

§103.22(c), the Chief Counsel should consider the following factors:

(1) Whether the disclosure would be appropriate under the relevant substantive law concerning privilege;

(2) Whether the disclosure would be appropriate under the rules of procedure governing the case or matter in which the demand arose; and,

(3) Whether the requesting party has demonstrated that the information requested is:

(i) Relevant and material to the action pending, based on copies of the summons and complaint that are required to be attached to the subpoena *duces tecum* or other demand;

(ii) Genuinely necessary to the proceeding, *i.e.*, a showing of substantial need has been made;

(iii) Unavailable from other sources; and,

(iv) Reasonable in its scope, *i.e.*, the documents, information, or testimony sought are described with particularity.

(4) Whether consultation with the originating component requires that the Chief Counsel make a separate determination as to the disclosure of the information requested.

(b) *Circumstances where disclosure will not be made.* Among the demands in response to which disclosure will not be authorized by the Chief Counsel are those demands with respect to which any of the following factors exist:

(1) Disclosure would violate a treaty, statute (such as the Privacy Act, 5 U.S.C. 552a, the Trade Secrets Act, 18 U.S.C. 1905, or the income tax laws, 26 U.S.C. 6103 and 7213), or a rule of procedure, such as the grand jury secrecy rule, Fed.R.Crim.Proc. rule 6(e) (18 U.S.C.App.);

(2) Disclosure would violate a specific regulation;

(3) Disclosure would reveal classified or confidential information;

(4) Disclosure would reveal a confidential source or informant;

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, interfere with enforcement proceedings, or disclose investigative techniques and procedures;

(6) Disclosure would improperly reveal confidential commercial informa-

tion without the owner's consent (*e.g.*, entry information);

(7) Disclosure relates to documents which were produced by another agency or entity;

(8) Disclosure would unduly interfere with the orderly conduct of Customs business;

(9) Customs has no interest, records, or other official information regarding the matter in which disclosure is sought;

(10) There is a failure to make proper service upon the United States; or

(11) There is a failure to comply with federal, state, or local rules of discovery.

§ 103.24 Procedure in the event a decision concerning a demand is not made prior to the time a response to the demand is required.

If response to a demand is required before the instructions from the Chief Counsel are received, the U.S. Attorney, his/her assistant, or other appropriate legal representative shall be requested to appear with the Customs employee upon whom the demand has been made. The U.S. Attorney, his/her assistant, or other appropriate legal representative shall furnish the court or other authority with a copy of the regulations contained in this subpart, 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 Chief Counsel, and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

§ 103.25 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the demand in response to a request made in accordance with §103.24 pending receipt of instructions, or rules that the demand must be complied with irrespective of instructions rendered in accordance with §§103.22, 103.23, 103.26, or 103.27 of this subpart not to produce the documents or disclose the information sought, the Customs employee upon whom the demand has been made shall, pursuant to this subpart, respectfully decline to comply

§ 103.26

with the demand. *See, United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 103.26 Procedure in the event of a demand for Customs information in a state or local criminal proceeding.

Port directors, special agents in charge, and chiefs of field laboratories may, in the interest of federal, state, and local law enforcement, upon receipt of demands of state or local authorities, and at the expense of the State, authorize employees under their supervision to attend trials and administrative hearings on behalf of the government in any state or local criminal case, to produce records, and to testify as to facts coming to their knowledge in their official capacities. However, in cases where a defendant in a state or local criminal case demands testimony or the production of Customs documents or information, authorization from the Chief Counsel is required as under § 103.22 of this subpart. No disclosure of information under this section shall be made if any of the factors listed in § 103.23(b) of this subpart are present.

§ 103.27 Procedure in the event of a demand for Customs information in a foreign proceeding.

(a) *Required prior approval for disclosure.* In any foreign proceeding in which the Customs Service is not a party, no Customs employee shall, in response to a demand, furnish Customs documents or testimony as to any material contained in Customs files, any information relating to or based upon material contained in Customs files, or any information or material acquired as part of the performance of that person's official duties (or because of that person's official status) without the prior approval of the Chief Counsel, as described in paragraph (b) of this section.

(b) *Employee notification to Counsel.* Whenever a demand in a foreign proceeding is made upon a Customs employee concerning pre-clearance activities within the territory of the foreign country, that employee shall immediately notify the appropriate Associate Chief Counsel responsible for the pre-clearance location. All other demands in a foreign proceeding shall be

reported by Customs employees to the Chief Counsel. The Customs employee shall then await instructions from the Chief Counsel concerning the response to the demand.

(c) *Counsel notification to originating component.* Upon receipt of a proper demand for Customs information, one which complies with the provisions of § 103.22(c), if the Chief Counsel believes that it will comply with any part of the demand, it will immediately advise the originating component.

(d) *Conditions for authorization of disclosure.* The Chief Counsel, subject to the terms of paragraph (e) of this section, may authorize the disclosure of Customs documents or the appearance and testimony of a Customs employee if:

(1) Production of the demanded documents or testimony, in the judgment of the Chief Counsel, are appropriate under the factors specified in § 103.23(a) of this subpart; and

(2) None of the factors specified in § 103.23(b) of this subpart exist with respect to the demanded documents or testimony.

(e) *Limitations on the scope of authorized disclosure.* (1) The Chief Counsel shall authorize the disclosure of Customs information by a Customs employee without further authorization from Customs officials whenever possible, provided that:

(i) If necessary, Counsel has consulted with the originating component regarding disclosure of the information demanded;

(ii) There is no objection from the originating component to the disclosure of the information demanded; and

(iii) Counsel has sought to limit the demand for information to that which would be consistent with the factors specified in § 103.23 of this part.

(2) In the case of an objection by the originating component, the Chief Counsel shall make the disclosure determination.