

(c) The appropriate Department official designated in § 5.42 will notify the Department employee and such other persons as circumstances may warrant of its decision regarding compliance with the request or demand.

(d) The Office of the General Counsel will consult with the Department of Justice regarding legal representation for Department employees in appropriate cases.

**§ 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;

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(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.

**§ 5.49 Prohibition on providing expert or opinion testimony.**

(a) Except as provided in this section, and subject to 5 CFR 2635.805, Department employees shall not provide opinion or expert testimony based upon information which they acquired in the scope and performance of their official Department duties, except on behalf of the United States or a party represented by the Department of Justice.

(b) Any expert or opinion testimony by a former employee of the Department shall be excepted from 5.49(a) where the testimony involves only general expertise gained while employed at the Department.

(c) Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States, the appropriate Department official designated in § 5.44 may, consistent with 5 CFR 2635.805, in their discretion and with the concurrence of the Office of the General Counsel, grant special, written authorization for Department employees, or former employees, to appear and testify as expert witnesses at no expense to the United States.

(d) If, despite the final determination of the appropriate Department official designated in § 5.44, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a current or former Department employee, that person shall immediately inform the Office of the General Counsel of such order. If the Office of the General Counsel determines that no further legal review of or challenge to the court's order will be made, the Department employee, or former em-

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ployee, shall comply with the order. If so directed by the Office of the General Counsel, however, the employee, or former employee, shall respectfully decline to testify.

**APPENDIX A TO PART 5—FOIA/PRIVACY ACT OFFICES OF THE DEPARTMENT OF HOMELAND SECURITY**

I. For the following Headquarters components of the Department of Homeland Security, FOIA and Privacy Act requests should be sent to the Departmental Disclosure Office, Department of Homeland Security, Washington, DC 20528. The Headquarters components are:

**A**

Office of the Secretary  
Office of the Deputy Secretary  
Office of the Under Secretary for Management

**B**

Office of the General Counsel  
Office of the Inspector General  
Office of International Affairs  
Office of Legislative Affairs  
Office of Public Affairs  
Office of National Capital Region Coordination  
Office of Professional Responsibility  
Office for State and Local Government Coordination

**C**

Directorate of Border and Transportation Security  
Directorate of Emergency Preparedness and Response  
Directorate of Information Analysis and Infrastructure Protection  
Directorate of Science and Technology

II. Requests made to components that have transferred or will transfer into the Department of Homeland Security, should be sent as follows:

A. Former components of the Department of Agriculture:

1. Animal and Plant Health Inspection Service, USDA, APHIS, LPA, FOIA, 4700 River Road, Unit 50, Riverdale, MD 20737-1232
2. Plum Island Animal Disease Center; Submit request to the APHIS address above or, FOIA Coordinator, USDA-REE-ARS-Information Staff, 5601 Sunnyside Avenue, Bldg. 1, Room 2248, Mail Stop 5128, Beltsville, MD 20705-5128

B. Former components of the Department of Commerce:

1. Critical Infrastructure Assurance Office (A former office of the Bureau of Industry and Security); Freedom of Information Coordinator, Bureau of Industry and Security,