Military Divorce: Identifying, Obtaining and Introducing Military Financial and Other Documents as Evidence

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

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Mark E. Sullivan*

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Obtaining Government Documents

When requesting government records, remember that the production of personnel records are governed by many rules of the federal government. The starting point for each inquiry is the Privacy Act of 1974, as amended.¹ There are, of course, numerous procedural roadblocks outside this statute, and this means that it won’t be easy to obtain what you are seeking. You may have to jump over some hurdles to obtain those important documents and data. This often translates into more time and more expense.

The last option should be to request papers from “Uncle Sam.” Perhaps there are easier options. If not, then be prepared to do some extra work to get what you want, and don’t expect results overnight.

Quick Options for Obtaining Documents

When trying to obtain pay or personnel records, there are four options. They vary from “easy” to difficult and “even more difficult.”

First, you should see if you can obtain the appropriate documents from your client. If you represent Mrs. Amanda Jones, the estranged wife of Navy CPO (chief petty officer) Clyde Jones, see if she can help you. When you are seeking information on her husband’s pay and allowances, ask her. She may just happen to have a copy of the most recent Leave and Earnings

Statement (LES) of her husband. Perhaps he printed it from the internet and left it lying on the
dining room table. Her quick action in snapping a picture of it on her “smart phone” would save
you a boatload of work in regard to determining his pay and allowances. Even an LES which is
a few months old will be helpful in determining what compensation he’s receiving at present.
With this pay statement in hand, you can go to the Regular Military Compensation Calculator,
which is located at http://militarypay.defense.gov/pay/calc/index.html to determine the “civilian
equivalent” of his pay and allowances, some of which are non-taxable. This would be of
significant help in determining family support.

The same is true with retirement earnings. What if the document concerned were his
Retiree Account Statement? Her quick action in copying or preserving the document would
make it far easier to prove what his retired pay was than the often-cumbersome process of
discovery.

**Discovery Options**

The second option is discovery. Don’t overlook requesting documents and information
through the civil procedure discovery rules. A request for documents, pursuant to Rule 34 (that’s
the federal rule; look to your own state rule for the equivalent provision as to document
production) will usually specify a response date within 30 days. If CPO Jones has the document
you are requesting in his possession, then he is obligated to turn it over at the date and time
specified in the document request.

The real issue here is: what documents are in the possession of the other party? Some
years ago, the LES used to be mailed to the servicemember (SM). That’s no longer the case.
Today the SM’s LES is found at the secure website of the SM, located at https://mypay.dfas.mil.
This is the source for information about the active-duty pay, Reserve/Guard pay, retired pay,
Combat-Related Special Compensation statements and W-2 statements for the individual.

So is it in the possession of CPO Jones if it’s on the Internet? One could argue by analogy that a document in CPO Jones’ lock box at the bank is still in his possession and should be produced. Likewise he should be compelled to produce through a document request those papers which are in the hands of an agent of his, such as a bank officer holding a copy of his financial statement. Can you use these parallels to obtain the LES stored at a secure Internet website?

Without documents from the above sources, you will usually need to obtain consent of the individual concerned. A consent for the release of documents that is acceptable to DFAS (the Defense Finance and Accounting Service) is found at APPENDIX 2. Ask Clyde’s attorney to have him to execute the form so that you can transmit it to the military pay center right away. If there is resistance, ask the court to order him to sign it.

Getting Documents Directly from the Government

Finally, if all of these options fail, you’ll need to obtain the information from the federal government. How does one do this?

One alternative is to use interrogatories served upon the U.S. government. The federal government has promulgated rules which allow you to serve the government with interrogatories to answer specific questions.\(^2\) So your questions might be:

1) What was the base pay of Navy CPO Clyde R. Jones, SSN 222-11-3344, during the period June 1 – December 1, 2012?

2) What additional allowances did he have in those months, and what was he paid for each?

3) What mandatory deductions did he have from that pay in #1), specifying the nature and

\(^2\) 5 CFR § 581.303
amount of each?

4) What were his allotments from that pay in #1), specifying the nature and amount of each??

Are you anticipating problems with the government accepting and complying with your documents? The requirements for the U.S. government honoring legal process are found at 5 CFR 581.305.

Further Problems…

For the “big picture” on providing information and documents in litigation cases, see 32 CFR § 93.1 and DoD Directive 5405.2, 1 “Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses,” July 23, 1985, reprinted in 32 CFR part 97. You should read this information carefully, since the legal process served on the U.S. government must be in compliance with agency rules and regulations. The court cannot impose sanctions on an agency or a federal employee for refusal to comply with your subpoena or court order. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951) (federal employee could not be held in contempt for following a rule of his agency that demanded that the agency provide approval before producing - in response to a court order - government information).

Each of the services has a “litigation regulations.” That of the Army – the largest military service – is found at AR [Army Regulation] 27-40. An entire chapter is dedicated to service of process.

Compulsory Process

To use compulsory process, get an order from a court of competent jurisdiction. This order could be in the form of a subpoena, but it still must be signed by a judge. While it may be helpful to have a certified copy of the order or subpoena, that is not necessary.
Where to send the documents demanding a response? Service of legal process (with the appropriate addresses for each agency) is covered at 5 CFR § 581.202.

Consider consulting the servicing lawyer or judge advocate for the command you’re contacting. According to COL Duncan Aukland, Staff Judge Advocate for the Ohio National Guard, “If the testimony is that important, then you should be able to explain it to me so I can talk to the supervisor about providing the testimony. In light of the current conflict, we need our folks on the job, not hanging out at the courthouse for hours and (perhaps) days.”

Aukland adds, “If the records can be released, it is in our command’s interest to make them available, and make them admissible under Evidence Rules 902 and 1005. We often use Dept. of the Army Form 4 for the production and admission of evidence requested from us.”

**Where to Send the Documents?**

If obtained by compulsory process from the US government, where should the documents be sent? Some attorneys want the records transmitted directly to them, so that they can provide a copy to the other side and save a trip to the courthouse to obtain them when they arrive. Others prefer, at least for the sake of appearances, to have the judge require that the records he or she has ordered to produce shall be returnable to the court. Once the records are there, counsel can ask the court for a copy or have the clerk transmit a photocopy to each of the attorneys. Still others want the records to be sealed upon arrival at the court.

The court order should not set an unrealistic deadline for production of the records. In general it is best to allow two to four weeks for a response, and usually four weeks will produce a better chance of successful production. To put it another way, you cannot demand that the government produce documents now for a trial that’s a week away. Details of how to request documents in a court order or subpoena are found below.
An example of a request for documents which the author used in a custody case (with fictitious names and other information) is found at APPENDIX 1. This is a motion to obtain Department of the Navy disciplinary and investigative records, along with a subpoena and a letter to the Office of General Counsel, Department of the Navy. All these documents were prepared pursuant to the regulations cited therein and with unofficial guidance by a command judge advocate at the installation involved. This officer knew the contents of the records and was willing to point out what needed to be done to obtain their release. Despite all these precautions, the Navy still denied the request and directed the author to federal court if he wanted to challenge the ruling! This is not the usual response when payroll records are requested; in this particular case, the officer involved was a high-level commander and the documents detailed sensitive information about his activities with the wife of a fellow officer.

Based on this experience, the author cautions that one should not assume that every document request, even when done properly, will result in compliance. Some cases are just too sensitive for release of their documents to a court in a divorce case without the intervention of a federal district court judge, which most clients cannot afford. In general, however, a domestic court order for pay records (Leave and Earnings Statement, Retiree Account Statement or, in the case of the Department of Veterans Affairs, records of VA disability compensation) are usually honored by the government agency involved.

**Rules and Regulations**

The Department of Defense has established its own regulations, pursuant to the Act and to DoD Directive 5400.11, and this privacy publication is set out in “Department of Defense Privacy Program,” DoD 5400.11-R (May 14, 2007). You can find the directives, publications, administrative instructions, memoranda, and forms you need from the “DoD Issuances” website,
located at http://www.dtic.mil/whs/directives/. As an agency of DoD, the Defense Finance and Accounting Service is bound by these rules. The specific rules that DFAS has promulgated regarding release of information are found at DoD Financial Management Regulation, Volume 7B, Chapter 18, “Release of Information,” which contains specific references to the regulations of each of the DoD branches of service. The DoDFMR can be found at http://comptroller.defense.gov/fmr.

The Coast Guard is part of the armed forces. An agency of the Department of Homeland Security, the Coast Guard has promulgated its rules at the CG-61 Reference Guide, published by the USCG Office of Information Management. Go to www.uscg.mil and type “CG-61 Reference Guide” into the SEARCH window. Extensive information about release of information from the Coast Guard may be found at the USCG’s Freedom of Information & Privacy Act website located at http://www.uscg.mil/foia.

**Dealing with the VA and National Guard**

Records for the Department of Veterans Affairs, such as disability rating letters, rating appeals, and applications for VA disability compensation, are not found in the Department of Defense. These records can be found at the regional VA office. It is best to contact the officer there in charge of FOIA (Freedom of Information Act) and Privacy Act matters when attempting to obtain records. A friendly phone call (one not accompanied by an unrealistic deadline) is the proper way to start the process.

When talking with the VA, be specific about what records you are requesting. Don’t ask, for example, to get copies of any and all records regarding the disabilities claimed by the veteran. If you want the most recent communication from VA to the individual which shows his current disability rating (which is expressed in multiples of ten, e.g., 20%, 50% or 90%), then ask for
The National Guard has two components, the Army National Guard and the Air National Guard. Both of these are operated on a state-by-state basis through the state’s adjutant general. That is where to send requests for pay information or National Guard retirement points.

**Discharge Forms, Personnel Records**

In addition to Retiree Account Statements and Leave and Earnings Statements, attorneys often need to see the discharge form of servicemembers to determine years of creditable service. The National Personnel Records Center (NPRC) has provided the following website for veterans to gain access to their DD-214s (that is, Report of Separation) online: [http://www.archives.gov/veterans](http://www.archives.gov/veterans). Military veterans and the next of kin of deceased former military members may now use a new online military personnel records system to request documents.

Requesters must supply all information essential for NPRC to process the request, and delays occur when NPRC has to ask veterans for additional information because the initial request is incomplete. The new web-based application was designed to provide better service on these requests by eliminating the records center’s mailroom processing time.

Also available to the veteran or (when the veteran is deceased) the next of kin is Standard Form 180, which can be downloaded from the online website mentioned above. The title is “Request Pertaining to Military Records,” and it may be used to obtain discharge papers and the Official Military Personnel File (OMPF) of the veteran. Also subject to disclosure through SF 180 are medical records. This includes service treatment records outpatient health records and dental records. If hospital records (i.e., inpatient treatment) are requested, the full name of the facility and the date of admission must be provided (e.g., Womack General Hospital, Ft. Bragg,
The form requires the signature of the individual. There are no specific terms on the form which mention court orders, but it may be useful to use this form even when an individual veteran will not sign the request and it must go through the court process. In that case, the applicant would probably fill in the following sample information at Section III, Part 1, which lists “Requester Is” – Judge Jane Doe, Bay County Circuit Court, East Virginia, pursuant to court order 4/13/2013, copy enclosed.

The second page of SF 180 shows “Location of Military Records,” with addresses for each category of servicemember, retiree or other veteran. The form shows addresses for the Air Force Personnel Center, the Air Reserve Personnel Center, the Coast Guard’s Personnel Service Center, the National Personnel Records Center, the Navy Personnel Command, Headquarters of the Marine Corps and of the Marine Corps Reserve, the U.S. Army Human resources Command, the Records Management Center of the Department of Veterans Affairs, the National Archives and Records Administration, and the Division of Commissioned Corps Officer Support of the Public Health Service.

**Requests for Payroll Information of Servicemembers**

DFAS will respond to a written request in the form of a subpoena for information regarding the pay of military personnel. This includes a printout of pay information for up to the last two years as well as individual Leave and Earnings Statements. The subpoena must be signed by a state or federal judge. It must include the SM’s name and Social Security number. The request letter and subpoena should be sent to:
Getting Government Records into Evidence

What about getting government records into evidence when the other side won’t settle and you have to go to court? If the other side is unwilling to stipulate to the authenticity and admissibility of the records which you have, what should you do?

The first order of business is to check your state’s rules of evidence to find out the requirements for admission of business records. Not surprisingly, each state is different. Some of the states have adopted the Federal Rules of Evidence (FRE), and some have their own evidence codes. For those who are using the state version of the FRE, the business records rule is contained at FRE 902 (11), but your rule might be slightly or entirely different. Make sure you know what is needed as essential statements in the affidavit.
Don’t expect easy going. Many attorneys think that the agencies have a “go-by” or an example for such an affidavit. That’s not so. There is no general template which is commonly used across agency lines. Many attorneys complain that they are being told they have to submit to the agency a sample of what the wording should be. “One size fits all” is not the rule in this area. It is a common practice to require the applicant’s attorney to draft the affidavit, which is they reviewed and revised by the legal office in the agency. You must submit the wording to the federal office which has the records. It will then adopt or adapt the language as needed.

Once the documents have been produced, does the agency just say that they’ve provided the records and they’re accurate? If that were the response, it would be a major mistake in terms of trial practice. How will the court know what records were provided? How will the judge know that the documents which you have are the ones that the agency sent to you? The records must be attached to the affidavit, not merely referred to in the document.

Whether the agency sends the affidavit to the attorney or to the court is an issue. The answer belongs to the requesting attorney. Below are observations on the two options.

If the government sends the records and affidavit – the “packet” – to the court under seal, then there can be no legitimate question as to whether you have substituted documents or altered them. The judge is the one who will open the packet and determine what records have been provided. On the other hand, unless you get an extra copy of what’s in the packet, you won’t know what is in the records until the court opens them. This leads to three alternative solutions:

a) Get a copy from the agency (by consent of the individual concerned or by court order or judge-signed subpoena). Then request the documents again, along with a business records affidavit that accompanies your request.
b) Get the documents (as above) from the agency, and then send them back to the agency with your business records affidavit, so they can certify that these are indeed the records provided, and then can attach them to the affidavit.

c) Have the agency send the packet to the court but also send copies to the attorney.

A sample affidavit from the Department of Veterans Affairs will demonstrate what is usually included. See the example below.
BUSINESS RECORDS DECLARATION
Pursuant to 28 U.S.C. § 1746

This is a certification of authenticity of domestic business records pursuant to Federal Rules of Evidence 902 (11).

I, Larry G. West, attest under the penalties of perjury (or criminal punishment for false statement or false attestation) that:

1) I am employed by the United States Department of Veterans Affairs (DVA).
2) My official title is Paralegal.
3) I am a custodian of records for the DVA.
4) Each of the records attached hereto is the original record or a true and accurate duplicate of the original record in the custody of the DVA, and I am a custodian of the attached records.
5) The records attached to this certificate were made at or near the time of the occurrence of the matters set forth.
6) The records attached were made by (or from information transmitted by) a person with knowledge of those matters.
7) Such records were kept in the course of a regularly conducted business activity of the DVA.
8) Such records were made by the DVA as a regular business practice.

The enclosed records are:

- Letter to Jacob Harris Stein, XXX-XX-5566, dated April 12, 2010, titled “Your Original VA Disability Rating and Reasons for the Rating” and

Dated: July 13, 2013

Larry G. West
Larry G. West, Paralegal

Subscribed and sworn to before me this ____ day of ______________, 2013.

________________________________
Notary signature
My commission expires: ________________________
APPENDIX 1

MOTION AND LETTER FOR NAVY DOCS

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF BUCKINGHAM DISTRICT COURT DIVISION
FILE NO. 08 CV 223

ROGER K. BAIRD, JR.,
Plaintiff

v.
NANCY L. BAIRD,
Defendant

MOTION FOR NAVY RECORDS

Plaintiff hereby moves this Court pursuant to N.C.G.S. §1A and Rule 45 of the Rules of Civil Procedure for an order granting a subpoena directed to the United States Navy for the production of documents, as further explained below. The Plaintiff shows the court that:

BACKGROUND

1) Plaintiff is an officer in the U.S. Navy, currently stationed in Japan and the Defendant is a Navy officer, currently stationed in Florida. The parties were married to each other on April 12, 1997 and subsequently separated from each other on October 9, 2008. There are two minor children born during the parties’ marriage: Ellen G. Baird, born August 2, 2001 and Lewis R. Baird, born April 19, 2003.

2) On November 3, 2008, Plaintiff filed his Complaint seeking, inter alia, child custody.

DISCOVERY REQUESTS FROM BOTH PARTIES

3) Both parties have asked for all documentation that the other party has related to a disciplinary hearing involving the conduct of a certain Commander John Q. Doe in December 2008. Mr. Doe is the former commander of the Navy’s Far East Intelligence Group, based at Naval Air Facility Watusi in Japan. Upon information and belief, Defendant had an extramarital affair with Mr. Doe, this conduct destroyed the Baird marriage, it also destroyed Mr. Doe’s career and it had an impact on the care and custody of the minor children.

4) Plaintiff in discovery has requested that Defendant admit this affair and explain the consequences that her behavior with Mr. Doe had on the family, including the effects on the minor children.
5) Then-Commander Doe was relieved of his duty as commander of the Group on December 23, 2008. He received nonjudicial punishment, referred to as “Admiral’s Mast,” as a direct result of his committing adultery with the wife of a fellow officer.

6) The parties both seek to obtain from each other all documentation about these proceedings in December 2008. Both parties have demanded, through their attorneys, to review this documentation.

**RELEVANCE TO THE CASE**

7) The Plaintiff, by way of discovery, has requested that Defendant both admit the affair and explain specific details from Defendant as to the nature of her relationship with Mr. Doe, its duration and its impact on the minor children.

8) The information in Mr. Doe’s case file associated with the administrative action taken in December 2008, will tend to show that Mr. John P. Doe did, in fact, have an extramarital affair with the Defendant. It will also show the nature, frequency and duration of the Defendant’s conduct with Mr. Doe, which directly correlates to her absences.

9) The case file will show documents, e-mails, and witness statements regarding the lapses of time in which Defendant left the minor children to be with Mr. Doe.

10) The case file will also assist in impeaching Defendant on her sworn statements if she denies that she had an affair, is untruthful as to its nature or duration, denies that her behavior had an impact on the children or claims that her conduct never resulted in their being left alone, with no supervision.

**PROCEDURES FOR OBTAINING NAVY RECORDS**

11) The United States Navy, pursuant to its publication, SECNAVINST 5820.8A, Enclosures (3) and (4), describes the proper procedure for obtaining Navy records. The Secretary of the Navy’s sole delegate for service of process is the General Counsel of the Navy, who must be served with a subpoena by certified mail or Federal Express at the following address: General Counsel of the Navy, Navy Litigation Office, 720 Kennon Street SE, Bldg. 36 Room 233, Washington Navy Yard, DC 20374-5013. The office of the General Counsel of the Navy will subsequently forward the matter to the proper determining authorities for action.

12) In addition to a subpoena requesting specified Navy records, a detailed written request must be submitted to the appropriate determining authority to assure an informed and timely evaluation of the request. The outline of information to be provided is included in Enclosure (4) of SECNAVINST 5820.8A. Additionally, counsel for the Plaintiff has prepared this detailed written request to accompany the court’s subpoena to the General Counsel of the Navy and it is included with this motion.
13) The subpoena in this case should request the following:
   a) The Navy’s internal investigation of the alleged inappropriate relationship between John P. Doe and Nancy L. Baird, in Japan, Okinawa, and elsewhere during and before December 2008 including witness statements, e-mails; and
   b) The Navy’s record of administrative, punitive, nonjudicial or other action against Commander Doe.

**WHEREFORE** the Plaintiff prays that this Court:

1) Sign a subpoena (copy attached hereto) for production of the United States Navy’s disciplinary and investigative files for Commander John P. Doe.

2) Grant such other relief for Plaintiff as is just and proper.

______________________________  Date:____________/13
Jack M. Wilson, Attorney for Plaintiff
926 Greenwood Drive
Warren, NC 27604
Pursuant to N.C.G.S. §1A and Rule 45 of the North Carolina Rules of Civil Procedure, the court issues this subpoena:

To: General Counsel of the Navy, Navy Litigation Office, 720 Kennon Street SE, Bldg. 36 Room 233, Washington Navy Yard, DC 20374-5013

Date: April 17, 2013

Documents:
1) The Navy’s internal investigation of the alleged inappropriate relationship between Commander John P. Doe, SSN 432-22-5567, and Nancy L. Baird, in Japan, Okinawa, and elsewhere during and before December 2008 including witness statements, documents and e-mails; and
2) The Navy’s record of administrative, punitive, nonjudicial or other action against Commander Doe.

Place for Production: Buckingham County Courthouse, Room 141, Warren, NC 27604 (P.O. Box 355)

Date: _______________ /13

Ellen G. Lindhoffer, Judge Presiding
March 1, 2013
General Counsel of the Navy
Navy Litigation Office
720 Kennon Street SE
Bldg. 36 Room 233
Washington Navy Yard, DC 20374-5013

Re: SECNAVINST 5820.8A, Enclosure (4) – Subpoena for Navy Records

To Whom It May Concern:

Pursuant to SECNAVINST 5820.8A, Enclosure (4): Contents of a Proper Request or Demand, the undersigned attorney for the Plaintiff herein provides the requisite written request for documents to be produced pursuant to a subpoena duces tecum (attached hereto). In making said request, we disclose the following:

1. **Identification of parties, their counsel, and the nature of the litigation:**
   a. **Case Caption:** Roger K. Baird, Jr. vs. Nancy L. Baird
   b. **Docket Number:** 08 CVD 19038
   c. **Court:** District Court, Buckingham County, North Carolina
   d. **Plaintiff:** Roger K. Baird, Jr.
   e. **Defendant:** Nancy L. Baird
   f. **Attorney for Plaintiff:** Jack M. Wilson, 9926 Greenwood Drive, Warren, NC 27604; phone number - 919-999-7766; fax number - 919-233-4455
   g. **Attorney for Defendant:** Janet Kelly, 208 Green Valley Ave., Warren, NC 27604; phone number - 919-334-8211; fax number – 919-243-9967
   h. **Date and Time that documents must be produced:** April 17, 2009, at 9:00 a.m.
   i. **Location for Production:** Clerk of Court, ATTN: District Court Judge Ellen G. Lindhoffer, PO Box 355, Warren, NC 27604 Buckingham County Courthouse, Room 141, Warren, NC 27604

2. **Identification of information or documents requested**
   a. Documents requested are the case files associated with the administrative action taken against Commander John P. Doe, former commander of the Far East Intelligence Group based at Naval Air Facility Watusi in Japan, in December 2008.
   b. The location of the requested case files associated with the administrative action taken against Commander John P. Doe in December 2008 is at Naval Air Facility Watusi Japan.

3. **Description of why the information is needed**
   a. **Summary and Posture of Case:** Commander Roger K. Baird, Jr., the Plaintiff, filed a lawsuit in North Carolina against the Defendant, Nancy L. Baird, for claims related to child custody, child support, and equitable distribution. The assigned judge on the case is District Court Judge Ellen G. Lindhoffer. The minor children currently reside with Plaintiff in Japan. Defendant current resides in Norman, Oklahoma. On May 13, 2009 the Warren County District Court will conduct a temporary child custody hearing.
   b. **Statement of Relevance:** The information in the case files associated with the administrative action taken in May 2008 against former Commander John P. Doe, former commander of the Japan-based Carrier Air Wing 5 based at Naval Air Facility Watusi in Japan, is relevant for the foregoing reasons:
      i. It will show that the Defendant carried on an extramarital affair with Commander Doe;
      ii. It will also show that she was absent from the children during the periods of time when she was with Commander Doe;
iii. When she was absent, depending on the dates and times, the children were either left alone or in the care and custody of Commander Baird, who is petitioning for custody of the children.

c  **Testimony Sought:** Plaintiff seeks no factual, expert or opinion testimony from the U.S. government.

4. **Additional Considerations**
   
a  Plaintiff is willing to pay in advance all reasonable expenses and costs of searching for and producing documents associated with the administrative action taken against Commander John P. Doe in May 2008.

b  We will provide Defendant’s attorney with a copy of all correspondence and documents originated by the determining authority so they may have the opportunity to submit any related litigation requests and participate in any discovery.

If the General Counsel of the Navy requires any additional information in evaluating this request, please let our office know and we shall provide same.

Sincerely,

Jack M. Wilson
Attorney at Law
APPENDIX 2

PRIVACY ACT RELEASE FORM

DATA REQUIRED BY THE PRIVACY ACT OF 1974 (5 U.S.C. 552a). AUTHORITY: Title 5 U.S.C. 552, Title 5 U.S.C. 552a, Title 5 U.S.C. 551, DoD 5400.7-R, and DoD 5200.1-R. PURPOSE: To obtain and maintain information upon which to base a reply or inquiry. ROUTINE USES: Data may be provided under any of the DoD "Blanket Routine Uses" published at http://privacy.defense.gov/notices/. Disclosure: Voluntary; however, if you fail to provide all the requested information DFAS may not be able to fulfill your request in a timely manner.

Pursuant to the Privacy Act of 1974, I hereby authorize ___________________ to obtain information from any federal government records information regarding my entitlements as the former spouse of a retired military member, including but not limited to, records regarding military retired pay (as shown on the Retiree Account Statement), the Survivor Benefit Plan, VA disability compensation, current pay and allowances (as shown of the Leave and Earnings Statement) or any other benefit or entitlement from the federal government.

Special instructions or limitations (or “none”)
______________________________________________________________________________
______________________________________________________________________________
______________________________________________________________________________

Signature ___________________________________   Date _____________
Printed Name ____________________________________
Address __________________________________________________
City _____________________________   State _____   Zip___________
Home Telephone_______________________  Work Telephone______________________
Date of Birth _______________   Claim Number (if applicable) ___________________
Requests for Official Information and Government Witnesses

Major Steve Watkins and Major Jennifer McKeel*

I. Background

The Department of the Army (DA) receives a significant number of requests for official information and the appearance of personnel as witnesses for use in litigation, commonly referred to as *Touhy* requests. For the Army, *Touhy* requests are governed by 5 U.S.C. § 301, 32 Code of Federal Regulations (C.F.R.) § 97 (codifying Department of Defense Directive (DoDD) 5405.2), and 32 C.F.R. § 516 Subpart G (codifying Army Regulation (AR) 27-40 Chapter 7), as well as the Supreme Court’s decision in *Touhy*.

This article is meant to provide judge advocates and Department of the Army (DA) civilian attorneys with an overview of the *Touhy* framework; it is not designed to be all-inclusive as to every possible legal issue that could arise when confronted with a *Touhy* request. Rather, this article describes the most common requests received and provides guidance on how best to respond. The first part focuses on requests for official information in the form of documentary or other tangible information. Part two addresses requests for testimony from DA or military personnel as it relates to official information. Finally, this paper addresses subpoenas and how best to respond.

II. Requests for Information

*Touhy* requests can and should be acted upon by the servicing Staff Judge Advocate (SJA) or Command Counsel of the appropriate office, command, or activity with control over the official information being requested. Requests for official information, whether in the form of documents or testimony, must be submitted in writing and must set forth, the nature and relevance of the official information sought. The request must also be submitted at least 14 days before the desired date of production. An initial response should be provided to the requester acknowledging receipt by the correct office and giving an approximate date of completion, if additional time is required.

Not surprisingly, many *Touhy* requests are submitted to the incorrect office or command. When this happens, every effort should be made by the receiving office to determine the correct location for processing. The requester should be notified in writing of the correct point of contact, and a positive handoff with the proper office should be conducted. All too often, the Litigation Division of the United States Army Legal Services Agency (USALSA) becomes involved in *Touhy* matters because the requester was needlessly sent from one office to the next without receiving a response to the original request. In these situations, requesters become so frustrated that they will file an action with the court. This could take the form of requesting the judge in the case at bar issue a subpoena for the information, or a separate action against the government under the Administrative Procedures Act (APA). A discussion of this distinction occurs infra. In turn, the Army is forced to expend significant time and resources on a request that could have been easily answered in the first place.

The Army’s position on *Touhy* requests when it does not have an interest in litigation is clear: "DA policy is to make official information reasonably available for use in Federal and state courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure." When the Army is not a party, but has an interest in litigation, it maintains a policy of strict impartiality and equal access to official information and fact witnesses, but not as to expert or opinion witnesses.

* See, e.g., 32 C.F.R. §§ 516.41(b), 516.42(a), 516.47(c), and 516.48(a). Such individuals are referred to in the C.F.R. as the "deciding official," which is the term that will used in this article to refer to the local SJA, of the Army (DA) civilian attorneys with an overview of the *Touhy* framework; it is not designed to be all-inclusive as to every possible legal issue that could arise when confronted with a *Touhy* request. Rather, this article describes the most common requests received and provides guidance on how best to respond. The first part focuses on requests for official information in the form of documentary or other tangible information. Part two addresses requests for testimony from DA or military personnel as it relates to official information. Finally, this paper addresses subpoenas and how best to respond.

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Therefore, the Army should always take reasonable efforts to approve proper *Touhy* requests and to make official information available for use by parties to third-party litigation.9

When evaluating the merits of a *Touhy* request, keep in mind the releasability factors set forth in 32 C.F.R. § 516.44.10 In general, if the requester has complied with the regulation, if the requested information is neither classified nor privileged, and if the release would not itself violate law or regulation (to include protections afforded under the Privacy Act11), then it should be released.12 The statute which enables the promulgation of *Touhy* regulations specifically disclaims an independent basis for withholding information13 Therefore, any decision to withhold official information must cite to specific statutory or authority apart from the *Touhy* framework.14

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9 It should be noted that this article, as well as the laws, regulations, and cases cited herein, are only applicable to requests related to third-party litigation. That is, cases between two or more private litigants where the government is not a party. If the government is a party to the case, the Federal Rules of Civil Procedure (F.R.C.P.) governing discovery generally apply.

10 The failure to comply with such regulation(s) may form the basis of withholding information, but only until the requester complies with the regulation. There is no prescribed format for making a *Touhy* request. A typical request received by the Litigation Division and other agencies is attached at Appendix A.

11 Information protected by the Privacy Act of 1974, 5 U.S.C. § 552a, cannot be provided unless the statutory restrictions imposed by the act are overcome. The simplest means by which a requester can overcome the statutory restrictions is to provide a written release authorization signed by the individual to whom the information pertains. If the requester is unable to obtain authorization, then a court ordered release signed by a judge of a court of competent jurisdiction must be provided. A state court generally lacks authority to order disclosure of a nonparty federal agency's records, including those subject to the Privacy Act. See, e.g., Bosaw v. NTEU, 887 F.Supp. 1081, 1210-17 (S.D. Ind. 1995). The order must direct the person to whom the records pertain to release the specific records or instruct that copies of the records be delivered to the clerk of court. The order must also indicate that the court has determined the materiality of the records and the non-availability of a claim of privilege. A Privacy Act-compliant protective order must also be in place prior to release of any protected records.

12 32 C.F.R. § 516.45. Note that there is a typographical error in this section. The reference to “§ 536.44” should read “§ 516.44.” A helpful flow chart of the evaluation process covering the most common situations is included at Appendix D.

13 5 U.S.C. § 301. The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public. Id.

14 All references to DoD Directive (DoDD) 5405.2 or Army Regulation (AR) 27-40, will instead cite to the corresponding Code of Federal Regulations (C.F.R.) section. This the practice of the Litigation Division when corresponding with civilian attorneys, as they are far more likely to be familiar with, and have independent access to, the C.F.R. as opposed to the DoDD or AR 27-40.

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Another common reason for denying a request is when a requester seeks to obtain official information from Criminal Investigation Division (CID), and fulfilling the request would interfere with or compromise an ongoing investigation. In these situations, a denial is appropriate, but it is not permanent. Once the investigation is complete, and barring any other reasons for denying release, the requested information should be provided. Finally, the fact that information is embarrassing to an agency or individual is not a proper basis for denying its release.

III. Request for Appearance of Witnesses

Requests for testimony from specifically identified present or former DA personnel in third-party litigation require a *Touhy* request when the testimony sought involves official information, the witness is to testify as an expert, or the absence of the witness from duty will seriously interfere with the accomplishment of the military mission.15 Keep in mind, however, that the *Touhy* process merely authorizes testimony. The Army generally cannot compel a Soldier or DA personnel to testify in a third-party action. However, once the requester has a *Touhy* approval in hand, there is no longer a barrier to issuing a subpoena to the individual whose testimony is requested as it relates to the approved testimony. Any individual who does not wish to testify despite the presence of a valid subpoena should be advised to seek the advice of an attorney concerning the consequences, if any, of refusal. Any individual not
authorized to consult with Army counsel should consult with private counsel, at no expense to the government.  

When the information being requested involves official information, “the matter will be referred to the SJA or legal advisor serving the individual whose testimony is requested.” If, on the other hand, the Touhy request is for expert testimony, the deciding official is authorized to deny the request, which decision may be appealed to Litigation Division. There is an exception which allows for Department of the Army personnel to testify in third-party litigation about official information without having to obtain approval from Litigation Division. Department of the Army personnel can never furnish expert or opinion testimony for a party whose interests are adverse to the interests of the United States or in a case in which the United States has an interest. However, if the deciding official believes the requester has shown “exceptional need or unique circumstances, and the anticipated testimony will not be adverse to the interests of the United States,” the request for expert testimony may be forwarded to Litigation Division for approval.

To protect the Army’s interest, an Army judge advocate or DA civilian attorney should be present during all interviews, depositions, or trial testimony to serve as the Army’s legal representative. The approval letter signed by the deciding official should specifically explain the legal representative’s role, the scope of the official information that may be provided by the witness and any caveats to the release of such information. See Appendix C for a sample witness approval letter.

If, during the interview or deposition, a question exceeds the request’s authorization (e.g., calls for the disclosure of classified information) the Army’s legal representative will advise the witness not to answer. If questioning continues to require answers beyond the scope of the approval, the legal representative will terminate the interview or deposition to avoid unauthorized disclosure of information. In the case of in-court testimony, the Army’s legal representative must advise the judge, in advance, of the applicable policy and regulations precluding witnesses from disclosing certain official information. Every effort should be made, however, to provide releasable information and continue the interview or testimony.

IV. Subpoenas

Attorneys unfamiliar with the Touhy process will typically subpoena the required information and/or witness(es) without first complying with the applicable regulations. Although the processing of a subpoena will depend on several factors, a few general guidelines apply to any subpoena received by your office. Most importantly, never ignore a subpoena.

A subpoena for release of official information, or for the testimony of a government witness, in private litigation, should be promptly referred to the deciding official. Also, if a subpoena or request is received in a case in which the United States has an interest, the SJA should coordinate with the General Litigation Branch at Litigation Division prior to action, unless the case has previously been delegated. Occasionally, the subpoena will contain a short suspense date that does not allow for studied evaluation or even consultation with Litigation Division or the local United States Attorney’s Office. In those instances, the deciding official should follow the procedures as outlined in 32 C.F.R. § 516.41(f).

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16  32 C.F.R. § 516.47(d).
17  32 C.F.R. § 516.48(a).
18  32 C.F.R. § 516.48(b).  A sample denial letter for expert witness testimony can be found at Appendix E.
19  32 C.F.R. § 516.49(a).
20  32 C.F.R. §§ 516.49(b) and 516.52.
21  32 C.F.R. § 516.49(b).
22  32 C.F.R. § 516.48(b).
23  32 C.F.R. § 516.48(b).  A script should be read prior to the giving of any testimony, whether in deposition, interview, or trial, which sets forth the legal advisor’s role and the scope of the witness’ authorized testimony. A sample script can be found at Appendix F.
24  See 32 C.F.R. § 516.41.
25  32 C.F.R. § 516.41(c).
26  (1) Furnish the court or tribunal a copy of this regulation (32 C.F.R. part 516, subpart G) and applicable case law (See United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951)); (2) Inform the court or tribunal that the requesting individual has not complied with this Chapter, as set out in 32 C.F.R. §§ 97 and 516, or that the subpoena or order is being reviewed; (3) Seek to stay the subpoena or order pending the requester’s compliance with this Chapter or a final determination by Litigation Division; and, (4) If the court or other tribunal declines to quash or stay the subpoena or order,
A. Subpoenas From a State Court

Absent unique or unusual circumstances, state courts lack jurisdiction to compel nonparty federal officials to testify or produce documents, or to enforce subpoenas seeking the same. This is grounded not only in the fact that the presence of a subpoena indicates an inherent failure to comply with applicable regulations, but also a failure to take into consideration the concept of sovereign immunity. These subpoenas arise most often from domestic relations or family court actions, although a significant minority derive from state criminal prosecutions.

It is important to bifurcate your analysis when receiving a subpoena from a state court. Although the court does not have jurisdiction over the official information that the subpoenaed individual possesses, and thus cannot compel disclosure, the state court may have jurisdiction over the person and thus can compel their appearance. In such cases, if the subpoena is not quashed or withdrawn, the individual should appear as directed, but respectfully decline to answer any questions or produce any documents that relate to official information until the issue is resolved by either Litigation Division or the U.S. Attorney’s Office.

B. Subpoenas From a Federal Court

Though beyond the scope of this article, practitioners should be aware that there is a circuit split on whether Federal court subpoenas may issue at all against Federal entities in third-party litigation and, if so, how they are enforced. Some circuits hold that the sole method of obtaining Federal witnesses or information is via the Federal Rules of Civil Procedure (FRCP) 45. Other circuits are more accepting of enforcement via the Federal Rules of Civil Procedure (FRCP) 45. The following information is general in nature and before responding to a subpoena, attorneys should educate themselves on the state of the law within their jurisdiction.

Federal court subpoenas require the consideration of Touhy-related issues in conjunction with FRCP 45. Under FRCP 45, if a subpoena is for documents, the subpoenaed party must submit any objections (usually by letter to the subpoenaing attorney, depending on local rules) within fourteen days of service or by the return date, if sooner. The burden is then on the subpoenaing party to decide whether to negotiate further or move to compel. If a subpoena is for a deposition, the onus is on the subpoenaed party to file any motion to quash or for a protective order in a “timely” manner. “Timely” is usually interpreted to mean fourteen days from service or before the return date, absent circumstances justifying a delay. Therefore, it is especially important that Federal court subpoenas be acted upon in a timely manner. Both the local U.S. Attorney’s Office and Litigation Division should be notified immediately upon receipt of a Federal court subpoena. Unless specifically and unmistakably directed otherwise by the U.S. Attorney’s Office or Litigation Division, the recipient should comply with such a subpoena.

C. General Guidance Regarding Subpoenas

Filing a motion to quash a subpoena or taking formal action of any type in response to a subpoena can sometimes be avoided by simply making contact with the requester. The most effective method of avoiding a protracted struggle over an improper subpoena is simply to pick up the phone, contact the issuing attorney, and explain the rules. If that is not possible, a letter, such as the one found at Appendix H, can be sent. Such informal resolution, if possible, is always the preferred method and will often result in the party complying with the Touhy regulations and withdrawing the subpoena. If such resolution is not possible, further strategy in any particular case should be discussed with Litigation Division or the United States Attorney's Office in advance. If the requester does move to compel the requested testimony, then the U.S. Attorney's Office will defend the Army consistent with Touhy doctrine and principles of sovereign immunity.

32 “The limitations on a state court’s subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause. Such limitations do not apply when a federal court exercises its subpoena power against federal officials. For the foregoing reasons, we believe that federal district courts, in reviewing subpoena requests under the federal rules of discovery, can adequately protect both an individual’s right to ‘every man’s evidence’ as well as the government’s interest in not being used as a ‘speakers bureau’ for private litigants.” Exxon Shipping Co. v. United States Dept of Interior, 54 F.3d 774, 778 (9th Cir. Alaska 1994).

33 See FED. R. CIV. P. 45(c)(1)(B).

34 See FED. R. CIV. P. 45(c)(3), 26(c).
V. Privilege Review

Prior to the release of any official information, the deciding official must review the documents for privileged information. Most commonly the Privacy Act, the Procurement Integrity Act, the Health Insurance Portability and Accountability Act, Army Safety Investigations, and Inspector General records are subject to laws and regulations that preclude their release. In such cases, the deciding official’s release determination must be in compliance with the applicable law and/or regulation.

VI. Conclusion

While DA policy is to make official information reasonably available for use in third-party litigation, the disclosure of such must be made in accordance with the applicable Touhy regulations. Further, present or former DA personnel may disclose official information only if they obtain written approval from the appropriate deciding official. Subpoenas can present certain unique and time-sensitive issues that must be addressed immediately upon receipt. When in receipt of a request for official information, ensure that it complies with 32 C.F.R. § 516 Subpart G and AR 27-40, chapter 7, and respond accordingly. While most requests can be resolved at the local level, deciding officials should never hesitate to contact the Litigation Division for assistance with those requests that cannot be resolved at their level.
October 30, 2013

VIA EMAIL AND U.S. MAIL

[Redacted]

Acting Assistant Chief Counsel/Division Counsel  
Department of the Army  
South Pacific Division, U.S. Army Corps of Engineers  
1455 Market Street  
San Francisco, CA 94103-1399  
Email: [Redacted]@usace.army.mil

Re: [Redacted] v. [Redacted]  
Superior Court of Muscogee County, Georgia, No. [Redacted]

Dear [Redacted]:

Thank you for your letter of October 18, 2013 outlining the requirements for requesting the deposition of [Redacted] in the above-referenced litigation.

Pursuant to 32 C.F.R. § 97.6(c) and § 516(d), we request that [Redacted] appear for a deposition on Wednesday, November 27, 2013 at 10:00 a.m. at Walnut Creek Marriott, 2355 N. Main St., Walnut Creek, California, 94596. [Redacted].

The nature of the proceeding is a Fifth Amended Complaint filed by Plaintiffs against [Redacted] and the Army entered into operating agreements to create privatized Army residential communities at Fort Belvoir, Virginia. In 2005, the same parties entered into operating agreements to create privatized Army residential communities at Fort Benning, Georgia (collectively, the “Projects”). The Fifth Amended Complaint alleges that [Redacted] engaged in fraud and other misconduct resulting in the termination of [Redacted]’s 50-year property management agreements at both Projects.

[Redacted] served as the senior career person within the Army Secretariat responsible for the Army’s worldwide installations and housing structure. Prior to his appointment
as the DASA(I&H), [redacted] was a member of the USACE team and concurrently served as the [redacted] of the South Pacific Division Regional Integration Team at Headquarters. [redacted]'s testimony is relevant to the lawsuit because he worked with the RCI partners in overseeing operations at the military housing communities and he has personal knowledge related to the operations and management of the Projects. Additionally, [redacted] communicated directly with upper management at both [redacted] and [redacted] regarding issues at the Projects. We want to inquire of [redacted] about the issues in the Fifth Amended Complaint and the performance and management of both Projects.

We understand that, as a government employee, testimony from [redacted] is subject to the limitations of 32 CFR § 97.6(e). We wish to assure you that we seek only factual testimony from him.

Thank you for your communications and assistance to date. Please let me know if you need any additional information.

Very truly yours,

[redacted]
March 28, 2015

SUBJECT: Plaintiff(s) v. Defendant(s), Civil Action File No.: 14CV1234, Superior Court of Muscogee County, State of Georgia

O. Wendell Holmes, Jr.  
Hughes, Van Devanter, & Assoc.  
1 First St. NE  
Washington, DC 20543

Dear Mr. Holmes:

This letter responds to your letter of March 28, 2015, a request for official information made pursuant to Army Regulation (AR) 27-40, Chapter 7 (as codified 32 C.F.R. §516 et seq.). This letter specifically relates to your request for copies of the Aviation Unit Maintenance (AVUM) and Aviation Intermediate Maintenance (AVIM) estimated Repair Appraisal for the accident helicopter, and the flight plan for the accident helicopter for August 18, 2014, DD Form 175, for use in the above-referenced case. Subject to the following conditions, your request for these documents is approved.

Pursuant to 32 C.F.R. §§516.43-45, the documents you requested have been determined to be releasable, subject to certain caveats. Information falling into the following general areas has therefore been redacted:

- Any information that is classified, privileged, or otherwise protected from public disclosure. U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION Chapter 7 (19 September 1994) (hereinafter "AR 27-40"); 32 C.F.R. §516.41, 44.

- Any information the disclosure of which would violate the Privacy Act, absent a written release authorization signed by the individual to whom the information pertains or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a.

- Any information the disclosure of which would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly

- Information which is protected by the deliberative process privilege; which relates to the process by which policies are formulated; and/or is or was at the time predecisional in nature. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that “[t]he cases uniformly rest the [deliberative process] privilege on the policy of protecting the ‘decision making processes of government agencies’” (quoting Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972))); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. The requested documents are enclosed, with Bates Stamp Army_20150220_0001 thru Army_20150220_0047. According to our records, this release comprises the totality of responsive documents in the possession of the Army, and your Touhy request is now closed. If you should have any questions, please feel free to contact me at (703) 693-xxxx or xxx.xxx.mil@mail.mil.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney

Enclosure
SUBJECT: Plaintiff(s) v. Defendant(s), Civil Action File No.: 14CV1234, Superior Court of Muscogee County, State of Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

This letter responds to your letter of March 28, 2015, a request for official information made pursuant to Army Regulation (AR) 27-40, Chapter 7 (as codified 32 C.F.R. §516 et seq.). This letter specifically relates to your request for the depositions of Mr. John Smith and Mr. Bill Jones for use in the above-referenced case. Subject to the following conditions, your request is approved.

Pursuant to 32 C.F.R. §516.48, these individuals may provide official information during a deposition. Based on your request, they may release official information regarding their personal knowledge in the following general areas, subject to the caveats which follow:

Mr. Smith: The operation and management of the Projects and his communications with upper management of both Plaintiff and Defendant regarding construction problems and delays at the Projects.

Mr. Jones: The Community Development Management Plans at the Projects, the performance of the property and asset manager at the Projects, and residential and operational issues at the Projects.

Caveats and Reservations: Deponents are prohibited from offering testimony which falls into the following general, non-exhaustive, areas:

- Any information that is classified, privileged, or otherwise protected from public disclosure. U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION Chapter 7 (19 September 1994) (hereinafter "AR 27-40"); 32 C.F.R. § 516.41, 44.
- Any information the disclosure of which would violate the Privacy Act, absent a written release authorization signed by the individual to whom the information pertains or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a.

- Any information the disclosure of which would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances. U.S. DEP’T OF DEF., DIR. 5405.2, RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DOD PERSONNEL AS WITNESSES para. 6.2.6 (23 July 1985); AR 27-40, Appendix C. See, e.g., Am. Mgmt. Servs., LLC v. Dep’t of the Army, 703 F.3d 724, 729 (4th Cir. 2013) cert. denied, 12-1233, 2013 WL 1499158 (U.S. Oct. 7, 2013).

- Information which is protected by the deliberative process privilege; which relates to the process by which policies are formulated; and/or is was at the time predecisional in nature. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (stating that “[t]he cases uniformly rest the [deliberative process] privilege on the policy of protecting the ‘decision making processes of government agencies’” (quoting Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (6th Cir. 1972))); Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deponents may only provide factual information related to their involvement in the events that gave rise to the present litigation. They may not be qualified as expert witnesses or be asked for personal opinions relating to official information. See AR 27-40, para. 7-10; 32 C.F.R. §516.49(a).

The following conditions apply to this authorization. First, an Army-designated attorney must be present during the deposition. AR 27-40, para. 7-9; 32 C.F.R. §516.48. Second, the witnesses’ participation must be at no expense to the United States. AR 27-40, para. 7-16; 32 C.F.R. §516.55; the Army must be provided a copy of the deposition transcript, also at no expense to the United States (electronic copies are acceptable). Finally, this approval is limited to the requested deposition and subject areas and does not extend to any other forum or format. If the testimony of any of the individuals is later requested for trial, a new Touhy request must be submitted.

The decision whether to testify in private litigation is within the discretion of the prospective witnesses. The United States cannot compel an official to participate in private litigation. 32 CFR §516.47(d). This authorization is also subject to the approval of the witness’ supervisor to be absent during the period involved. If the witness’ absence on the requested time...
and/or date would seriously interfere with the accomplishment of a military mission, the deposition would need to be rescheduled. 32 CFR §516.47(a)(3). Advance scheduling is therefore important for all parties concerned.

We look forward to working with you to find mutually acceptable dates for the testimony of these individuals. Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. Our office will continue to keep your Touhy request open until the completion of the requested depositions. In the interim, if you should have any questions, please feel free to contact me at (703) 693-xxxx or xxxx.mil@mail.mil.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney
Release of Information in Judicial or Quasi Judicial Proceeding

   - Y: Forward to appropriate agency & notify requester. (32 C.F.R. §97.6(a)(2))
   - N: Are you proper agency to address?

2. Are you proper agency to address?
   - Y: Forward to appropriate agency & notify requester. (32 C.F.R. §97.6(a)(2))
   - N: Deny. (32 C.F.R. §97.6(c)(2))

3a. Is Request a Subpoena or Court Order?
   - Y: Deny. (32 C.F.R. §97.6(c)(2))
   - N: Is Request Written?

3b. Does Subpoena or Court Order otherwise comply with steps 4-7 below?
   - Y: Deny. (32 C.F.R. §97.3(c))
   - N: Does it relate to ongoing litigation?

4. Does it relate to ongoing litigation?
   - Y: Deny. (32 C.F.R. §97.6(c)(2))
   - N: Does it state nature and relevance of information?

5. Does it state nature and relevance of information?
   - Y: Can you reasonably comply in time provided?
   - N: Deny. (32 C.F.R. §516.41(d))

6. Did you receive 14 days advance notice?
   - Y: Can privilege be waived/document redacted/protective order entered/material declassified?
   - N: Deny.

7. Is the information releasable?
   - Y: Release.
   - N: Can privilege be waived/document redacted/protective order entered/material declassified?

3c. Contact requestor, explain 32 C.F.R. §516, Subpart G, and request withdrawal of Subpoena.

3d. Did Requestor withdraw Subpoena or Court Order?
   - N: Contact LITDIV for guidance
   - Y: Await proper request
April 28, 2015

General Litigation Branch

John Q. Attorney
100 Anywhere
Suite 701
New York City, NY 20001

Dear Mr. Chapman:

This responds to your request for _______ to appear as an expert witness in private litigation:_____________. For the following reasons, the request is denied.

Army Regulation 27-40 forbids Army personnel from providing expert testimony in private litigation, with or without compensation, except under the most extraordinary circumstances. See 32 C.F.R. § 97.6(e), 516.49. Several reasons support the exercise of strict control over such witness appearances.

The Army policy is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have a significant interest. When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary.

The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. If Army personnel testify as expert witnesses in private litigation, their official duties are invariably disrupted, often at the expense of the Army’s mission and the Federal taxpayer.

Finally, the Army is concerned about the potential for conflict of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust and confidence in the integrity of our Government.

This case does not present the extraordinary circumstances necessary to justify the requested witness’ expert testimony. You have demonstrated no exceptional need or unique circumstances that would warrant (his or her) appearance. The expert testimony desired can be secured from non-Army sources. Consequently, we are unable to grant you an exception to the Army’s policy. In accordance with 32 CFR §516.49, you may appeal this determination to the
United States Army Litigation Division. The appeal authority is:

Chief, Army Litigation
U.S. Army Legal Services Agency
Litigation Division
9275 Gunston Rd., Suite 3000
Fort Belvoir, VA 22060

If you have any questions, please call ________ at XXX-XXX-XXXX.

Sincerely,

Signature Block
Touhy Script (Deposition, Interview, Trial)

Good morning, I’m [your name] with the [organization]. I am present here today representing the United States Army as required by 32 C.F.R. § 516.48. My representation of [deponent name] is limited to matters related to the release of official Army information and to [his/her] role as [officer/employee] of the United States Army. In accordance with Army Regulation 27-40, Chapter 7 and 32 C.F.R. § 516.48, [deponent name] is authorized to disclose official information related to [insert scope of authorization as contained in approval letter]. [Insert approving official / Office] has authorized [deponent name] to provide this information in the matter of [Insert Case Caption]. The letter authorizing this disclosure is dated [date] and signed by [authorizing official]. I request that this document be admitted as an exhibit to this deposition.

[Deponent name] is specifically prohibited from disclosing certain information. [He/She] may not provide classified or privileged information or provide information that is otherwise protected from public disclosure, such as Privacy Act protected information, without appropriate additional authorization. [He/She] may not provide opinion testimony (such as hypothetical questions) or expert testimony without additional justification and approval required by 32 C.F.R. §516.49. In accordance with 32 C.F.R. § 516.48, I am required to instruct the deponent not to answer questions which call for official information outside the scope of this authorization or seek information which is otherwise prohibited from disclosure.

{Use this paragraph when the expected testimony covers both official and non-official information.

Official information is defined by 32 C.F.R. Part 516, Appendix F as “All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the United States Armed Forces.”}

{Use this paragraph when the deponent has been authorized to provide expert testimony.

In accordance with Army Regulation 27-40, Chapter 7 and 32 C.F.R. § 516.49, [deponent name] is authorized to provide expert testimony related to [insert scope of approved expert testimony contained in approval letter]. While both parties may question the deponent on this field of expertise, the deponent is not authorized to provide expert testimony on other subjects.}

{Use this paragraph when the deponent is an AMEDD member and has been authorized to provide expert testimony.

In accordance with Army Regulation 27-40, Chapter 7 and 32 C.F.R. § 516.49 (c), [deponent name] is authorized to provide testimony related to the treatment of [insert patient name]. Both parties may question the deponent on this patient, limited to the scope of the [patient
confidentiality waiver / court order] and the previously mentioned approval letter from [authorizing official]. [Deponent’s] testimony must be limited to [his / her] treatment of the patient, investigations [he / she] has made, laboratory tests [he/she] has conducted, or other actions taken in the regular course of their duties. Deponent must limit [his / her] testimony to factual matters such as the following: observations of the patient or other operative facts; the treatment prescribed or corrective action taken; course of recovery or steps required for repair of damage suffered; and, contemplated future treatment. [His / her] testimony may not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis.

Read this paragraph in cases in which the Army is NOT a party and DOES NOT have an interest in the case:

It is DoD policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. Army policy is one of strict impartiality in private litigation in which the Army is not a named party or does not have a significant interest as that term is defined in 32 C.F.R. § 516, Appendix F. Therefore, my role during this deposition is solely to protect the Army's interest and, as such, my intervention will be limited to that end. The parties are responsible for advancing their respective positions and objections as it relates to matters outside the Army's interest.

Read this paragraph in cases in which the Army is NOT a party but DOES have an interest in the case:

It is DoD policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. In private litigation in which the United States is not a party, but does have a significant interest as that term is defined in 32 C.F.R. § 516, Appendix F, Army policy is one of strict impartiality in regards to access to information and fact witnesses; that is, all parties shall have equal access to official information and fact witnesses. Therefore, my role during this deposition is solely to protect the Army's interest and, as such, my intervention will be limited to that end. The parties are responsible for advancing their respective positions and objections as it relates to matters outside the Army's interest.

Thank you.

Dolores M. Jones, Esq.
Dewey, Cheatem, & Howe, PLLC
610 South Main Street
San Jose, CA 95113

Dear Ms. Jones:

This letter responds to your [Subpoena / request] of March 30, 2015 for the personnel, medical, and finance records of SPC Walter Snuffy. As outlined in detail below, your request is denied because [the subpoena does not comply with federal laws or regulations regarding the release of the information sought and] this office is not the custodian of any of the records you seek.

Finance records for Army personnel are maintained by the Defense Finance and Accounting Service (DFAS) and requests must be sent directly to that office. I have enclosed a publication entitled, "Working With The Military As An Employer" which contains contact information for DFAS, as well as other information you might find helpful.

Personnel records are generally maintained at the unit level. You should direct your request for those records to:

[Change the below information to the servicing OSJA of the Soldier's command. For National Guard Soldiers, this should be the office of the State Adjutant General. Determining the correct POC for Reserve Soldiers may be more challenging.]
Office of the Staff Judge Advocate
10th Mountain Division (Light Infantry)
Att'n.: Administrative Law Division
141 Lewis Avenue
Fort Drum NY 13602-5100

***Delete the above paragraph and use this one for individuals who are retired or otherwise no longer serving.*** Personnel records for retired/discharged individuals should be requested from:
We recommend contacting the NPRC to determine requirements prior to submitting a request.

As for medical records, we recommend you contact the Department of Veterans Affairs (VA), Records Management Center, in St. Louis, MO, or call their toll free number at 1-800-827-1000 to identify the current location of specific health records and to find out how to obtain releasable documents or information.

[Remove this paragraph if the original request was not in the form of a subpoena.] The presence of a subpoena in this case does not affect the requirements contained in 32 C.F.R. § 97.6(c) and Part 516, Subpart G. In accordance with Touhy, the Secretary of the Army may withhold release authority for official Army information from his subordinates— as he has done in the above-referenced regulations. Based upon these regulations, an Army employee, if ordered by the court to testify or produce documents not properly requested and approved for release, must respectfully decline. It is well settled that courts cannot compel a federal agency employee to testify or produce documents in violation of agency regulations. See, Touhy, 340 U.S. at 467-70; Boron Oil Co., 873 F.2d at 69-70; and United States Steel Corp. v. Mattingly, 663 F.2d 68 (10th Cir. 1980).

[Remove this paragraph if the original request was not in the form of a subpoena.] Furthermore, in this instance, refusal to comply with the specified subpoena for the production of records is also grounded on "sovereign immunity," [and not merely housekeeping regulations], Comsat Corporation v. National Science Foundation, 190 F.3d 269, 277 (4th Cir. 1999). The Administrative Procedures Act (APA) provides the "sole avenue for review." Id., at 274, citing Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998).

You should be aware that much of the information you seek may be protected by the Privacy Act and/or the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Any records so protected may only be disclosed with a written release authorization signed by the individual to whom the information pertains, or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a; 45 C.F.R. § 164.512(e). A subpoena or other legal process signed by an attorney or clerk of court for records or information protected by the Privacy Act does not authorize the release of the protected information. See, e.g., Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985); 5 U.S.C. §552a(b)(11) and 32 C.F.R. §516.46(b)(1).

The order must direct release of the specific record(s) or instruct that copies of the record(s) be delivered to the clerk of court. The order must also indicate that the court has
determined the materiality of the records and the non-availability of a claim of privilege. Typically, a Privacy Act-compliant protective order must also be in place prior to release of any protected records. Note that a state court generally lacks authority to order disclosure of a nonparty federal agency's records. See, e.g., Bosaw v. NTEU, 887 F.Supp. 1199, 1217 (S.D. Ind. 1995).

Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. If you should have any questions, please feel free to contact me at (703) 693-xxxx or xxxxxxxxxx@mail.mil.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney

Enclosure
SUBJECT:  Plaintiff(s) v. Defendant(s), Civil Action File No.: 14CV1234, Superior Court of Muscogee County, State of Georgia

O. Wendell Holmes, Jr.
Hughes, Van Devanter, & Assoc.
1 First St. NE
Washington, DC 20543

Dear Mr. Holmes:

***If the subpoena seeks information/documents rather than the testimony of an individual(s), adjust the language accordingly. The citations to cases and regs are the same regardless.*** I coordinate general litigation issues for the U.S. Army. I am writing because we have learned that you have issued a subpoena to John Smith, an Army employee, in reference to the above captioned litigation, for a deposition to take place on November 25, 2014. As outlined in detail below, your request is denied because the subpoena does not comply with federal laws or regulations regarding the release of the information sought.

Under 32 C.F.R. §§ 97 and 516, the Army must authorize the production of official documents or testimony in private litigation. In this case, the Army cannot authorize Mr. Smith to appear unless his appearance is requested in writing and in accordance with Department of Defense Directive 5405.2; 32 C.F.R. § 97.6; Army Regulation 27-40, Chapter 7; and 32 C.F.R. § 516, Subpart G. The request must include, *inter alia*, the nature and relevance of the official information sought. 32 C.F.R. § 516.41(d). It is important for this request to be as specific as possible. We cannot act on your request until we receive the required information, and, absent a proper request and approval of that request by the designated Army official, no official information may be released. 32 C.F.R. 516.41(d); see, *e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989); *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981); *United States v. Allen*, 554 F.2d 398 (10th Cir. 1977) cert. denied, 434 U.S. 836, 98 S.Ct. 124, 54 L.Ed.2d 97 (1977).

The presence of a subpoena in this case does not affect the requirements contained in 32 C.F.R. § 97.6(c) and Part 516, Subpart G. In accordance with *Touhy*, the Secretary of the
Army may withhold release authority for official Army information from his subordinates—as he has done in the above-referenced regulations. Based upon these regulations, an Army employee, if ordered by the court to testify or produce documents not properly requested and approved for release, must respectfully decline. It is well settled that courts cannot compel a federal agency employee to testify or produce documents in violation of agency regulations. See, Touhy, 340 U.S. at 467-70; Boron Oil Co., 873 F.2d at 69-70; and United States Steel Corp. v. Mattingly, 663 F.2d 68 (10th Cir. 1980).

***REMOVE IF NOT APPLICABLE.*** You should be aware that much of the information you seek may be protected by the Privacy Act. Any records so protected may only be disclosed with a written release authorization signed by the individual to whom the information pertains, or a court ordered release signed by a judge of a court of competent jurisdiction. 5 USC §552a. A subpoena or other legal process signed by an attorney or clerk of court for records or information protected by the Privacy Act does not authorize the release of the protected information. See, e.g., Doe v. DiGenova, 779 F.2d 74 (D.C. Cir. 1985); 5 U.S.C. § 552a(b)(11) and 32 C.F.R. §516.46(b)(1).

The order must direct release of the specific record(s) or instruct that copies of the record(s) be delivered to the clerk of court. The order must also indicate that the court has determined the materiality of the records and the non-availability of a claim of privilege. Typically, a Privacy Act-compliant protective order must also be in place prior to release of any protected records.***

***REMOVE IF THE UNDERLYING CASE IS FEDERAL RATHER THAN STATE.*** Note that a state court generally lacks authority to order disclosure of a nonparty federal agency's records. See, e.g., Bosaw v. NTEU, 887 F.Supp. 1199, 1217 (S.D. Ind. 1995).***

***REMOVE THIS PARAGRAPH IF THE UNDERLYING CASE IS FEDERAL RATHER THAN STATE.*** Furthermore, in this instance, refusal to comply with the specified subpoena for the production of records is also grounded on "sovereign immunity," [and not merely housekeeping regulations], Comsat Corporation v. National Science Foundation, 190 F.3d 269, 277 (4th Cir. 1999). The Administrative Procedures Act (APA) provides the "sole avenue for review." Id., at 274, citing Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998).***

*** In the case of documents, remove this paragraph concerning "opinion/expert testimony" entirely.*** Finally, if Mr. Smith appears as a witness, he may only give factual testimony. He may not testify as an opinion or expert witness. This limitation is based on Department of Defense and Army policy that generally prohibits Government employees from appearing as expert witnesses in private litigation. See 32 CFR §§ 97.6(e). ***
Our sole concern in this matter is to protect the interests of the United States Army; the Army will not block access to witnesses or documents to which you are lawfully entitled. We look forward to hearing from you so that we may timely process your request. I can be reached at (703) 693-xxxx or xxxx.mil@mail.mil if you have any questions.

Sincerely,

William J. Brennan, Jr.
Major, U.S. Army
Litigation Attorney

cc:
United States Attorney for ______ District of _______