

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1702

Procedures Governing the Acceptance of Service of Process Upon the Office of the Director of National Intelligence and Its Employees in Their Official, Individual or Combined Official and Individual Capacities

AGENCY: Office of the Director of National Intelligence.

ACTION: Proposed regulation.

SUMMARY: The ODNI is publishing this proposed regulation to invite public comment prior to final adoption of the regulation governing the procedures it will follow for the acceptance of service of process upon the ODNI and its employees in their official, individual or combined official and individual capacities.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments by either of the following methods:

Mail: Office of the Director of National Intelligence—Office of the General Counsel, Washington, DC 20511, Attention: Tricia Wellman.

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tricia Wellman, 703-275-2527.

SUPPLEMENTARY INFORMATION: The Office of the Director of National Intelligence (ODNI) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, 118 Stat. 3638. The ODNI began operations on April 22, 2005, the day after the first Director of National Intelligence took office. Since that time the ODNI has been working to publish regulations for matters that may affect the public.

This proposed regulation establishes the procedures for acceptance of service of process upon the ODNI and its employees.

Lists of Subjects in 32 CFR Part 1702

Courts, government employees.

Title 32 of the Code of Federal Regulations is amended by adding Part 1702 to read as follows:

PART 1702—PROCEDURES GOVERNING THE ACCEPTANCE OF SERVICE OF PROCESS

Sec.

1702.1 Scope and purpose.

1702.2 Definitions.

1702.3 Procedures governing acceptance of service of process.

1702.4 Notification to Office of General Counsel.

1702.5 Interpretation.

Authority: The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004); National Security Act of 1947, as amended, 50 U.S.C. 401 *et seq.*; Executive Order 12333, as amended.

§ 1702.1 Scope and purpose.

This part sets forth the ODNI policy concerning service of process upon the ODNI and ODNI employees in their official, individual or combined official and individual capacities. This Part is intended to ensure the orderly execution of ODNI affairs and is not intended to impede the legal process.

§ 1702.2 Definitions.

For purposes of this Part the following terms have the following meanings:

DNI. The Director of National Intelligence.

General Counsel. The ODNI's General Counsel, Acting General Counsel or Deputy General Counsel.

ODNI. The Office of the Director of National Intelligence and all of its components, including, but not limited to, the National Counterintelligence Executive, the National Counterterrorism Center, the National Counterproliferation Center, the Program Manager for the Information Sharing Environment, and all national intelligence centers and program managers the DNI may establish.

ODNI Employee. Any current or former employee, contractor, independent contractor, assignee or detailee to the ODNI.

OGC. The Office of the General Counsel of the ODNI.

Process. A summons, complaint, subpoena or other document properly issued by or under the authority of, a federal, state, local or other government entity of competent jurisdiction.

§ 1702.3 Procedures governing acceptance of service of process.

(a) Service of process upon the ODNI or an ODNI employee in the employee's official capacity.

(1) Personal service. Unless otherwise expressly authorized by the General Counsel, personal service of process upon the ODNI or an ODNI employee in the employee's official capacity, may be accepted only by an OGC attorney at ODNI Headquarters. The OGC attorney shall write or stamp "Service Accepted In Official Capacity Only" on the return of service form.

(2) Mail service. Where service of process by registered or certified mail is authorized by law, only an OGC attorney may accept such service of

process upon the ODNI or an ODNI employee in the employee's official capacity, unless otherwise expressly authorized by the General Counsel. The OGC attorney shall write or stamp, "Service Accepted In Official Capacity Only," on the waiver of personal service form. Service of process by mail must be addressed to the Office of the Director of National Intelligence, Office of General Counsel, Washington, DC 20511, and the envelope must be conspicuously marked "Service of Process."

(b) Service of process upon an ODNI employee solely in the employee's individual capacity.

(1) *Generally.* ODNI employees will not be required to accept service of process in their purely individual capacity on ODNI facilities or premises.

(2) *Personal Service.* Subject to the sole discretion of the General Counsel, process servers generally will not be allowed to enter ODNI facilities or premises for the purpose of serving process upon an ODNI employee solely in the employee's individual capacity. Except for the DNI, the Principal Deputy Director of National Intelligence, and the Director of the Intelligence Staff, the OGC is not authorized to accept service of process on behalf of any ODNI employee in the employee's individual capacity.

(3) *Mail Service.* Unless otherwise expressly authorized by the General Counsel, ODNI employees are not authorized to accept or forward mailed service of process directed to another ODNI employee in that employee's individual capacity. Any such process will be returned to the sender via appropriate postal channels.

(c) Service of Process Upon an ODNI employee in a combined official and individual capacity. Unless otherwise expressly authorized by the General Counsel, service of process, in person or by mail, upon an ODNI employee in the employee's combined official and individual capacity, may be accepted only for the ODNI employee in the employee's official capacity by an OGC attorney at ODNI Headquarters. The OGC attorney shall write or stamp, "Service Accepted In Official Capacity Only," on the return of service form.

(d) Acceptance of service of process shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue or any other defense in law or equity available under the laws or rules applicable to the service of process.

§ 1702.4 Notification to Office of General Counsel.

An ODNI employee who receives or has reason to expect to receive, service of process in an official, individual or combined individual and official capacity in a matter that may involve testimony or the furnishing of documents that could reasonably be expected to involve ODNI interests, shall promptly notify the OGC ((703) 275-2527) prior to responding to the service in any manner, and if possible, before accepting service.

§ 1702.5 Interpretation.

Any questions concerning interpretation of this regulation shall be referred to the Office of General Counsel for resolution.

Dated: October 2, 2008.

Corin R. Stone,

Deputy General Counsel, Office of the Director of National Intelligence.

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE**32 CFR Part 1703****Regulations Governing the Production of Office of the Director of National Intelligence Information or Material in Proceedings Before Federal, State, Local or Other Government Entity of Competent Jurisdiction**

AGENCY: Office of the Director of National Intelligence.

ACTION: Proposed regulation.

SUMMARY: The ODNI is publishing this proposed regulation to invite public comment prior to final adoption of the regulation governing the procedures it will follow for the production of ODNI information or material in proceedings before federal, state, local or other government entity of competent jurisdiction.

DATES: Submit comments on or before November 17, 2008.

ADDRESSES: You may submit comments by either of the following methods:

Mail: Office of the Director of National Intelligence—Office of the General Counsel, Washington, DC 20511, Attention: Tricia Wellman.

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Tricia Wellman, (703) 275-2527.

SUPPLEMENTARY INFORMATION: The Office of the Director of National Intelligence

(ODNI) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, 118 Stat.3638. The ODNI began operations on April 22, 2005, the day after the first Director of National Intelligence took office. Since that time the ODNI has been working to publish regulations for matters that may affect the public.

This regulation outlines the procedures current and former ODNI employees must follow when they receive a demand for ODNI information or material in connection with proceedings before federal, state, local or other government entity of competent jurisdiction. These regulations are typically called Touhy regulations because of the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), in which the Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor.

Lists of Subjects in 32 CFR Part 1703

Courts, government employees.

Title 32 of the Code of Federal Regulations is amended by adding Part 1703 to read as follows:

PART 1703—PRODUCTION OF ODNI INFORMATION OR MATERIAL IN PROCEEDINGS BEFORE FEDERAL, STATE, LOCAL OR OTHER GOVERNMENT ENTITY OF COMPETENT JURISDICTION

Sec.

- 1703.1 Scope and purpose.
- 1703.2 Definitions.
- 1703.3 General.
- 1703.4 Procedure for production.
- 1703.5 Interpretation.

Authority: The Intelligence Reform and Terrorism Prevention Act of 2004, Public Law No. 108-458, 118 Stat. 3638 (2004); National Security Act of 1947, as amended, 50 U.S.C. sec. 401 *et seq.*; Executive Order 12333, as amended; and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 1703.1 Scope and purpose.

This Part sets forth the policy and procedures with respect to the production or disclosure of material contained in the files of the ODNI, information relating to or based upon material contained in the files of the ODNI, and information acquired by any person while such person was an employee of the ODNI as part of the performance of that person's official duties or because of that person's association with the ODNI.

§ 1703.2 Definitions.

The following definitions apply to this Part:

Defenses: Any and all legal defenses, privileges or objections available to the ODNI in response to a demand.

Demand:

(1) Any subpoena, order or other legal summons issued by a federal, state, local or other government entity of competent jurisdiction with the authority to require a response on a particular matter or a request for appearance of an individual where a demand could issue.

(2) Any request for production or disclosure which may result in the issuance of a subpoena, order, or other legal process to compel production or disclosure.

DNI: The Director of National Intelligence.

General Counsel: The ODNI's General Counsel, Acting General Counsel or Deputy General Counsel.

ODNI: The Office of the Director of National Intelligence and all of its components, including, but not limited to, the Office of the National Counterintelligence Executive, the National Counterterrorism Center, the National Counterproliferation Center, the Program Manager for the Information Sharing Environment, and all national intelligence centers and program managers the DNI may establish.

ODNI Employee: Any current or former employee, contractor, independent contractor, assignee or detailee to the ODNI.

ODNI Information or Material: Information or material that is contained in ODNI files, related to or based upon material contained in ODNI files or acquired by any ODNI employee as part of that employee's official duties or because of that employee's association with the ODNI.

OGC: The Office of the General Counsel of the ODNI.

OGC Attorney: Any attorney in the OGC.

Proceeding: Any matter before a court of law, administrative law judge, administrative tribunal or commission or other body that conducts legal or administrative proceedings, and includes all phases of the proceeding.

Production or Produce: The disclosure of ODNI information or material in response to a demand.

§ 1703.3 General.

(a) No ODNI employee shall respond to a demand for ODNI information or material without prior authorization as set forth in this Part.

(b) This part is intended only to provide procedures for responding to