

§ 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

demands for production of documents or information, and does not create any right or benefit, substantive or procedural, enforceable by any party against the United States.

§ 1703.4 Procedure for production.

(a) Whenever a demand is made for ODNI information or material, the employee who received the demand shall immediately notify OGC ((703) 275–2527). The OGC and the ODNI employee shall then follow the procedures set forth in this section.

(b) The OGC may assert any and all defenses before any search for potentially responsive ODNI information or material begins. Further, in its sole discretion the ODNI may decline to begin a search for potentially responsive ODNI information or material until a final and non-appealable disposition of any or all of the asserted defenses is made by the federal, state, local or government entity of competent jurisdiction. When the OGC determines that it is appropriate to search for potentially responsive ODNI information and material, the OGC will forward the demand to the appropriate ODNI offices or entities with responsibility for the ODNI information or material sought in the demand. Those ODNI offices or entities shall then search for and provide to the OGC all potentially responsive ODNI information and material. The OGC may then assert any and all defenses to the production of what it determines is responsive ODNI information or material.

(c) In reaching a decision on whether to produce responsive ODNI information or material, or to object to the demand, the OGC shall consider whether:

- (1) Any relevant privileges are applicable;
- (2) The applicable rules of discovery or procedure require production;
- (3) Production would violate a statute, regulation, executive order or other provision of law;
- (4) Production would violate a non-disclosure agreement;
- (5) Production would be inconsistent with the ODNI's responsibility to protect intelligence sources and methods, or reveal classified information or state secrets;

(6) Production would violate a specific ODNI policy issuance or instruction; and

(7) Production would unduly interfere with the orderly conduct of ODNI functions.

(d) If oral or written testimony is sought by a demand in a case or matter in which the ODNI is not a party, a

reasonably detailed description of the testimony sought in the form of an affidavit, or a written statement if that is not feasible, by the party seeking the testimony or its attorney must be furnished to the OGC.

(e) The OGC shall notify the appropriate employees of all decisions regarding responses to demands and provide advice and counsel for the implementation of the decisions.

(f) If response to a demand is required before a decision is made whether to provide responsive ODNI information or material, an OGC attorney will request that a Department of Justice attorney appear with the ODNI employee upon whom that demand has been made before the court or other competent authority and provide it with a copy of this regulation and inform the court or other authority as to the status of the demand. The court will be requested to stay the demand pending resolution by the ODNI. If the request for a stay is denied or there is a ruling that the demand must be complied with irrespective of instructions rendered in accordance with this Part, the employee upon whom the demand was made shall, if directed to do so by the General Counsel or its designee, respectfully decline to comply with the demand under the authority of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and this regulation.

(g) ODNI officials may delegate in writing any authority given to them in this Part to subordinate officials.

(h) Any individual or entity not an ODNI employee as defined in this Part who receives a demand for the production or disclosure of ODNI information or material acquired because of that person's or entity's association with the ODNI should notify the OGC ((703) 275–2527) for guidance and assistance. In such cases the provisions of this regulation shall be applicable.

§ 1703.5 Interpretation.

Any questions concerning interpretation of this Regulation shall be referred to the OGC for resolution.

Dated: October 2, 2008.

Corin R. Stone,

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

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 3

[EPA–HQ–OEI–2003–0001; FRL–8730–7]

RIN 2025–AA23

Extension of Cross-Media Electronic Reporting Rule Deadline for Authorized Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the Final Cross-Media Electronic Reporting Rule (CROMERR) deadline for authorized programs (states, tribes, or local governments) with existing electronic document receiving systems to submit an application for EPA approval to revise or modify their authorized programs. This action proposes to extend the current October 13, 2008, deadline until January 13, 2010. Additionally, in the “Rules and Regulations” section of this **Federal Register**, EPA is making this revision as a direct final rule without a prior proposed rule. If the Agency receives no relevant adverse comment, EPA will not take further action on this proposed rule.

DATES: Written comments must be received by November 3, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OEI–2003–0001, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.

- *E-mail:* oei.docket@epa.gov.

- *Mail:* CROMERR Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Hand Delivery: EPA Docket Room, EPA West, Room 3334, 1301 Constitution Avenue, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OEI–2003–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you