

§ 5.81

through 5.49, apply to any subject matter not already covered by this subpart, including but not limited to demands or requests directed to current or former FEMA contractors.

[54 FR 11715, Mar. 22, 1989, as amended at 72 FR 43546, Aug. 6, 2007]

§ 5.81 Statement of policy.

(a) It is the policy of FEMA to make its records available to private litigants to the same extent and in the same manner as such records are made available to members of the general public, except where protected from disclosure by litigation procedural authority (e.g., Federal Rules of Civil Procedure) or other applicable law.

(b) It is FEMA's policy and responsibility to preserve its human resources for performance of the official functions of the Agency and to maintain strict impartiality with respect to private litigants. Participation by FEMA employees in private litigation in their official capacities is generally contrary to this policy.

§ 5.82 Definitions.

For purposes of this subpart, the following terms have the meanings ascribed to them in this section:

(a) *Demand* refers to a subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority (e.g., an administrative or State legislative body), signed by the presiding officer, for the production, disclosure, or release of FEMA records or information or for the appearance and testimony of FEMA personnel as witnesses in their official capacities.

(b) *Employee of the Agency* includes all officers and employees of the United States appointed by or subject to the supervision, jurisdiction or control of the Director of FEMA.

(c) *Private litigation* refers to any legal proceeding which does not involve as a named party the United States Government, or the Federal Emergency Management Agency, or any official thereof in his or her official capacity.

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§ 5.83 Authority to accept service of subpoenas.

In all legal proceedings between private litigants, a subpoena duces tecum or subpoena ad testificandum or other demand by a court or other authority for the production of records held by FEMA Regional offices or for the oral or written testimony of FEMA Regional employees should be addressed to the appropriate Regional Director listed in § 5.26. For records or testimony of the Office of Inspector General, the subpoena should be addressed to the Inspector General, FEMA, Washington, DC 20472. For all other records or testimony, the subpoena should be addressed to the General Counsel, FEMA, Washington, DC 20472. No other official or employee of FEMA is authorized to accept service of subpoenas on behalf of the Agency.

§ 5.84 Production of documents in private litigation.

(a) The production of records held by FEMA in response to a subpoena duces tecum or other demand issued pursuant to private litigation, whether or not served in accordance with the provisions of § 5.83 of this subpart, is prohibited absent authorization by the General Counsel or, as to records of the Office of the Inspector General, by the Inspector General.

(b) Whenever an official or employee of FEMA, including any Regional Director, receives a subpoena or other demand for the production of Agency documents or material, he or she shall immediately notify and provide a copy of the demand to the General Counsel, unless the subpoena or demand seeks the production of documents or material maintained by the Office of Inspector General, in which case a copy of the demand shall be provided to the Inspector General.

(c) The General Counsel (or Inspector General), after consultation with other appropriate officials as deemed necessary, shall promptly determine whether to disclose the material or documents identified in the subpoena or other demand. Generally, authorization to furnish the requested material or documents shall not be withheld unless their disclosure is prohibited by

relevant law or for other compelling reasons.

(d) Whenever a subpoena or demand commanding the production of any record is served upon any Agency employee other than as provided in § 5.83 of this subpart, or the response to a demand is required before the receipt of instructions from the General Counsel (or Inspector General), such employee shall appear thereto, respectfully decline to produce the record(s) on the ground that it is prohibited by this section and state that the demand has been referred for the prompt consideration of the General Counsel (or, where appropriate, the Inspector General).

(e) Where the release of documents in response to a subpoena duces tecum is authorized by the General Counsel (or, as to documents maintained by the Office of Inspector General, the Inspector General), the official having custody of the requested records will furnish, upon the request of the party seeking disclosure, authenticated copies of the documents. No official or employee of FEMA shall respond in strict compliance with the terms of a subpoena duces tecum unless specifically authorized by the General Counsel (or Inspector General).

§ 5.85 Authentication and attestation of copies.

The Director, Deputy Director, Associate Directors, Administrators, the General Counsel, the Docket Clerk, Inspector General, Regional Directors, and their designees, and other heads of offices having possession of records are authorized in the name of the Director to authenticate and attest for copies or reproductions of records. Appropriate fees will be charged for such copies or reproductions based on the fee schedule set forth in section 5.46 of this part.

§ 5.86 Production of documents in litigation or other adjudicatory proceeding in which the United States is a party.

Subpoenas duces tecum issued pursuant to litigation or any other adjudicatory proceeding in which the United States is a party shall be handled as provided at § 5.8.

§ 5.87 Testimony of FEMA employees in private litigation.

(a) No FEMA employee shall testify in response to a subpoena or other demand in private litigation as to any information relating to material contained in the files of the Agency, or any information acquired as part of the performance of that person's official duties or because of that person's official status, including the meaning of Agency documents.

(b) Whenever a demand is made upon a FEMA employee, other than an employee of the Office of Inspector General, for the disclosure of information described in paragraph (a) of this section, that employee shall immediately notify the Office of General Counsel. Employees of the Office of Inspector General shall notify the Inspector General of such demands. The General Counsel (or Inspector General through designated legal counsel), upon receipt of such notice and absent waiver of the general prohibition against employee testimony at his or her discretion, shall arrange with the appropriate United States Attorney the taking of such steps as are necessary to quash the subpoena or seek a protective order.

(c) In the event that an immediate demand for testimony or disclosure is made in circumstances which would preclude prior notice to and consultation with the General Counsel (or Inspector General), the employee shall respectfully request from the demanding authority a stay in the proceedings to allow sufficient time to obtain advice of counsel.

(d) If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with paragraph (c) of this section pending consultation with counsel, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to testify or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing these regulations and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).