

## § 93.4

(g) *NSA attorney.* Refers to an attorney in the NSA Office of General Counsel (OGC).

### § 93.4 Policy.

Official information that is not classified, privileged, or otherwise protected from public disclosure, should generally be made reasonably available for use in Federal and State courts and by other governmental bodies.

### § 93.5 Procedures.

(a) *Release of official information in litigation.* NSA personnel shall not produce, disclose, release, comment upon, or testify concerning any official information during litigation without the prior written approval of the GC. In exigent circumstances, the GC may issue oral approval, but a record of such approval will be made and retained in the OGC. NSA personnel shall not provide, with or without compensation, opinion or expert testimony concerning official NSA information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice (DoJ). Upon a showing by the requester of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the NSA or the United States, the GC may, in writing, grant special authorization for NSA personnel to appear and testify at no expense to the United States. Official information may be released in litigation only in compliance with the following procedures.

(1) If official information is sought, through testimony or otherwise, by a litigation demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph (a)(5) of this section, NSA personnel may only produce, disclose, release, comment upon or testify concerning those matters that were specified in writing and approved by the GC.

(2) Whenever a litigation demand is made upon NSA personnel for official information or for testimony concerning such information, the person upon whom the demand was made shall

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immediately notify the OGC. After consultation and coordination with the DoJ, if required, the GC shall determine whether the individual is required to comply with the demand and shall notify the requester or the court or other authority of that determination.

(3) If a litigation demand requires a response before instructions from the GC are received, the GC shall furnish the requester or the court or other authority with a copy of § 93.1(a) and this part 93. The GC shall also inform the requester or the court or other authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.

(4) If a court or other authority declines to stay the demand in response to action taken pursuant to paragraph 3 of this section, or if such court or other authority orders that the demand must be complied with notwithstanding the final decision of the GC, the NSA personnel upon whom the demand was made shall notify the GC of such ruling or order. If the GC determines that no further legal review of or challenge to the ruling or order will be sought, the affected NSA personnel shall comply with the demand or order. If directed by the GC, however, the affected NSA personnel must decline to provide the information.<sup>3</sup> The NSA personnel shall state the following to the Court:

“I must respectfully advise the Court that under instructions given to me by the General Counsel of the National Security Agency, in accordance with Department of Defense Directive 5405.2 and NSA Regulation 10–62, I must respectfully decline to [produce/disclose] that information.”

(5) In the event NSA personnel receive a litigation demand for official information originated by another U.S. Government component, the GC shall forward the appropriate portions of the request to the other component. The GC shall notify the requester, court, or other authority of the transfer, unless

<sup>3</sup> See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) wherein the Supreme Court held that a government employee could not be held in contempt for following an agency regulation requiring agency approval before producing government information in response to a court order.

such notice would itself disclose classified information.

(b) *Acceptance of service of process.* The following are mandatory procedures for accepting service of process for NSA personnel sued or summoned in their official capacities, and for attempting service of process on NSA premises.

(1) *Service on NSA or on NSA personnel in their official capacities.* § 93.1(d) requires service of process on the NSA or NSA personnel sued or summoned in their official capacity to be made by serving the United States Attorney for the district in which the action is brought, and by sending copies of the summons and complaint by registered or certified mail to the Attorney General of the United States and to the NSA or such NSA personnel. Only the GC or an NSA attorney is authorized to accept the copies of the summons and complaint sent to the NSA or NSA personnel pursuant to § 93.1(d). Acceptance of the copies of the summons and complaint by the GC or an NSA attorney does not constitute an admission or waiver with respect to the validity of the service of process or of the jurisdiction of the court or other body. Such copies shall be sent by registered or certified mail to: General Counsel, National Security Agency, 9800 Savage Road, Fort George G. Meade, MD 20755-6000. The envelope shall be conspicuously marked "Copy of Summons and Complaint Enclosed." Except as provided in paragraph (b)(3) of this section, no other person may accept the copies of the summons and complaint for NSA or NSA personnel sued or summoned in their official capacities, including the sued or summoned NSA personnel, without the prior express authorization of the GC.

(i) Parties who wish to deliver, instead of sending by registered or certified mail, the copies of the service of process to NSA or to NSA personnel sued or summoned in their official capacities, will comply with the procedures for service of process on NSA premises in paragraph (b) of this section.

(ii) Litigants may attempt to serve process upon NSA personnel in their official capacities at their residences or other places. Because NSA personnel

are not authorized to accept such service of process, such service is not effective under § 93.1(d). NSA personnel should refuse to accept service. However, NSA personnel may find it difficult to determine whether they are being sued or summoned in their private or official capacity. Therefore, NSA personnel shall notify the OGC as soon as possible if they receive any summons or complaint that appears to relate to actions in connection with their official duties so that the GC can determine the scope of service.

(2) *Service upon NSA personnel in their individual capacities on NSA premises.* Service of process is not a function of NSA. An NSA attorney will not accept service of process for NSA personnel sued or summoned in their individual capacities, nor will NSA personnel be required to accept service of process on NSA premises. Acceptance of such service of process in a person's individual capacity is the individual's responsibility. NSA does, however, encourage cooperation with the courts and with judicial officials.

(i) When the NSA person works at NSA Headquarters at Fort George G. Meade, Maryland, the process server should first telephone the OGC on (301) 688-6054, and attempt to schedule a time for the NSA person to accept process. If the NSA person's affiliation with NSA is not classified, the NSA attorney will communicate with the NSA person and serve as the contact point for the person and the process server. If the person consents to accept service of process, the NSA attorney will arrange a convenient time for the process server to come to NSA, and will notify the Security Duty Officer of the arrangement.

(ii) A process server who arrives at NSA during duty hours without first having contacted the OGC, will be referred to the Visitor Control Center (VCC) at Operations Building 2A. The VCC will contact the OGC. If an NSA attorney is not available, the process server will be referred to the Security Duty Officer, who will act in accordance with Office of Security (M5) procedures approved by the GC. Service of process will not be accepted during non-duty hours unless prior arrangements have been made by the OGC. For

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purposes of this part, duty hours at NSA Headquarters are 0800 to 1700, Monday through Friday, excluding legal holidays. A process server who arrives at NSA during non-duty hours without having made arrangements through the OGC to do so will be told to call the OGC during duty hours to arrange to serve process.

(iii) Upon being notified that a process server is at the VCC, an NSA attorney will review the service of process and determine whether the NSA person is being sued or summoned in his official or individual capacity. (If the person is being sued or summoned in his or her official capacity, the NSA attorney will accept service of process by noting on the return of service form that "service is accepted in official capacity only.") If the person is being sued or summoned in his or her individual capacity, the NSA attorney will contact that person to see if that person will consent to accept service.

(3) *Procedures at field activities.* Chiefs of NSA field activities may accept copies of service of process for themselves or NSA personnel assigned to their field component who are sued or summoned in their official capacities. Field Chiefs or their designees will accept by noting on the return of service form that "service is accepted in official capacity only." The matter will then immediately be referred to the GC. Additionally, Field Chiefs will establish procedures at the field site, including a provision for liaison with local judge advocates, to ensure that service of process on persons in their individual capacities is accomplished in accordance with local law, relevant treaties, and Status of Forces Agreements. Such procedures must be approved by the GC. Field Chiefs will designate a point of contact to conduct liaison with the OGC.

(4) No individual will confirm or deny that the person sued or summoned is affiliated with NSA until a NSA attorney or the Field Chief has ascertained that the individual's relationship with NSA is not classified. If the NSA person's association with NSA is classified, service of process will not be accepted. In such a case, the GC must be immediately informed. The GC will then contact the DoJ for guidance.

(5) *Suits in Foreign Courts.* If any NSA person is sued or summoned in a foreign court, that person, or the cognizant Field Chief, will immediately telefax a copy of the service of process to the OGC. Such person will not complete any return of service forms unless advised otherwise by an NSA attorney. OGC will coordinate with the DoJ to determine whether service is effective and whether the NSA person is entitled to be represented at Government expense pursuant to § 93.1(f).

### § 93.6 Fees.

Consistent with the guidelines in § 93.1(e), NSA may charge reasonable fees to parties seeking, by request or demand, official information not otherwise available under the Freedom of Information Act, 5 U.S.C. 552. Such fees are calculated to reimburse the Government for the expense of providing such information, and may include:

(a) The costs of time expended by NSA employees to process and respond to the request or demand;

(b) Attorney time for reviewing the request or demand and any information located in response thereto, and for related legal work in connection with the request or demand; and

(c) Expenses generated by materials and equipment used to search for, produce, and copy the responsive information.

### § 93.7 Responsibilities.

(a) *The General Counsel.* The GC is responsible for overseeing NSA compliance with § 93.1(a) and this part 93, and for consulting with DoJ when appropriate. In response to a litigation demand requesting official information or the testimony of NSA personnel as witnesses, the GC will coordinate NSA action to determine whether official information may be released and whether NSA personnel may be interviewed, contacted, or used as witnesses. The GC will determine what, if any, conditions will be imposed upon such release, interview, contact, or testimony. In most cases, an NSA attorney will be present when NSA personnel are interviewed or testify concerning official information. The GC may delegate these authorities.