



GPO Directive 905.4

SUBJECT CLASSIFICATION

November 13, 2015

ISSUE DATE

Testimony of GPO Employees and Production of Documents in Legal Proceedings

TITLE/SUBJECT

**1. Purpose and Scope.** This Directive provides guidance to GPO employees about what must be done when an employee receives a request or demand to provide official information, documents, or testimony relating to their official duties or because of their official status in a legal proceeding. It also describes the policies and procedures, coordinated through the Office of the General Counsel, when such requests or demands are made. This Directive:

a. applies to the testimony of a Government Publishing Office (GPO) employee and to GPO documents in legal proceedings in which the United States is a party. It also applies in legal proceedings between private litigants in which a litigant requests or demands documents or employee testimony about official information acquired through an employee’s official duties or because of the employee’s official status.

b. sets forth procedures to be followed when an employee is issued a subpoena, order, or other demand (collectively referred to in this Directive as a “demand”) by a court or other competent authority, or is requested by a private litigant, to provide testimony or produce documents concerning official information acquired in the course of performing official duties or because of the employee’s official status.

c. prescribes the policies and procedures of the GPO with respect to the acceptance of service of legal process and pleadings in legal proceedings involving the GPO.

d. does not waive the United States’ or the GPO’s sovereign immunity or any other right or privilege with regard to any legal proceedings, including state or local proceedings.

e. does not apply to any legal proceeding in which an employee is to testify as to facts or events that are in no way related to the employee’s official duties or the functions of the GPO. Nor does it apply to Congressional or Government Accountability Office (GAO) demands for testimony or documents.

f. does not apply to employee testimony in connection with matters arising under (1) the agency’s collective bargaining agreements; (2) under GPO Instruction 650.18, Procedures for Processing Complaints of Employment Discrimination; (3) under 5 C.F.R. parts 432 and 752 relating to corrective actions; or (4) as delineated in 5 U.S.C. § 5520a.

<p>ORIGINATING OFFICE</p> <p>General Counsel</p>	<p>EFFECTIVE DATE</p> <p>November 13, 2015</p>
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**2. Authority.** 44 U.S.C. § 301; 44 U.S.C. § 3102; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

**3. Goals.** The goals of this Directive are to:

- a. Conserve the time of employees for conducting official business;
- b. Minimize the possibility of involving the GPO in issues not related to its mission;
- c. Maintain the impartiality of the GPO among private litigants;
- d. Avoid spending the time and resources of the United States for private purposes or controversies unrelated to GPO's mission;
- e. Protect confidential, sensitive information and the deliberative processes of the GPO;  
and
- f. Establish centralized procedures for deciding whether to approve testimony or produce documents relating to information acquired by an employee in the course of his or her official duties.

**4. Definitions.**

a. ***Demand*** means an order, or subpoena for testimony or documents, or interrogatories, requests for admission, or requests for documents served under the authority of a court order or rule, intended for use or possible use in, or in preparation for, a legal proceeding.

b. ***Document*** means any record or other informational item, regardless of media format and including copies thereof, held by GPO, including without limitation, official letters, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, photographs, electronic media and sound or mechanical reproductions, e-mail (including email attachments) and other electronic communication (including voicemail), text messages, official personnel folders, employee performance files, and promotion files.

c. ***Employee*** means any current or former officer or employee of the GPO.

d. ***General Counsel*** means the GPO General Counsel or the GPO employee(s) in the Office of the General Counsel to whom the General Counsel has delegated authority to act under this Directive.

e. **Legal proceeding** means any case or controversy pending before any federal, state, or local court (including grand jury proceedings), any administrative proceeding pending before any federal, state, or local agency, or any legislative proceeding pending before any state or local

agency. The inclusion of state or local courts or agencies within this definition does not waive sovereign immunity or any privilege for the United States or the GPO for any purpose.

f. **Legal proceeding between private litigants** means any legal proceeding in which neither the GPO nor the United States (including any federal agency or officer of the United States in his or her official capacity) is a party.

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

h. **Request** means an inquiry asking for documents, official information or testimony of an employee sent to the General Counsel in accordance with paragraph 8 or 9 below or an inquiry asking for such information directed to any employee of the GPO that should have gone to the General Counsel in accordance with this Directive.

i. **Testimony** means any written or oral statement by a witness, including depositions, answers to interrogatories, admissions, affidavits, declarations, and statements at a hearing or trial.

## **5. Production prohibited unless approved.**

a. In response to a demand of a court or other competent authority, or to any request, formal or informal, for official information, documents, or testimony by any attorney or legal representative or employee outside of the GPO, no employee or former employee shall, without the prior, written approval of the General Counsel:

- (1) disclose any information relating to materials contained in the files of GPO;
- (2) disclose any information or produce any material acquired or official information learned as part of the performance of the person's official duties, or because of the person's official status;
- (3) make a statement or release official information about official GPO policy or positions, unless required in the performance of his or her official duties to form and express these policies or positions;
- (4) make statements or release information that is classified or privileged; or
- (5) provide opinions or expert testimony concerning official information, subjects, employees, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written authorization from the General Counsel.

b. An attorney in the Office of the General Counsel must be included in all communications between a GPO employee and the Department of Justice, or the legal office of any other Federal agency, unless this requirement is waived by the General Counsel or his designee.

c. Any requests for information from any media or journalistic source must be directed to the Public Relations Office, which will consult with the General Counsel when appropriate.

**6. Testimony by employees in legal proceedings in which the United States is a party.**

In any legal proceeding in which the United States (including any federal agency or officer of the United States) is a party:

a. The General Counsel shall arrange for an employee to testify as a witness for the United States whenever the attorney representing the United States requests it.

b. An employee may testify for the United States both as to facts within the employee's personal knowledge and as an expert or opinion witness when appropriate.

c. An employee who receives a demand to testify on behalf of a party other than the United States when the United States is a party must first inform the General Counsel before taking any action. If approved by the General Counsel, the employee may testify as to facts within the employee's personal knowledge, provided that the testimony be subject to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Evidence, and any applicable claims of privilege.

d. An employee may not testify as an expert or opinion witness, with regard to any matter arising out of the employee's official duties or the functions of the GPO, for any party other than the United States in any legal proceeding in which the United States is a party. However, upon a showing of exceptional need or unique circumstances, and a determination by the General Counsel in consultation with the Department of Justice that anticipated testimony will not be adverse to GPO or United States interests, the General Counsel may grant special written authorization for GPO employees to appear and testify as an expert or opinion witness at no expense to the United States. Such authorization will be rarely granted.

**7. Legal proceedings between private litigants: General rules.** In legal proceedings between private litigants:

a. If, in a legal proceeding between private litigants, an employee is served with a demand, or receives a request, to testify in that employee's official capacity or concerning knowledge or information acquired in the course of the employee's official duties or to produce or provide documents or any information relating to the employee's official duties, the employee shall immediately notify the General Counsel.

b. The proper method for obtaining testimony or documents from an employee is to submit a request to the General Counsel as provided in paragraph 8 and 9 of this Directive, not to serve a demand on the employee.

c. If authorized by the General Counsel to testify pursuant to these rules, an employee may testify only as to facts within that employee's personal knowledge with regard to matters arising out of the employee's official duties. In such a case, the General Counsel will keep the employee informed of the status of the demand for testimony and will give the employee who has been authorized to testify reasonable notice in advance of the date for his or her testimony.

(1) When the proceeding arises from an accident or incident, an employee may testify only as to personally known facts, not reasonably available from other sources, observed by the employee or uncovered during the employee's investigation of the accident or incident or observed by the employee even if he or she did not investigate the accident or incident. The employee shall decline to testify regarding facts beyond the scope of his or her official duties.

(2) The employee shall not testify to facts or any information that are contained in a report, or in any part of a report, unless the employee has obtained permission from the General Counsel to disclose the information.

(3) The employee shall not disclose classified information.

(4) The employee shall not disclose confidential or privileged information unless the employee has obtained permission from the General Counsel to disclose the information.

(5) The employee shall not testify as to facts when the General Counsel determines that the testimony would not be in the best interest of the GPO or the United States if disclosed.

d. An employee shall not testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the GPO. An employee who is asked questions that call for expert or opinion testimony shall decline to answer on the grounds that it is prohibited by this Directive. The General Counsel shall advise the employee on how to proceed if the presiding officer directs the employee to provide expert or opinion testimony.

e. An employee shall not provide testimony at a trial or hearing. An employee's testimony, if approved by the General Counsel, shall be limited to a single deposition, affidavit, or set of interrogatories, concerning the circumstances (e.g., an accident) from which the proceeding arose. Where multiple legal proceedings concerning those circumstances are pending, or can occur, or where multiple parties are involved, it shall be the duty of the private litigant seeking the testimony to ascertain, to the extent feasible, the identities of all parties, or potential parties, to those proceedings and notify them that a deposition has been granted and that they have the opportunity to participate. At least five (5) business days prior to the taking of any testimony, the private litigant shall submit to GPO an affidavit or certification, describing the extent of the search for parties and potential parties and listing the names of the parties and potential parties notified and the dates and methods of notification.

f. Where an employee has already provided testimony, any party wishing to obtain further testimony from that employee concerning the same matter or occurrence, whether in the same or a different private legal proceeding, may submit a request to the General Counsel to waive the restrictions of subparagraph e. of this paragraph. The request shall, in addition to meeting the requirements of paragraph 9 of this Directive, state (1) why the requester should be permitted to gather additional information despite not having previously requested the information when it had an opportunity to do so; (2) why the additional testimony is now required; and (3) why the prior testimony or previously supplied documents are insufficient.

**8. Legal proceedings between private litigants: Procedures to request documents.** In a legal proceeding between private litigants, a party who wishes to obtain documents from the GPO shall submit to the General Counsel a request for the documents at least thirty (30) days in advance of the date by which the documents are needed. The request shall be sent to the General Counsel at:

Office of the General Counsel  
U.S. Government Publishing Office  
732 N. Capitol Street, NW  
Room C-814, Mail Stop: GC  
Washington, D.C. 20401

The request will ordinarily be handled in accordance with the GPO's procedures concerning requests for information and records found in GPO Directive 905.3B, Subject: Public Access to GPO Information and Records. The request must be (1) in writing; (2) detailed and specific; (3) limited to the scope necessary for the specific matter(s) at issue; (4) accompanied by a statement setting forth the relevance of the documents to the proceeding; and (5) specific about the date by which requested documents are needed. The request should be resolved before any request for testimony under paragraph 9 is submitted. Where a request for testimony includes a request for additional documents, it shall indicate precisely how this new request differs in scope from any previous request in order to avoid agency duplication of effort. The General Counsel shall notify the requester of the approval or denial of the request.

**9. Legal proceedings between private litigants: Procedures to request testimony.**

a. Any party seeking the testimony of an employee in a legal proceeding between private litigants, concerning facts within the employee's personal knowledge of matters or official information arising out of the employee's official duties, shall, rather than serving a demand for the testimony, request the testimony at least thirty (30) days before it is intended to be taken or received. The request must be submitted to the General Counsel at:

Office of the General Counsel  
U.S. Government Publishing Office  
732 N. Capitol Street, NW  
Room C-814, Mail Stop: GC  
Washington, D.C. 20401

and must include the following:

- (1) The title of the case, docket number, and the court, or otherwise clearly identify the legal proceeding involved;
- (2) A statement setting forth the basic facts in the proceeding, such as the type, date, and location of an incident(s) or accident(s);
- (3) A summary of the unresolved issues related to the testimony sought;
- (4) A summary of the testimony sought and its relevance to the proceeding;
- (5) A certification with documentary or testimonial support that demonstrates that the information desired is not reasonably available from other sources, including publicly available GPO documents;
- (6) Pursuant to paragraph 7.e. of this Directive, an affidavit or certification describing the extent of a search of parties and potential parties, listing the names of the parties and potential parties notified and the dates and methods of notification;
- (7) A declaration that the party will not seek expert or opinion testimony from the employee or seek the testimony of the employee at a hearing or trial in the proceeding;
- (8) The specific form of testimony (deposition, affidavit, declaration, or answers to interrogatories) desired and the date by which it is desired, with the understanding that only one form of testimony, the one the General Counsel determines to be least burdensome to the GPO, will be permitted for each witness; and
- (9) A copy of any prior request(s) made by the same party to the GPO or other agency of the United States for documents pertaining to the matter being litigated and a copy of the response (not including the documents themselves) to the request(s). Copies of the documents previously disclosed by the GPO or the United States, or a list of those documents, must also be furnished, if requested by the General Counsel.

b. In accordance with the requirements of this section and the general provisions of this Directive, the General Counsel shall notify the requester of the approval or denial of the request. The General Counsel may attach special conditions to its approval.

c. The requesting party is responsible for any witness fees, costs, travel, and per diem rates in accordance with applicable law. Witness fees are to be made payable to the U.S. Government Publishing Office.

**10. Legal proceedings between private litigants: Procedures for taking testimony.**

a. Deposition testimony of an employee of the GPO may be taken only at the office to which the employee is assigned, or any other place designated by the General Counsel.

Additional conditions may be specified under paragraph 9.b. of this Directive. The time of the deposition shall be reasonably fixed to avoid substantial interference with the performance of the employee's or the General Counsel's official duties.

b. Upon completion of the deposition or any other testimony of an employee of the GPO, a copy of the transcript of the testimony shall be furnished, at the expense of the party requesting the testimony, to the General Counsel for the GPO's files.

**11. Legal proceedings between private litigants: Demands.**

a. The proper method for obtaining official information, documents or testimony from an employee relating to official information acquired in the course of the employee's performance of their official duties is through the procedures described in paragraph 9 or 10 above. However, if a demand is served, it must be served on the General Counsel and not on any individual employee.

b. Service.

(1) Demands for documents, official information or testimony must be in writing, and served on the General Counsel, Office of the General Counsel, U.S. Government Publishing Office, Room C-814, STOP: GC, 732 N. Capitol St. NW, Washington, DC 20401, in accordance with the Federal Rules of Civil Procedure.

(2) In any legal proceeding, process or pleadings must be served on the General Counsel and will have the same effect as if served upon the Director in his or her official capacity. Upon accepting service under this section, the General Counsel shall acknowledge the service and take appropriate action. This section does not in any way abrogate or modify the requirements of Rule 4 of the Federal Rules of Civil Procedure regarding service of summons and complaint.

c. If a demand is delivered to or served upon an employee instead of the General Counsel or an Office of the General Counsel employee authorized to accept service on behalf of the General Counsel, the recipient shall decline to accept the proffered service and may notify the person attempting to make service of the requirements for service under this Directive.

d. If an employee erroneously or inadvertently accepts a demand for official information related to his or her official duties or position that has not been validly issued or served on the GPO through service on the General Counsel, the employee must immediately inform the General Counsel's office. The General Counsel, in his or her discretion, may:



(1) grant the employee permission to testify or produce documents only if the purposes of this Directive are met or the General Counsel determines that an exception is appropriate;

(2) instruct the employee not to comply with the demand; and/or

(3) contact the requester of the demand, inform that person of the requirements of this Directive, and may, in the General Counsel's discretion, ask that the demand be withdrawn.

(i) If the requester of the demand refuses to have it withdrawn or fails to comply with this Directive, the GPO may seek to quash the demand or assert any objections or privileges as deemed warranted.

(ii) If the court or other competent authority declines to grant the GPO's motion to quash or other appropriate motion, the General Counsel shall instruct the employee whether to testify or produce documents pursuant to the demand. The General Counsel may permit the testimony under paragraph 9 and 10 of this Directive. If response to a demand is required before the court or other competent authority rules on the motion to quash or other appropriate motion and the court fails to stay the demand, the employee must appear at the stated time and place, produce a copy of this Directive, and respectfully refuse to provide any testimony or produce any documents. The General Counsel shall consult with the U.S. Department of Justice regarding legal representation for the GPO employee in appropriate cases. The General Counsel, or the legal representative arranged for the employee, shall advise the employee how to respond, including whether to testify, if the court or other competent authority rules that the demand must be complied with irrespective of this Directive.

e. Acceptance of service shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, venue, or any other defense in law or equity available under applicable laws, regulations, or rules.

f. GPO is not an authorized agent for service of process with respect to civil or criminal litigation brought against GPO employees, purely in their personal, non-official capacity.

h. Final Determination by the General Counsel. For demands properly served upon the General Counsel, the General Counsel makes the final determination about whether documents, official information, or testimony can be provided. All final determinations are within the sole discretion of the General Counsel and will be based on the factors listed in paragraph 12 below. The General Counsel will notify the requester and the Court or other authority of the final determination, the reasons for the grant or denial of the demand, and any conditions that the General Counsel may impose on the release of documents, or on the testimony of an employee. When in doubt about the propriety of granting or denying a demand for testimony or documents, the General Counsel will consult with the Department of Justice.

(1) When a decision is not made prior to the time a response is required. If a response to a demand is required before the General Counsel can make the determination referred to above, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this Directive, inform the court or other competent authority

that the demand is being reviewed, and respectfully seek a stay of the demand pending a final determination.

(2) In the event of an adverse ruling. If the court or other competent authority declines to stay the demand in response to a request made in accordance with paragraph 11, or if the court or other competent authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the official information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand consistent with *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

## **12. Factors to be considered by the General Counsel.**

a. In deciding whether to authorize the release of official information, documents, or the testimony of employees concerning official information acquired by employees in the course of their official duties, the General Counsel shall consider the following factors:

- (1) Whether disclosure is prohibited by statute, regulation, directive, rule, or other applicable legal authority;
- (2) Whether the demand is unduly burdensome;
- (3) GPO's ability to maintain impartiality in conducting its business;
- (4) Whether the time and resources of the United States would be used for private purposes or for controversies unrelated to GPO's mission;
- (5) The extent to which the time of employees for conducting official business would be compromised;
- (6) Whether the public might misconstrue variances between personal or expert opinions of employees and GPO policy;
- (7) Whether the demand or request demonstrates that the information requested is relevant and material to the action pending, genuinely necessary to the proceeding, unavailable from other sources, and reasonable in its scope;
- (8) Whether a number of similar demands would have a cumulative effect on the expenditure of agency resources;
- (9) Whether disclosure would have an adverse effect on GPO's performance of its mission and duties;
- (10) Whether disclosure would reveal internal deliberative processes;
- (11) Whether disclosure would reveal confidential commercial or financial information or trade secrets without the owner's consent;
- (12) Whether disclosure otherwise would be inappropriate under the circumstances; and
- (13) Any other factor that is appropriate.

b. Testimony or document disclosure will not ordinarily be authorized when:

- (1) The disclosure would violate a statute, regulation, directive, rule or other applicable legal authority;

- (2) The integrity of the administrative and deliberative processes of GPO would be compromised;
- (3) The disclosure would not be appropriate under the rules of procedure governing the case or matter in which the demand arose;
- (4) The disclosure, including release *in camera*, is not appropriate or necessary under the relevant substantive law concerning privilege;
- (5) The disclosure, except when *in camera* and necessary to assert a claim of privilege, would reveal information designated as classified or other matters exempt from unrestricted disclosure; or
- (6) The disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, or disclose trade secrets or similarly confidential commercial or financial information.

**13. No private right of action.** This Directive is intended only to provide guidance for the internal operations of GPO, and is not intended to, may not be relied upon to, and does not, create a right or benefit, substantive or procedural, enforceable at law by a party against the United States or the GPO.

**14. Rights and privileges not waived.**

Nothing in this Directive shall be construed as waiving any right or privilege that GPO or the United States might be entitled to under statute, regulation, directive, court rule, or other legal authority.

**15. Exceptions.**

a. The General Counsel may grant an exception to any requirement in this Directive. The exception may be granted only when the deviation will not interfere with matters of operational necessity, and when the General Counsel determines that:

- (1) It is necessary to prevent a miscarriage of justice;
- (2) The GPO has an interest in the decision that may be rendered in the legal proceeding; or
- (3) The exception is in the best interest of the GPO or the United States.

b. For Office of Inspector General employees and documents, the Inspector General, in conjunction with the General Counsel of the GPO, may permit an exception from any requirement of this Directive if the Inspector General determines, based on 44 U.S.C. Ch. 39, that application of the requirement would be inappropriate.

**16. Inquiries.** All questions concerning this Directive should be addressed to the Office of General Counsel on (202) 512-0033.

905.4  
11/13/2015

**17. Effective Date.** This Directive is effective upon issuance.

A handwritten signature in black ink that reads "Davita Vance-Cooks". The signature is written in a cursive, flowing style.

DAVITA VANCE-COOKS  
Director, Government Publishing Office