

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 2004

[Docket No. FR-4742-F-02]

RIN 2508-AA13

Office of Inspector General Subpoenas and Production in Response to Subpoenas or Demands of Courts or Other Authorities

AGENCY: Office of Inspector General, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations of the Office of Inspector General (OIG) to implement the statutory requirements concerning the issuance of OIG subpoenas, and responses to subpoenas issued to OIG employees in proceedings where OIG is not a party. This final rule follows publication of a proposed rule on September 20, 2002. No public comments were received in response to the proposed rule. Accordingly, the Department is adopting the proposed rule without change.

DATES: Effective Date: February 24, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background—The September 20, 2002 Proposed Rule

On September 20, 2002 (67 FR 59428), HUD published a proposed rule to amend the regulations of the HUD/OIG by updating the regulations in 24 CFR part 2004. The proposed rule provided that the Inspector General would delegate to the Counsel to the Inspector General the authority and responsibility for responding to requests and demands for production of OIG records and testimony of OIG employees (§ 2004.20). The proposed rule also identified the factors that OIG would consider in making determinations in response to such requests and what information requesters must provide (§§ 2004.21 and 2004.22). The proposed rule further specified when the request should be submitted (§ 2004.22), the time period for review (§ 2004.24), potential fees

(§ 2004.29), and, if a request is granted, any restrictions that may be placed on the disclosure of records or the appearance of an OIG employee as a witness (§§ 2004.26 and 2004.27). The proposed rule also indicated that the charges for witnesses are the same as those provided by the federal courts. Additionally, the rule explained that the fees related to production of records are the same as those charged under OIG's Freedom of Information Act regulation at 24 CFR part 2002. The rule further advised that the proposed charges for time spent by an employee to prepare for testimony and for production of records by OIG are authorized under 31 U.S.C. 9701. Under 31 U.S.C. 9701, an agency may charge for services or things of value that are provided by the agency.

II. This Final Rule

This final rule follows publication of the September 20, 2002, proposed rule, which invited public comment on the rule. The public comment period closed on November 19, 2002, with the Department's receiving no comments on the proposed rule. Accordingly, the Department is adopting the proposed rule without change.

III. Findings and Certifications

Environmental Review

This final 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 environmental review under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This final rule would not impose a federal mandate that will result in expenditures by state, local, or tribal governments and the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies

that this rule would not have a significant economic impact on a substantial number of small entities. There are no anti-competitive discriminatory aspects of the rule with regard to small entities and there are not any unusual procedures that would need to be complied with by small entities. Although HUD has determined that this final rule would not have a significant economic impact on a substantial number of small entities, HUD welcomes comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (2) the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

List of Subjects in 24 CFR Part 2004

Administrative practice and procedure, courts.

Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 2004 to read as follows:

PART 2004—SUBPOENAS AND PRODUCTION IN RESPONSE TO SUBPOENAS OR DEMANDS OF COURTS OR OTHER AUTHORITIES

1. Part 2004 is revised to read as follows:

Subpart A—General Requirements

Sec.

- 2004.1 Scope and purpose.
- 2004.2 Applicability.
- 2004.3 Definitions.

Subpart B—Office of Inspector General Subpoenas

- 2004.10 Service of an Office of Inspector General subpoena.

Subpart C—Requests for Testimony and Production of Documents

- 2004.20 General prohibition.
- 2004.21 Factors OIG will consider.
- 2004.22 Filing requirements for demands or requests for documents or testimony.
- 2004.23 Service of subpoenas or requests.
- 2004.24 Processing demands or requests.
- 2004.25 Final determination.

- 2004.26 Restrictions that apply to testimony.
 2004.27 Restrictions that apply to released records.
 2004.28 Procedure in the event of an adverse ruling.
 2004.29 Fees.

Authority: Inspector General Act of 1978, as amended (5 U.S.C. app.) and 42 U.S.C. 3535(d).

Subpart A—General Requirements

§ 2004.1 Scope and purpose.

(a) This part sets forth the policy for service of a subpoena issued by the Office of Inspector General (OIG), and policies and procedures that you must follow when you submit a demand or request to an employee of the OIG to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) The OIG intends these provisions to:

- (1) Promote economy and efficiency in its programs and operations;
 - (2) Minimize the possibility of involving OIG in controversial issues not related to OIG's functions;
 - (3) Maintain OIG's impartiality among private litigants where OIG is not a named party; and
 - (4) Protect sensitive, confidential information and the deliberative processes of OIG.
- (c) In providing for these requirements, OIG does not waive the sovereign immunity of the United States.
- (d) This part provides guidance for the internal operations of OIG. This part does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 2004.2 Applicability.

This subpart applies to demands and requests to employees for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which HUD or OIG is not a named party. However, this subpart does not apply to:

- (a) Demands upon or requests for an OIG employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of OIG;
- (b) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(c) Congressional demands and Congressional requests for testimony or records.

§ 2004.3 Definitions.

Counsel means the Counsel to the Inspector General.

Demand means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of an OIG employee that is issued in a legal proceeding.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

OIG means the Office of Inspector General, U.S. Department of Housing and Urban Development.

OIG employee or employee means:

- (1) Any current or former officer or employee of OIG;
- (2) Any other individual hired through contractual agreement by or on behalf of OIG or who has performed or is performing services under such an agreement for OIG; and
- (3) Any individual who served or is serving in any consulting or advisory capacity to OIG, whether formal or informal.

Records or official records or information means:

- (1) All documents and materials that are OIG agency records under the Freedom of Information Act, 5 U.S.C. 552;
- (2) All other documents and materials contained in OIG files; and
- (3) All other information or materials acquired by an OIG employee in the performance of his or her official duties or because of his or her official status.

Request means any informal request, by whatever method, for the production of records and information or for testimony that has not been ordered by a court or other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

Subpart B—Office of Inspector General Subpoenas

§ 2004.10 Service of an Office of Inspector General subpoena.

Service of a subpoena issued by OIG may be accomplished as follows:

- (a) *Personal service.* Service may be made by delivering the subpoena to the

person to whom it is addressed. If the subpoena is addressed to a corporation or other business entity, it may be served upon an employee of the corporation or entity. Service made to an employee, agent, or legal representative of the addressee shall constitute service upon the addressee.

(b) *Service by mail.* Service may also be made by mailing the subpoena, certified mail—return receipt requested, to the addressee at his or her last known business or personal address.

Subpart C—Requests for Testimony and Production of Documents

§ 2004.20 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the Inspector General or the Counsel.

§ 2004.21 Factors OIG will consider.

The Counsel or Inspector General, in their discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the Inspector General or the Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) OIG has an interest in the decision that may be rendered in the legal proceeding;
- (c) Allowing such testimony or production of records would assist or hinder OIG in performing its statutory duties or use OIG resources where responding to the request will interfere with the ability of OIG employees to do their work;
- (d) The records or testimony can be obtained from other sources;

(e) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(f) Disclosure would violate or be inconsistent with a statute, Executive Order, or regulation;

(g) Disclosure would reveal confidential or privileged information, trade secrets, or similar, confidential commercial, or financial information;

(h) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(i) Disclosure would result in OIG appearing to favor one litigant over another;

(j) Disclosure relates to documents that were produced by another agency;

(k) The demand or request is in conformance with all other applicable rules;

(l) The demand or request is sufficiently specific to be answered; and

(m) For any other good cause.

§ 2004.22 Filing requirements for demands or requests for documents or testimony.

You must comply with the following requirements whenever you issue demands or requests to an OIG employee for official records and information or testimony.

(a) Your request must be in writing and must be submitted to the Counsel. If you serve a subpoena on OIG or on an OIG employee before submitting a written request and receiving a final determination from the Counsel, OIG will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document sufficient to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on OIG to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OIG employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each OIG employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The OIG reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 30 days before the date that records or testimony are required. Requests submitted less than 30 days before records or testimony are required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

§ 2004.23 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the Counsel to the Inspector General, Office of Inspector General, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Room 8260, Washington, DC 20410–4500.

§ 2004.24 Processing demands or requests.

(a) After service of a demand or request to testify, the Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or to produce official records and information.

(b) The OIG will process requests in the order in which they are received. Absent exigent or unusual circumstances, OIG will respond within 30 days from the date that we receive all information necessary to the evaluation of the demand or request. The time for response will depend upon the scope of the request.

(c) The Counsel may grant a waiver of any procedure described in this subpart where a waiver is considered necessary to promote a significant interest of OIG, HUD, and the United States, or for other good cause.

§ 2004.25 Final determination.

The Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the

sole discretion of the Counsel. The Counsel will notify the requester of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the Counsel may impose on the release of records or information, or on the testimony of an OIG employee.

§ 2004.26 Restrictions that apply to testimony.

(a) The Counsel may impose conditions or restrictions on the testimony of OIG employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The OIG may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the Counsel, the employee shall not:

(1) Disclose confidential or privileged information;

(2) Testify as to facts when the Counsel determines such testimony would not be in the best interest of OIG, HUD and the United States; or

(3) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of OIG. This provision does not apply to requests from the United States for expert or opinion testimony.

§ 2004.27 Restrictions that apply to released records.

(a) The Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the Counsel. In cases where protective orders or confidentiality agreements have already been executed, OIG may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the Counsel so determines, original OIG records may be presented for examination in response to a demand or request, but they are not to

be presented as evidence or otherwise used in a manner by which they could lose their identity as official OIG records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes.

§ 2004.28 Procedure in the event of an adverse ruling.

If the Counsel declines to approve a demand for records or testimony and the court or other authority rules that the demand must be complied with irrespective of the instructions from the OIG not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462.

§ 2004.29 Fees.

(a) *Generally.* The Counsel may condition the production of records or appearance for testimony upon advance

payment of a reasonable estimate of the costs to OIG.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by OIG in its Freedom of Information Act Regulations at 24 CFR part 2002.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony,

in travel, and for attendance in the legal proceeding.

(d) *Payment of fees.* You must pay any applicable witness fees for current OIG employees and any records certification fees by submitting to the Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former OIG employees, you must pay applicable fees directly to the former employee in accordance with applicable statutes.

(e) *Waiver or reduction of fees.* The Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony or production of records. Additionally, fees will not be assessed if the total charge would be \$10.00 or less.

Dated: January 9, 2003.

Kenneth M. Donohue, Sr.,

Inspector General.

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