

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 15

[Docket No. FR-5015-F-02]

RIN 2501-AD18

Public Access to HUD Records Under the Freedom of Information Act (FOIA) and Production of Material or Provision of Testimony by HUD Employees

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule clarifies and explains the various types of requests for HUD documents and testimony by HUD employees that are intended to be covered by the Department's document production and testimony approval regulations. This final rule describes the procedures to be followed by a party in making a demand for HUD documents and HUD testimony. The final rule also explains the standards to be followed by HUD in determining whether production of documents or testimony should be permitted and, if so, any conditions or restrictions that HUD should impose. This final rule follows publication of an August 15, 2006, proposed rule on which HUD received one public comment. After careful consideration of the issues raised by the commenter, HUD has decided to adopt the August 15, 2006, proposed rule with minor changes.

DATES: *Effective Date:* March 28, 2007.

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 Seventh Street, SW., Room 10258, Washington, DC 20410-5000; telephone (202) 708-0300 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at (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. In § 15.2, HUD employees are defined as all current or former employees who are not employees of the Office of the Inspector General. Currently, HUD's

FOIA regulations governing the production of documents and provision of testimony by HUD employees are contained in subparts C and D, respectively. These regulations contain the procedures to be followed when a demand is served upon the Department or a HUD employee, and when employees are asked to provide testimony in legal proceedings.

II. The August 15, 2006, Proposed Rule

On August 15, 2006, HUD published a proposed rule (71 FR 46986) to revise the regulations contained in subparts C and D of 24 CFR part 15. The proposed rule intended to revise and amend subparts C and D in order to clarify the various types of requests for HUD documents and testimony by HUD employees that are intended to be covered by the regulations in 24 CFR part 15. The proposed rule also described the procedures to be followed by a party in making a demand to HUD for documents or testimony. The proposed rule explained the standards that are to be followed by HUD in determining whether production or testimony should be permitted and, if so, any conditions or restrictions that should be imposed on the disclosure. In addition to these changes, the proposed rule outlined technical corrections in both subparts C and D.

This final rule effects these revisions and amendments to subparts C and D. Further, the organization of 24 CFR part 15 is no longer based on a distinction between production of material and provision of testimony, but rather is based on the parties involved in the legal proceeding. Subpart C governs litigation between private parties, while subpart D governs litigation where one of the parties is the federal government. In order to improve clarity and highlight the processes to be followed, subparts C and D have been revised in their entirety.

For more detailed information regarding the regulatory changes, please refer to the preamble of the August 15, 2006, proposed rule.

III. This Final Rule; Changes to the August 15, 2006, Proposed Rule

This final rule follows publication of the August 15, 2006, proposed rule, and takes into consideration the public comment received on the proposed rule. After careful review of the public comment, HUD has made the following changes to the proposed rule:

1. *Inclusion of any other factors that HUD determines to be significant when making a demand.* This final rule provides that any demand made to HUD or a HUD employee to produce any

material or provide any testimony in a legal proceeding among private litigants must include specific information. HUD is making a minor revision to § 15.203, which lists the information that must be included in the demand, by adding a provision to require the inclusion of other factors that HUD considers significant. This additional provision does not change the obligation of parties when making a demand to include all information that would assist HUD in making a determination regarding the demand.

2. *Imposition of conditions and restrictions on a demand when the United States is a party to the legal proceeding.* HUD is clarifying the regulations to explicitly state that the Secretary or General Counsel may impose conditions or restrictions on the production of any material or provision of any testimony when the United States is a party to the legal proceeding. The proposed rule set forth the standards to be considered in making a determination of what material and testimony would be provided in legal proceedings between private parties. This final rule now makes these standards applicable to legal proceedings in which the United States is a party.

IV. Discussion of Public Comments Received on the August 15, 2006, Proposed Rule

The public comment period on the proposed rule closed on October 16, 2006. In response to the proposed rule, HUD received one public comment, from the National Leased Housing Association. This section of the preamble presents a summary of the significant issues raised by the public commenter on the August 15, 2006, proposed rule, and HUD's responses to those issues.

Comment: HUD does not have the authority to decline to comply with a court order to produce material or testimony. One commenter wrote that proposed revisions to §§ 15.202 and 15.206 misstate the law, are contrary to FOIA, and would create a constitutional problem by elevating HUD above court authority. The commenter wrote that HUD's reliance on *United States, ex. rel. Touhy v. Ragen* is overstated and that the government cannot simply refuse to produce evidence or provide testimony. The commenter recommends that the proposed regulation be replaced with a requirement that information will not be produced without a properly issued subpoena to the properly designated federal official and that all information should be produced unless it is subject to a recognized right or privilege.

HUD Response: HUD has not revised the rule in response to this comment. As proposed, when HUD is not a party to the legal proceeding, an employee is not to produce material or provide testimony unless the Secretary or General Counsel has granted prior approval. If a court or other authority declines to stay the demand until a determination is made by the Secretary or General Counsel, or if a production or provision of testimony is required by a court or other authority in spite of a determination not to provide the requested material, at the direction of legal counsel a HUD employee is to respectfully decline to comply with the demand. HUD, like any other entity that is served with a demand, may take all appropriate steps to limit the scope of or obtain the withdrawal of a demand.

While the regulations governing the production of material and the provision of testimony are included within the same part as the regulations implementing FOIA, these demands are not FOIA requests and are not treated as such. The purpose of FOIA is to provide the public with access to information regarding federal agencies in recognition of the importance of participation by an informed citizenry in the effective functioning of the federal government. Demands for the production of material or the provision of testimony in the context of a legal proceeding between private litigants do not affect a greater understanding of federal agencies for the public and, therefore, are not afforded the protections contained in FOIA's disclosure requirements.

Further, HUD's reliance on *United States, ex. rel. Touhy v. Ragen* (340 U.S. 462 (1951)) (*Touhy*) is not inappropriate. The court in *Touhy* recognized that the information contained in the files of a government department and the possibilities of harm from unrestricted disclosure in court necessitates a centralized determination as to whether a demand will be complied with or challenged. With regard to the issue of an executive agency treading on the domain of the judicial branch, the court in *Touhy*, reiterating a holding from an earlier court case, stated that it is lawful for a Secretary to reserve for his/her determination matters of this nature.

Accordingly, because the proposed regulation comports with the law and is consistent with federal agency practice, HUD has not revised it.

V. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this final rule

are under review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Approval and the assignment of an OMB control number is pending. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB 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 subject to notice and subject to 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 that are made by this final rule are procedural. Accordingly, the rule would not have any impact on the substantive rights or duties of small entities requesting HUD records under the Freedom of Information Act. Furthermore, because the fees charged under this rule are limited by FOIA to direct costs of searching for, reviewing, and duplicating the records processed for requesters, the fees are not economically significant.

Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

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 proposed 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 final 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 final 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 to read 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).

■ 2. Revise § 15.1(b) and (c) to read as follows:

§ 15.1 What is the purpose of this part?

* * * * *

(b) *Subpart C of this part.* Subpart C of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings among private litigants.

(c) *Subpart D of this part.* Subpart D of this part describes the procedures to be followed and standards to be applied in processing demands for the production of material or provision of testimony in legal proceedings in which the United States is a party.

* * * * *

■ 3. In § 15.2(b) add, in alphabetical order, definitions of the terms "Demand," "Good cause," "Material," "Production," "Testimony," and "United States" to read as follows:

§ 15.2 Definitions.

* * * * *

Demand means a subpoena, order, or other demand of a court or other authority that is issued in a legal

proceeding and any accompanying submissions.

* * * * *

Good cause means necessary to prevent a miscarriage of justice or to promote a significant interest of the Department.

* * * * *

Material means either documents or information contained in, or relating to contents of, the files of the Department or documents or information acquired by any person while such person was an employee of the Department as a part of the performance of his or her official duties or because of his or her official status.

* * * * *

Production refers to the provision of material by any means other than through the provision of oral testimony.

* * * * *

Testimony refers to any oral or written statements made in litigation under oath or penalty of perjury.

* * * * *

United States refers to the Federal Government of the United States (including the Department), the Secretary, and any employees of the Department in their official capacities.

■ 4. Revise subpart C to read as follows:

Subpart C—Production of Material or Provision of Testimony in Response to Demands in Legal Proceedings Among Private Litigants

Sec.

15.201 Purpose and scope.

15.202 Production of material or provision of testimony prohibited unless approved by the Secretary or General Counsel.

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

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

15.205 Method of production of material or provision of testimony.

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

Subpart C—Production of Material or Provision of Testimony in Response to Demands in Legal Proceedings Among Private Litigants

§ 15.201 Purpose and scope.

(a) This subpart contains the regulations of the Department concerning the procedures to be followed and standards to be applied when demand is issued in a legal proceeding among private litigants for the production or disclosure of any material, whether provided through production of material or provision of testimony.

(b) This subpart does not apply to demands, which are covered by part 2004 of this title, for production of material in the files of the Office of Inspector General or provision of testimony by employees within the Office of Inspector General.

§ 15.202 Production of material or provision of testimony prohibited unless approved by the Secretary or General Counsel.

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 Secretary or General Counsel 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.

§ 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 Associate General Counsel for Litigation, no later than 30 days before the date the material or testimony is required;

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

(3) State 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;

(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 or affidavit, 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 unduly burdensome or otherwise inappropriate under the relevant rules governing discovery);

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

(11) Include any other factors that the agency determines to be significant.

(b) Whenever a demand is made upon the Department or an employee of the Department for the production of material or provision of testimony, the Associate General Counsel for Litigation or designee shall be notified immediately. The Associate General Counsel for Litigation or designee shall maintain a record of all demands served upon the Department and refer the demand to the appropriate designee for processing and determination.

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

(a) The Secretary or General Counsel 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 that is of an expert or opinion nature, unless specifically authorized by the Secretary or the General Counsel 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 unless specifically authorized by the Secretary or General Counsel. Such authorization may be granted if the Secretary or General Counsel determines that it is warranted based upon an assessment of whether:

(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 is relevant to the legal proceeding;

(iv) Such material or testimony can 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 is reasonable;

(vii) 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.*, unduly burdensome or otherwise inappropriate under the relevant rules governing discovery); and

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

(b) Once a determination has been made, the requester will be notified of the determination, the reasons for the grant or denial of the demand, and any conditions that have been imposed upon the production of the material or provision of the testimony demanded.

(c) The Secretary or General Counsel 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, the terms of which must be acceptable to the Secretary or General Counsel, 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 or affidavit;

(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 made available in the particular legal proceeding for which testimony was demanded;

(6) A requirement that the requester provide the Department with a copy of a transcript of the employee's testimony free of charge; or

(7) Any other condition or restriction deemed to be in the best interests of the United States.

(d) The determination made with respect to the production of material or provision of testimony is within the sole discretion of the Secretary or General Counsel and shall constitute final agency action from which no administrative appeal is available.

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

(a) Where the Secretary or General Counsel 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.

(b) In any legal proceeding where the Secretary or General Counsel 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. That authentication shall be evidence that the documents are true copies of documents in the Department's files and be sufficient for the purposes of Rule 902 of the Federal Rules of Evidence.

(c) If response to the demand is required before the determination from the Secretary or General Counsel is received, the U.S. 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 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 Secretary or General Counsel.

§ 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 pending receipt of the determination from the Secretary or General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the determination by the Secretary or General Counsel 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)).

■ 5. Revise subpart D to read as follows:

Subpart D—Production of Material or Provision of Testimony in Response to Demands in Legal Proceedings in Which the United States Is a Party

Sec.

15.301 Purpose and scope.

15.302 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.

15.303 Consideration of demands for production of material or provision of testimony.

15.304 Method of production of material or provision of testimony.

Subpart D—Production of Material or Provision of Testimony in Response to Demands in Legal Proceedings in Which the United States Is a Party

§ 15.301 Purpose and scope.

(a) This subpart contains the regulations of the Department concerning the procedures to be followed and standards to be applied when demand is issued in a legal proceeding in which the United States is a party for the production or disclosure of any material, whether provided through production of material or provision of testimony.

(b) This subpart does not apply to demands, which are covered by part 2004 of this title, for production of material in the files of the Office of Inspector General or provision of testimony by employees within the Office of Inspector General.

§ 15.302 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.

All demands for production of material or provision of testimony in any legal proceeding in which the United States is a party shall be directed to the agency through the attorney representing the United States in the proceeding. Whenever the Department or an employee of the Department is notified by the attorney representing the United States of the demand for the production of material or provision of testimony in any legal proceeding in which the United States is a party, the Associate General Counsel for Litigation or designee shall be notified immediately.

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

(a) The Secretary or General Counsel shall consult with the attorney representing the United States as to the response to the demand for production of material or to the provision of testimony.

(b) An employee of the Department may not testify as an expert or opinion witness unless specifically authorized by the Secretary or the General Counsel for good cause shown.

(c) The Secretary or General Counsel may impose conditions or restrictions on the production of any material or provision of any testimony, as set forth in section 15.204(c).

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

Where the Secretary or General Counsel has authorized the production

of material or provision of testimony, the Associate General Counsel for Litigation or designee shall arrange for the production of any authorized material or provision of any authorized testimony through the attorney representing the United States. Where the Secretary or General Counsel has authorized the production of documents, 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. That authentication shall be evidence that the documents are true copies of documents in the Department's files and be sufficient for the purposes of Rule 902 of the Federal Rules of Evidence.

Dated: February 16, 2007.

Roy A. Bernardi,

Deputy Secretary.

[FR Doc. E7-3140 Filed 2-23-07; 8:45 am]

BILLING CODE 4210-67-P