



Washington, DC 20515

March 12, 2010

Order of the Architect of the Capitol

Subject: Release of Official Information in Litigation and Testimony by Architect of the Capitol (AOC) Personnel as Witnesses

Purpose: To define standards and rules of conduct required of all AOC personnel, when such personnel are demanded to provide documents or testimony in court.

Brief Description: This Order establishes AOC procedures regarding the testimony of employees and former employees concerning information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, as witnesses in legal proceedings and the production or disclosure of information contained in AOC documents for use in legal proceedings where the AOC is not a party, pursuant to a demand.

Effective Date: This Order is effective April 1, 2010

A handwritten signature in black ink, which appears to read "Stephen Ayers". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Stephen T. Ayers, AIA, LEED AP
Acting Architect of the Capitol

ORDER OF THE ARCHITECT OF THE CAPITOL

Subject: Release of Official Information in Litigation and Testimony by Architect of the Capitol (AOC) Personnel as Witnesses

Purpose: Define minimal standards and rules of conduct required of all AOC personnel, when such personnel are demanded to provide documents or testimony in court.

Brief Description: Explains AOC procedures regarding the testimony of employees and former employees concerning information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, as witnesses in legal proceedings and the production or disclosure of information contained in AOC documents for use in legal proceedings where the AOC is not a party, pursuant to a demand.

Effective Date: April 1, 2010

Supersedes: N/A

ORDER OF THE ARCHITECT OF THE CAPITOL

**SUBJECT: RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND
TESTIMONY BY ARCHITECT OF THE CAPITOL (AOC) PERSONNEL
AS WITNESSES**

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I. Definitions

AOC Personnel – AOC personnel means all Architect of the Capitol, U.S. Botanic Garden, and Capitol Visitor Center managing officials, supervisors, and employees.

Demand – Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official AOC information or for the appearance and testimony of AOC personnel as witnesses.

Litigation – All pre-trial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

Management Official – Management Official means an individual employed by the AOC in a position whose duties and responsibilities require or authorize the individual to formulate, determine, or influence the policies of the agency.

Official Information – All information of any kind, however stored, that is in the custody and control of the AOC, relates to information in the custody and control of the AOC, or was acquired by AOC personnel as part of their official duties or because of their official status within the AOC while such personnel were employed by or on behalf of the AOC.

II. Authorities

United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951) – Allows a Government employee, at the direction of his or her Management Official, to refuse to provide testimony or documentary evidence when presented with a subpoena for the information.

2 U.S.C. §§ 1301, *et. seq.* – The Congressional Accountability Act (CAA) applies employment, workplace safety, and certain other laws to the Legislative branch and its agencies, including the AOC, and lays out dispute resolution procedure for violations of these laws.

28 U.S.C. § 1733 (2009) – Deals with requests for copies of authenticated Government documents and the admissibility in court proceedings.

31 U.S.C. § 702; P.L. 110-161 – The Legislative Branch Contract Disputes Act codifies claim and appeal procedures for AOC contracts.

37 C.F.R. §§ 201.1, 203-205 – Lays out procedures for requests or demands relating to the Copyright Act.

AOC Order 752-1 (Discipline) – Governs the AOC internal procedures regarding discipline of non-bargaining unit AOC personnel.

III. Purpose and Applicability

A. *Purpose.*

1. This policy sets forth the procedures of the AOC regarding the testimony of employees and former employees pursuant to a demand for information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, as witnesses in legal proceedings and the production or disclosure of information contained in AOC documents for use in legal proceedings where the AOC is not a party.

2. The purposes of this policy are to:

- a. Ensure that employees' official time is used only for official purposes;
- b. To maintain the impartiality of the AOC among private litigants;
- c. To ensure that public funds are not used for private purposes;
- d. To ensure the protection of Congress' interests; and
- e. To establish centralized procedures for deciding whether or not to approve testimony or the production of documents.

B. *Applicability.*

1. This policy applies to:

- a. All AOC personnel;
- b. State court proceedings (including grand jury proceedings);
- c. Federal court proceedings; and
- d. State and local legislative and administrative proceedings.

2. This policy does not apply to:

- a. Matters related solely to an employee's personal dealings;
- b. Congressional requests or subpoenas for testimony or documents;

c. Any request or demand relating to activity within the scope of Title 17 of the United States Code (the Copyright Act and related laws). These are governed by Copyright Office regulations, which provide different procedures and for service on the General Counsel of the Copyright Office. *See* 37 C.F.R. §§ 201.1, 203-205;

d. Matters covered by contract claims brought pursuant to the Legislative Branch Contract Disputes Act 31 U.S.C. § 702; P.L. 110-161;

e. Matters brought pursuant to AOC Order 752-1 (Discipline);

f. Matters brought under a negotiated grievance procedure under a collective bargaining agreement to which the government is a party;

g. Matters brought under the Congressional Accountability Act, 2 U.S.C. 1301, *et. seq.* and;

h. In response to requests by Federal Government counsel, or counsel representing the interests of the Federal Government, in litigation conducted, in whole or in part, on behalf of the United States.

3. This policy is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases.

4. This policy does not preclude official comment on matters in litigation in appropriate cases.

5. This policy is intended only to provide guidance for the internal operations of the AOC and is not intended to, and does not, and may not, be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the AOC or the United States.

IV. Responsibility and Accountability

A. Accountability.

1. To maintain Congress's and the public's confidence and integrity in the AOC organization, all AOC personnel must adhere strictly to this policy.

2. Each AOC employee is fully accountable for his or her actions.

B. Duties of Individuals.

1. All AOC personnel shall comply with the terms of this policy.

2. AOC personnel who have reason to believe that this policy is being or have been violated must report the matter to an appropriate authority.

C. Duties of Management Officials.

1. Management Officials are responsible for ensuring compliance with this policy and are accountable for the manner in which they exercise that responsibility.

2. Management Officials will provide, upon request, a copy of this policy to all AOC personnel within their organizations.

3. Management Officials will receive and resolve promptly reports of violations of this policy.

4. Management Officials will ensure that all AOC personnel receive a briefing on this policy tailored to the nature of their duties upon initial appointment or employment.

D. Office of the General Counsel.

1. The General Counsel shall be the AOC deciding official to determine when demands on AOC employees for testimony/documents shall be complied with.

2. The General Counsel shall provide general policy and procedural guidance by issuing supplemental instruction or specific orders concerning the release of official AOC information and the testimony of AOC personnel as witnesses during litigation.

3. The General Counsel will maintain the official file of copies of all demands served on the AOC and AOC responses to these demands.

4. The General Counsel will regularly, but not less than annually provide training on this policy to all AOC personnel.

V. General Principles

A. Generally.

1. It is AOC policy to make official information of a factual nature, both testimonial and documentary, reasonably available for use in Federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

2. AOC personnel shall not provide official information, testimony, or documents, submit to interview, or permit anyone to view such information or visit a site, without prior authorization as required by this policy.

3. When authorized by the General Counsel, AOC personnel are permitted to give an interview or deposition, subject to the following limitations:

a. AOC personnel may discuss those factual matters within his or her personal knowledge;

b. AOC personnel may not make statements regarding any opinions formed related to his or her official duties, or to observations in the performance of contract plans and specifications, unless required in the performance of his or her official duties to form and express those opinions;

c. An AOC employee may not make statements regarding his or her interpretation of contract plans and specifications unless it was required in the performance of official duties to interpret those documents;

d. An AOC employee may not make statements regarding official AOC policy or what he or she believes to be official AOC policy regarding any matter unless required in the performance of his or her official duties to form and express official AOC policy;

e. An AOC employee may not make statements regarding the official AOC position or what he or she believes to be the official AOC position regarding any matter unless required in the performance of his or her official duties to form and express those positions;

f. An AOC employee may not make statements regarding, nor otherwise divulge or release, the nature or contents of any classified or privileged material; and

g. An AOC employee may not provide copies of official records unless the Architect of the Capitol has been served with a subpoena and has authorized the release of said records.

B. Opinion and Expert Testimony.

1. AOC personnel shall not provide, with or without compensation, opinion or expert testimony concerning official AOC information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this policy.

2. Upon a showing of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to AOC interests or the United States, the General Counsel may in its sole discretion, grant such written special authorization for AOC personnel to appear and testify as an expert or opinion witness at no expense to the United States. It is expected that approval for AOC personnel to provide expert or opinion testimony rarely will be granted.

VI. Procedures

A. *Contents of Demand.*

1. A demand for testimony from an AOC employee must be in writing. A demand for documents must be in the form of a subpoena.
2. A demand must contain the following information:
 - a. Identification of parties, their counsel, and the nature of the litigation, including the:
 - i. Case caption, docket number, court.
 - ii. Name, address, and telephone number of all counsel.
 - iii. Date and time on which the documents, information, or testimony sought must be produced; the requested location for production; and, if applicable, the estimated length of time attendance of AOC personnel will be required.
 - b. Identification of information or documents requested:
 - i. A description, in as much detail as possible, of the documents, information, or testimony sought.
 - ii. The location of the records, including the name, address, and telephone number, if known, of the person from whom the documents, information or testimony is sought.
 - c. Description of why the information is needed:
 - i. A brief summary of the facts of the case and the present status of the case.
 - ii. A statement of the relevance of the matters sought to the proceedings at issue.

d. Description of why the desired testimony or document is not reasonably available from another source and why no document could be provided and used in lieu of testimony.

B. When Testimony/Documents Requested from an AOC Employee.

1. Whenever a litigation request or demand is made upon AOC personnel for official AOC information or for testimony concerning such information, the personnel upon whom the request or demand was made shall immediately notify the General Counsel.

2. No AOC employee may provide testimony or produce documents in any proceeding to which this policy applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with the AOC, unless authorized by the General Counsel or his/her designee, or the Architect of the Capitol with advice of the General Counsel, for records and testimony relating to the AOC's work for Congress or materials prepared for other federal agencies covered by evidentiary privileges.

3. The requesting party is responsible for any witness fees, travel, and per diem in accordance with applicable law. Witness fees are to be made payable to the Treasurer of the United States for deposit in Treasury's miscellaneous receipts.

C. Response Procedures.

1. The General Counsel is authorized to determine whether official information originated by the AOC may be released in litigation; whether AOC personnel may be interviewed, contacted, or used as witnesses concerning official AOC information or as expert witnesses; and what, if any conditions will be imposed on such release, interview, contact, or testimony.

2. When an AOC employee receives a demand, the employee will immediately forward it to the General Counsel.

3. The General Counsel will determine whether or not compliance with the request would be appropriate and will respond as soon as practicable. The General Counsel, as appropriate, will request the assistance of the Department of Justice or the U.S. Attorney's Office or congressional officials where necessary to represent the interests of the AOC, the Congress, and the employee in any of the foregoing proceedings.

4. The General Counsel will consider and act upon demands under this regulation with due regard for the interests of Congress, where appropriate, statutory requirements, the AOC's interests, and the public interest, taking into account factors such as:

a. Whether any AOC purposes are violated, such as:

i. The need to conserve employees' time for conducting official business;

ii. The need to avoid spending the time and money of the United States for private purposes;

iii. The need to maintain impartiality among private litigants in cases where a substantial government interest is not involved; and

iv. Any other purpose that the General Counsel deems to be in the interest of Congress or the AOC.

b. Whether the demand is unduly burdensome or otherwise inappropriate under the applicable court rules.

c. Whether the disclosure, including release *in camera*, is appropriate under the rules of procedure governing the case or matter in which the demand arose.

d. Whether the disclosure, including release *in camera*, is appropriate or necessary under the relevant substantive law concerning privilege.

e. Whether the disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

5. If the General Counsel has not acted by the return date on a subpoena, the employee must appear at the stated time and place (unless advised by the General Counsel that the subpoena has been withdrawn) and inform the court (or other interested parties) that the demand has been or is being, as the case may be, referred for the prompt consideration of the appropriate AOC or congressional officials and shall respectfully request the court (or other authority) to stay the demand pending a final determination on the demand.

6. If the General Counsel has denied approval to comply with the subpoena, and the court or authority rules that the demand must be complied with irrespective of such a denial, the employee upon whom such a demand has been made shall produce a copy of this policy and shall respectfully refuse to provide any testimony or produce any documents. *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

D. Request for Authenticated Copies of AOC Documents

1. Requests for authenticated copies of AOC documents for admissibility purposes under 28 U.S.C. 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents that would otherwise be released pursuant to subpoena, court order or as otherwise required by court.
2. The advice of the General Counsel should be obtained concerning the proper form of authentication and information as to the proper person having custody of the record.

VII. Service of Process

A. Designated Agent for Service of Process.

1. The General Counsel is the designated agent for service of process for the AOC.
2. The General Counsel is authorized to accept and sign receipt of service of process served upon the agency or the Architect of the Capitol in his official capacity.

B. Where to Serve Demands.

1. Requesting parties must serve subpoenas to:

Office of General Counsel
Ford House Office Building, Room H2-265A
2nd & D Street, SW
Washington, D.C. 20515

2. All demands must contain the requirements listed in section VI.B., above.

ATTACHMENT A – SAMPLE LETTER FROM GENERAL COUNSEL TO EMPLOYEE
REQUESTED TO TESTIFY

From: Architect of the Capitol, Office of General Counsel
To: (AOC Employee who has been summoned)
Subj:
Ref:
Encl:

By letter dated (date), enclosure (1), and amendment thereto, dated (date), enclosure (2), (requesting attorney), the attorney representing (opposing party), in the case of (case name, case number, and jurisdiction), has requested (state the nature of the request, date, time, location).

Pursuant to (insert authority), you are authorized to give an interview, and a deposition, if and when scheduled, and upon being served a subpoena, subject to the following limitations:

If the testimony is taped, recorded, or transcribed, you and your supervisor shall be provided with a copy of the tape, recording, or transcript, free of charge;

You may discuss those factual matters within your personal knowledge;

You may not make statements regarding any opinions you may have formed relating to your official duties or to observations in the performance of contract plans and specifications unless you were required in the performance of your official duties to form and express those opinions;

You may not make statements regarding your interpretation of contract plans and specifications unless you were required in the performance of your official duties to interpret those documents;

You may not make statements regarding official AOC policy or what you believe to be official AOC policy regarding any matter unless required in the performance of your official duties to form and express official AOC policy;

You may not make statements regarding the official AOC position or what you may believe to be the official AOC position regarding any matter unless you were required in the performance of your duties to form and express those positions;

You may not make statements regarding, nor may you otherwise divulge or release, the nature or contents of any classified or privileged material;

You may not provide expert testimony; and

You may not provide copies of official records unless the Architect of the Capitol has been served with a Subpoena and has authorized the release of said records.

The requesting party is responsible for any witness fees, travel, and per diem in accordance with applicable law. Witness fee's are to be made payable to the Treasurer of the United States for deposit in Treasury's miscellaneous receipts.

In the event that any party seeks disclosure of information which is outside the scope of enclosure (1) and the authority granted by this letter or prohibited by the limitations outlined in this letter, you are to decline to answer on the basis that it is outside the scope of the authority granted to you by the Architect of the Capitol and you are to seek advice from this office at (202) 225-1210.

//Signed//
General Counsel

Copy to:
(Requesting counsel)

ATTACHMENT B – SAMPLE LETTER IN RESPONSE TO A LITIGATION REQUEST
RECEIVED BY LETTER OR PHONE CALL

From: Architect of the Capitol, Office of General Counsel
To: Requesting Party
Subj:
Ref:
Encl:

Dear _____:

This letter confirms your (correspondence) (conversation of (date)), with ((name) of this office), in which you advised that you are seeking official documents of the Architect of the Capitol (or testimony of AOC personnel stemming from the performance of their official duties). You previously were advised of the regulations and procedures that pertain to your request.

The release of official records for litigation purposes, including a release in response to a subpoena, is controlled by AOC regulations. They are issued consistent with *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951), which confirms the authority of the head of a Federal agency to control the release of official information, including testimony. They advance the policy that factual official information should be made reasonably available for use in litigation, unless that information is classified, privileged, or otherwise protected from public disclosure.

As indicated by (name), in order for a determination to be made regarding the release of the information you seek, you must submit a request in writing to (title and address of determining authority). The following information is needed for a thorough determination to be made regarding release:

1. Identification of parties, their counsel, and the nature of the litigation, including:
 - a. Caption of case, docket number, court.
 - b. Name, address, and telephone number of all counsel.
 - c. The date and time on which the documents, information, or testimony sought must be produced; the requested location for production; and if applicable, the estimated length of time attendance of AOC personnel will be required.
2. Identification of information or documents requested:
 - a. A description, in as much detail as possible, of the documents, information, or testimony sought.
 - b. The location of the records, including the name, address, and telephone number, if known, of the person from whom the documents, information or testimony is sought.

3. Description of why the information is needed

a. A brief summary of the facts of the case and the present posture of the case.

b. A statement of the relevance of the matters sought to the proceedings at issue.

4. Description of why the desired testimony or document is not reasonably available from another source and why no document could be provided and used in lieu of testimony.

Once the information is received, your request will be processed as expeditiously as possible. Your point of contact is the General Counsel, who may be reached at (202) 225-1210.

//Signed//

General Counsel

Copy to:
(Relevant Employee)