

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Part 15**

[Docket No. FR-5206-F-02]

RIN 2501-AD39

Public Access to HUD Records Under the Freedom of Information Act (FOIA) and Production of Material or Provision of Testimony by HUD Employees: Revisions to Policies and Practices Regarding Subpoenas and Other Demands for Testimony

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule modifies HUD's policies and practices regarding responses to subpoenas and other demands for testimony of HUD employees, or for production of documents by HUD. This rule delegates authority to additional officials within HUD's Office of General Counsel and revises the criteria used to evaluate such demands. Finally, this rule eliminates unnecessary provisions covering HUD's response to demands in cases in which the United States is a party to the case in which testimony or documents are requested. This rule follows publication of an August 12, 2008 proposed rule, but makes no changes at this final rule stage.

DATES: *Effective Date:* December 26, 2008.

FOR FURTHER INFORMATION CONTACT:

Nancy Christopher, Associate General Counsel for Litigation, Office of Litigation, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10258, Washington, DC 20410-0500; telephone number 202-708-0300 (this is not a toll-free telephone number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

HUD's regulations at 24 CFR part 15 describe the policies and procedures governing public access to HUD records under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the policies and procedures governing the production of material or provision of testimony by HUD employees. On February 26, 2007 (72 FR 8580), HUD published a final rule to clarify and explain the various types of requests for HUD documents and testimony by HUD employees that are intended to be

covered by HUD's document production and testimony approval regulations. The final rule revised subparts C and D to describe the procedures to be followed by a party in making a demand to HUD for documents or testimony, and to explain the standards followed by HUD in determining whether production or testimony should be permitted. A technical correction to the final rule was published on September 20, 2007 (72 FR 53876).

After implementing the revised procedures for consideration of demands for documents or testimony, HUD determined that additional changes were necessary to ensure the careful and efficient processing of all such demands. Those changes were proposed in a rule published on August 12, 2008 (73 FR 46826). The changes included, among other things, adding reference to the various officials within the Office of General Counsel (OGC) with responsibility for addressing a demand for production of material or provision of testimony, and providing guidance to persons engaged in private litigation, to which the United States is not a party, on the procedures to be followed when making a demand on HUD for documents or testimony. The preamble to the August 12, 2008 proposed rule, at 73 FR 46826 and 46827, explained in detail the changes proposed to the regulations in 24 CFR part 15, and HUD refers the reader to the proposed rule for the full listing of the regulatory changes proposed.

The August 12, 2008 proposed rule provided a 60-day public comment period, which ended on October 14, 2008. At the end of the public comment period, HUD received only one public comment. The commenter complained that the proposed rule, in § 15.206, appeared to direct HUD employees not to cooperate with court orders for the production of testimony or materials. The language in § 15.206, which directs HUD employees not to produce documents or testimony without official HUD approval, is longstanding. This regulatory section was amended by the August 2008 proposed rule primarily to add reference to the "Authorized Approving Official," the official who is in the best position to consider and approve demands for testimony or documents.

HUD believes that the commenter misunderstands the directions to HUD employees provided in § 15.206. What "official HUD approval" provides is confirmation that the subpoena is directed to matters within the scope of the individual's employment, and the employee was not acting outside the scope of his or her employment. Official

HUD approval is required for the protection of the employee, not to frustrate a court proceeding.

II. This Final Rule

At this final rule stage, HUD adopts the August 12, 2008 proposed rule without change.

III. Findings and Certifications*Paperwork Reduction Act*

The information collection requirements contained in this rule were submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a valid control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule that is subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The regulatory amendments made by this rule are procedural and serve to advise on the process and procedures engaged in by the Department when producing material or providing testimony in response to demands in legal proceedings. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on

state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 15

Classified information, Courts, Freedom of information, Government employees, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons discussed in the preamble, HUD amends 24 CFR part 15 as follows:

PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION BY HUD EMPLOYEES

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 42 U.S.C. 3535(d).
Subpart A also issued under 5 U.S.C. 552. Section 15.107 also issued under E.O. 12958, 60 FR 19825, 3 CFR Comp., p. 333.
Subparts C and D also issued under 5 U.S.C. 301.

■ 2. Amend § 15.2(b) by adding, in alphabetical order, definitions of the terms “Appropriate Associate General Counsel,” “Appropriate Regional Counsel,” and “Authorized Approving Official,” to read as follows:

§ 15.2 Definitions.

* * * * *

(b) * * *
Appropriate Associate General Counsel means the Associate General Counsel for Litigation or the Associate General Counsel for HUD Headquarters employees in those programs for which the Associate provides legal advice.

Appropriate Regional Counsel means the Regional Counsel for the Regional Office having delegated authority over the project or activity with respect to which the information is sought. For

assistance in identifying the Appropriate Regional Counsel, see Appendix A to this part.

Authorized Approving Official means the Secretary, General Counsel, Appropriate Associate General Counsel, or Appropriate Regional Counsel.

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§ 15.102 [Amended]

■ 3. In § 15.102(b), remove the reference “<http://www.hud.gov/ogc/bshelf2a.html>” and, in its place, add the reference “<http://www.hud.gov>.”

§ 15.103 [Amended]

■ 4. In § 15.103(c), remove the reference “<http://www.hud.gov/ogc/foiafree.html>” and, in its place, add the reference “<http://www.hud.gov>.”

■ 5. Add § 15.201(c) to read as follows:

§ 15.201 Purpose and Scope.

* * * * *

(c) This subpart also provides guidance to persons engaged in private litigation, to which the United States is not a party, on the procedures to be followed when making a demand for documents or testimony on the Department of Housing and Urban Development. This subpart does not, and may not be relied upon to, create any affirmative right or benefit, substantive or procedural, enforceable against HUD.

■ 6. Revise § 15.202 to read as follows:

§ 15.202 Production of material or provision of testimony prohibited unless approved.

Neither the Department nor any employee of the Department shall comply with any demand for production of material or provision of testimony in a legal proceeding among private litigants, unless the prior approval of the Authorized Approving Official has been obtained in accordance with this subpart. This rule does not apply to any legal proceeding in which an employee may be called to participate, either through the production of documents or the provision of testimony, not on official time, as to facts or opinions that are in no way related to material described in § 15.201.

■ 7. Revise § 15.203 to read as follows:

§ 15.203 Making a demand for production of material or provision of testimony.

(a) Any demand made to the Department or an employee of the Department to produce any material or provide any testimony in a legal proceeding among private litigants must:

(1) Be submitted in writing to the Department or employee of the Department, with a copy to the Appropriate Associate General Counsel or Appropriate Regional Counsel, no later than 30 days before the date the material or testimony is required;

(2) State, with particularity, the material or testimony sought;

(3) If testimony is requested, state:

(i) The intended use of the testimony, and

(ii) Whether expert or opinion testimony will be sought from the employee;

(4) State whether the production of such material or provision of such testimony could reveal classified, confidential, or privileged material;

(5) Summarize the need for and relevance of the material or testimony sought in the legal proceeding and include a copy of the complaint, if available;

(6) State whether the material or testimony is available from any other source and, if so, state all such other sources;

(7) State why no document[s], or declaration[s] or affidavit[s], could be used in lieu of oral testimony that is being sought;

(8) Estimate the amount of time the employee will need in order to prepare for, travel to, and attend the legal proceeding, as appropriate;

(9) State why the production of the material or provision of the testimony is appropriate under the rules of procedure governing the legal proceeding for which it is sought (e.g., not be unduly burdensome or otherwise inappropriate under the relevant rules governing discovery); and

(10) Describe how producing such material or providing such testimony would affect the interests of the United States.

(b) If the Department determines that the requestor has failed to provide the information required by paragraph (a) of this section, or that the information provided is insufficient to consider the demand in accordance with § 15.204, the Department may require that additional information be provided by the requestor before the demand is considered.

(c) Whenever a demand is made upon the Department or an employee of the Department for the production of material or provision of testimony, the employee shall immediately notify the Appropriate Associate General Counsel or Appropriate Regional Counsel.

■ 8. Revise § 15.204 to read as follows:

§ 15.204 Consideration of demands for production of material or provision of testimony.

(a) The Authorized Approving Official shall determine what material is to be produced or what testimony is to be provided, based upon the following standards:

(1) *Expert or opinion material or testimony.* In any legal proceeding among private litigants, no employee of the Department may produce material or provide testimony as described in § 15.201(a) that is of an expert or opinion nature, unless specifically authorized by the Authorized Approving Official for good cause shown.

(2) *Factual material or testimony.* In any legal proceeding among private litigants, no employee of the Department may produce material or provide testimony as described in § 15.201(a) that is of a factual nature, unless specifically authorized by the Authorized Approving Official. The Authorized Approving Official shall determine whether any of the following factors are applicable. Such a demand may either be denied, or conditionally granted in accordance with § 15.204(c), if any such factors are applicable:

(i) Producing such material or providing such testimony would violate a statute or regulation;

(ii) Producing such material or providing such testimony would reveal classified, confidential, or privileged material;

(iii) Such material or testimony would be irrelevant to the legal proceeding;

(iv) Such material or testimony could be obtained from any other source;

(v) One or more documents, or a declaration or affidavit, could reasonably be provided in lieu of oral testimony;

(vi) The amount of employees' time necessary to comply with the demand would be unreasonable;

(vii) Production of the material or provision of the testimony would not be required under the rules of procedure governing the legal proceeding for which it is sought (e.g., unduly burdensome or otherwise inappropriate under the relevant rules governing discovery);

(viii) Producing such material or providing such testimony would impede a significant interest of the United States; or

(ix) The Department has any other legally cognizable objection to the release of such information or testimony in response to a demand.

(b) Once a determination has been made, the requester will be notified of the determination. If the demand is

denied, the requestor shall be notified of the reasons for the denial. If the demand is conditionally approved, the requestor shall be notified of the conditions that have been imposed upon the production of the material or provision of the testimony demanded, and the reasons for the conditional approval of the demand.

(c) The Authorized Approving Official may impose conditions or restrictions on the production of any material or provision of any testimony. Such conditions or restrictions may include the following:

(1) A requirement that the parties to the legal proceeding obtain a protective order or execute a confidentiality agreement to limit access to, and limit any further disclosure of, material or testimony;

(2) A requirement that the requester accept examination of documentary material on HUD premises in lieu of production of copies;

(3) A limitation on the subject areas of testimony permitted;

(4) A requirement that testimony of a HUD employee be provided by deposition at a location prescribed by HUD or by written declaration;

(5) A requirement that the parties to the legal proceeding agree that a transcript of the permitted testimony be kept under seal or will only be used or only made available in the particular legal proceeding for which testimony was demanded;

(6) A requirement that the requester purchase an extra copy of the transcript of the employee's testimony from the court reporter and provide the Department with a copy at the requester's expense; or

(7) Any other condition or restriction deemed to be in the best interests of the United States, including reimbursement of costs to the Department.

(d) The determination made with respect to the production of material or provision of testimony pursuant to this subpart is within the sole discretion of the Authorized Approving Official and shall constitute final agency action from which no administrative appeal is available.

■ 9. Revise § 15.205 to read as follows:

§ 15.205 Method of production of material or provision of testimony.

(a) Where the Authorized Approving Official has authorized the production of material or provision of testimony, the Department shall produce such material or provide such testimony in accordance with this section and any conditions imposed upon production of material or provision of testimony pursuant to § 15.204(c).

(b) In any legal proceeding where the Authorized Approving Official has authorized the production of documents, the Department shall respond by producing authenticated copies of the documents, to which the seal of the Department has been affixed, in accordance with its authentication procedures. The authentication shall be evidence that the documents are true copies of documents in the Department's files and shall be sufficient for the purposes of Rules 803(8) and 902 of the Federal Rules of Evidence and Rule 44(a)(1) of the Federal Rules of Civil Procedure.

(c) If response to a demand is required before the determination from the Authorized Approving Official is received, the U.S. Attorney, Department of Justice Attorney, or such other attorney as may be designated for the purpose will appear or make such filings as are necessary to furnish the court or other authority with a copy of the regulations contained in this subpart and will inform the court or other authority that the demand has been, or is being, as the case may be, referred for prompt consideration. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested determination from the Authorized Approving Official.

■ 10. Revise § 15.206 to read as follows:

§ 15.206 Procedure in the event of an adverse ruling regarding production of material or provision of testimony.

If the court or other authority declines to stay the demand made in accordance with § 15.205(c) pending receipt of the determination from the Authorized Approving Official, or if the court or other authority rules that the demand must be complied with irrespective of the determination by the Authorized Approving Official not to produce the material or provide the testimony demanded or to produce subject to conditions or restrictions, the employee upon whom the demand has been made shall, if so directed by an attorney representing the Department, respectfully decline to comply with the demand. (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)).

■ 11. Revise § 15.302 to read as follows:

§ 15.302 Production of material or provision of testimony prohibited unless approved.

Neither the Department nor any employee of the Department shall comply with any demand for production of material or provision of testimony in a legal proceeding in which the United States is a party, unless the prior approval of the attorney

representing the United States has been obtained in accordance with this subpart. This rule does not apply to any legal proceeding in which an employee may be called to participate, either through the production of documents or the provision of testimony, not on official time, as to facts or opinions that are in no way related to material described in § 15.301.

- 12. Revise § 15.303 to read as follows:

§ 15.303 Procedure for review of demands for production of material or provision of testimony in any legal proceeding in which the United States is a party.

Whenever a demand is made upon the Department or an employee of the Department for the production of material or provision of testimony, the employee shall immediately notify the Appropriate Associate General Counsel or Appropriate Regional Counsel.

- 13. Revise § 15.304 to read as follows:

§ 15.304 Consideration of demands for production of material or provision of testimony.

Consideration of demands shall be within the province of the attorney representing the United States, who may raise any valid objection to the production of material or provision of testimony in response to the demand.

- 14. Add § 15.305 to read as follows:

§ 15.305 Method of production of material or provision of testimony.

If the production of material or provision of testimony has been authorized, the Department may respond by producing authenticated copies of the documents, to which the seal of the Department has been affixed in accordance with its authentication procedures. The authentication shall be evidence that the documents are true copies of documents in the Department's files and shall be sufficient for the purposes of Rules

803(8) and 902 of the Federal Rules of Evidence and Rule 44(a)(1) of the Federal Rules of Civil Procedure.

- 15. Revise Appendix A to read as follows:

Appendix A to Part 15—Location Information for HUD FOIA Reading Rooms and Contact Information for Regional Counsel

The Department maintains a reading room in Headquarters and in each of the Secretary's Representative's Offices. In addition, each of the Secretary's Representative's Offices has a Regional Counsel. The location and contact information for HUD's FOIA Reading Rooms and for the Regional Counsel can be found in HUD's Local Office Directory, on HUD's Internet site at <http://www.hud.gov>.

Dated: November 17, 2008.

Roy A. Bernardi,
Deputy Secretary.

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