- 8.3.4. AOC employees may not make statements regarding official AOC policy/positions or what they believe to be official AOC policy/positions regarding any matter unless required in the performance of their official duties to form and express official AOC policy/positions.
- 8.3.5. AOC employees may not make statements regarding, nor otherwise divulge or release, the nature or contents of any classified or privileged material.
- 8.3.6. AOC employees may not provide copies of official records unless the AOC has been served with a subpoena and the General Counsel has authorized the records' release.

8.4. Opinion and Expert Testimony

- 8.4.1. AOC employees shall not provide, with or without compensation, opinion or expert testimony concerning official AOC information, subjects, employees, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with written authorization required by this policy.
- 8.4.2. Upon a showing of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to AOC interests or the United States, the General Counsel may in its sole discretion, grant written authorization for AOC employees to appear and testify as an expert or opinion witness at no expense to the United States. It is expected that approval for AOC employees to provide expert or opinion testimony rarely will be granted.

9. Requests for Documents/Testimony

- 9.1. A demand for testimony from an AOC employee must be in writing. A demand for documents must be by subpoena. A demand must contain the following information:
 - 9.1.1. Identification of parties, their counsel, and the nature of the litigation, including the case caption, docket number, court.
 - 9.1.2. Name, address and telephone number of all counsel.
 - 9.1.3. Date and time on which the documents, information or testimony sought must be produced.

- 9.1.4. Requested location for production.
- 9.1.5. Estimated length of time attendance of AOC employees will be required.
- 9.1.6. Description, in as much detail as possible, of the documents, information or testimony sought.
- 9.1.7. Location of the records, including the name, address and telephone number, if known, of the person from whom the documents, information or testimony is sought.
- 9.1.8. Brief summary of the facts of the case and the present status of the case.
- 9.1.9. Statement of the relevance of the matters sought to the proceedings at issue.
- 9.1.10. Description of why the desired testimony or document is not reasonably available from another source and why no document could be provided and used in lieu of testimony.
- 9.2. The requesting party is responsible for any witness fees, travel and per diem in accordance with applicable law. Witness fees are to be made payable to the Treasurer of the United States for deposit in Treasury's miscellaneous receipts.
- 9.3. Requests for authenticated copies of AOC documents for admissibility purposes under 28 U.S.C. § 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents that would otherwise be released pursuant to subpoena, court order or as otherwise required by court. General Counsel advice should be obtained concerning the proper form of authentication and information as to the proper person having custody of the record.

10. Response to Requests for Litigation/Testimony

- 10.1. The General Counsel is authorized to determine whether official information originated by the AOC may be released in litigation; whether AOC employees may be interviewed, contacted, or used as witnesses concerning official AOC information or as expert witnesses; and what, if any conditions will be imposed on such release, interview, contact or testimony.
- 10.2. The General Counsel will determine whether or not compliance with the request would be appropriate and will respond as soon as practicable. The General Counsel, as appropriate, will request assistance from the Department of Justice, the U.S. Attorney's Office or congressional officials where necessary to represent the interests of the AOC, Congress and the employee in any of the foregoing proceedings.

- 10.3. The General Counsel will consider and act upon demands under this regulation with due regard for the interests of Congress, where appropriate, statutory requirements, the AOC's interests, and the public interest, taking into account factors such as whether:
- 10.3.1. Any AOC purposes are violated, such as:
 - 10.3.1.1. Conserving employees' time for conducting official business
 - 10.3.1.2. Avoiding spending government time and money for private purposes
 - 10.3.1.3. Maintaining impartiality among private litigants in cases where a substantial government interest is not involved
 - 10.3.1.4. Any other purpose that the General Counsel deems to be in the interest of Congress or the AOC
 - 10.3.2. The demand is unduly burdensome or otherwise inappropriate under the applicable court rules.
 - 10.3.3. The disclosure, including release *in camera*, is appropriate under the rules of procedure governing the case or matter in which the demand arose or is necessary under the relevant substantive law concerning privilege.
 - 10.3.4. The disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.
- 10.4. If the General Counsel has not acted by the return date on a subpoena, the employee must appear at the stated time and place (unless advised by the General Counsel that the subpoena has been withdrawn) and inform the court (or other interested parties) that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate AOC or congressional officials and shall respectfully request the court (or other authority) to stay the demand pending a final determination on the demand.
- 10.5. If the General Counsel has denied approval to comply with the subpoena, and the court or authority rules that the demand must be complied with irrespective of such a denial, the employee upon whom such a demand has been made shall produce a copy of this policy and shall respectfully refuse to provide any testimony or produce any documents. *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

11. Service of Process

The General Counsel is authorized to accept and sign receipt of service of process served upon the agency or the Architect of the Capitol in an official capacity.

Requesting parties must serve subpoenas to:

Office of General Counsel
Ford House Office Building, Room H2-265A
2nd & D Street, SW
Washington, DC 20515

All demands must contain the requirements listed in section B.9.1, above.

Attachment A – Sample Letter from OGC to Employee Requested to Testify

From: Architect of the Capitol, Office of General Counsel
To: (AOC Employee who has been summoned)
Subj:
Ref:
Encl:

By letter dated (date), enclosure (1), and amendment thereto, dated (date), enclosure (2), (requesting attorney), the attorney representing (opposing party), in the case of (case name, case number, and jurisdiction), has requested (state the nature of the request, date, time, location).

Pursuant to (insert authority), you are authorized to give an interview, and a deposition, if and when scheduled, and upon being served a subpoena, subject to the following limitations:

If the testimony is taped, recorded or transcribed, you and your supervisor shall be provided with a copy of the tape, recording or transcript, free of charge.

You may discuss those factual matters within your personal knowledge.

You may not make statements regarding any opinions you may have formed relating to your official duties, unless you were required in the performance of your official duties to form and express those opinions.

You may not make statements regarding your interpretation of contract plans and specifications unless you were required in the performance of your official duties to interpret those documents.

You may not make statements regarding official AOC policy/positions or what you believe to be official AOC policy/positions regarding any matter unless required in the performance of your official duties to form and express official AOC policy/positions.

You may not make statements regarding, nor may you otherwise divulge or release, the nature or contents of any classified or privileged material.

You may not provide expert testimony.

You may not provide copies of official records unless the Architect of the Capitol has been served with a Subpoena and has authorized the release of said records.

The requesting party is responsible for any witness fees, travel and per diem in accordance with applicable law. Witness fees are to be made payable to the Treasurer of the United States for deposit in Treasury's miscellaneous receipts.

In the event that any party seeks information which is outside the scope of enclosure (1) and the authority granted by this letter or prohibited by the limitations outlined in this letter, you are to decline to answer on the basis that it is outside the scope of the authority granted to you by the Architect of the Capitol and you are to seek advice from this office at 202.225.1210.

//Signed//
General Counsel

Copy to:
(Requesting counsel)

Attachment B – Sample Response to Litigation Request Received by Letter or Phone Call

From: Architect of the Capitol, Office of General Counsel
To: Requesting Party
Subj:
Ref:
Encl:

Dear _____:

This letter confirms your (correspondence) (conversation of (date)), with ((name) of this office), in which you advised that you are seeking official documents of the Architect of the Capitol (or testimony of AOC employees stemming from the performance of their official duties). You previously were advised of the procedures under AOC Order 38-2 that pertain to your request.

The release of official records for litigation purposes, including a release in response to a subpoena, is controlled by AOC regulations. They are issued consistent with *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951), which confirms the authority of the head of a federal agency to control the release of official information, including testimony. They advance the policy that factual official information should be made reasonably available for use in litigation, unless that information is classified, privileged, or otherwise protected from public disclosure.

As indicated by (name), in order for a determination to be made regarding the release of the information you seek, you must submit a request in writing to (title and address of determining authority). The following information is needed for a thorough determination to be made regarding release:

- Identification of parties, their counsel, and the nature of the litigation, including the case caption, docket number, court.
- Name, address and telephone number of all counsel.
- Date and time on which the documents, information or testimony sought must be produced.
- Requested location for production.
- Estimated length of time attendance of AOC employees will be required.
- Description, in as much detail as possible, of the documents, information or testimony sought.

- Location of the records, including the name, address and telephone number, if known, of the person from whom the documents, information or testimony is sought.
- Brief summary of the facts of the case and the present status of the case.
- Statement of the relevance of the matters sought to the proceedings at issue.
- Description of why the desired testimony or document is not reasonably available from another source and why no document could be provided and used in lieu of testimony.

Once the information is received, your request will be processed as expeditiously as possible. Your point of contact is the General Counsel, who may be reached at 202.225.1210.

//Signed//
General Counsel

Copy to:
(Relevant Employee)