

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1216

#### Testimony by MSPB Employees and Production of Official Records in Legal Proceedings

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Proposed rule.

**SUMMARY:** The Merit Systems Protection Board seeks public comment on a proposed rule that would set out procedures that requesters would have to follow when making demands on or requests to an MSPB employee to produce official records or provide testimony relating to official information in connection with a legal proceeding in which the MSPB is not a party. The rule would establish procedures to respond to such demands and requests in an orderly and consistent manner. The proposed rule will promote uniformity in decisions, protect confidential information, provide guidance to requesters, and reduce the potential for both inappropriate disclosures of official information and wasteful allocation of agency resources.

**DATES:** Comments must be received on or before February 14, 2006.

**ADDRESSES:** Send or deliver comments to the Office of the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; fax: (202) 653-7130; or e-mail: [mspb@mspb.gov](mailto:mspb@mspb.gov).

**FOR FURTHER INFORMATION CONTACT:** Bentley M. Roberts, Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419; (202) 653-7200; fax: (202) 653-7130; or e-mail: [mspb@mspb.gov](mailto:mspb@mspb.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The MSPB occasionally receives subpoenas and requests for MSPB employees to provide evidence or

testimony in litigation in which MSPB is not a party. Usually the subpoenas or requests for records are for the MSPB's records that are not available to the public under the Freedom of Information Act (FOIA). The MSPB may also receive a request for an MSPB employee to provide testimony relating to materials contained in the MSPB's official records or to provide testimony or information acquired by an MSPB employee during the performance of the MSPB employee's official duties.

Responding to such demands and requests may result in a significant disruption of an MSPB employee's work schedule and possibly involve the MSPB in issues unrelated to its responsibilities. In order to resolve these problems, many agencies have issued regulations, similar to the proposed regulation, governing the circumstances and manner in which an employee may respond to demands for testimony or for the production of documents. The United States Supreme Court upheld this type of regulation in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

Briefly summarized, the proposed rule will prohibit disclosure of nonpublic official records or testimony by the MSPB's employees, as defined in Part 1216.103(e), unless there is compliance with the rule. The proposed rule sets out the information that requesters must provide and the factors that the MSPB will consider in making determinations in response to requests for testimony or the production of documents.

The charges for witnesses are the same as those provided in Federal courts; and the fees related to production of records are the same as those charged under FOIA. The charges for time spent by an employee to prepare for testimony and for searches, copying, and certification of records by the MSPB are authorized under 31 U.S.C. 9701, which permits an agency to charge for services or things of value that are provided by the agency.

This rule applies to a range of matters in any legal proceeding in which the MSPB is not a named party. It also applies to former and current MSPB employees (as well as to MSPB consultants and advisors). Former MSPB employees are prohibited from testifying about specific matters for which they had responsibility during

their active employment unless permitted to testify as provided in the rule. They would not be prohibited from testifying about general matters unconnected with the specific MSPB matters for which they had responsibility.

This rule will ensure a more efficient use of the MSPB's resources, minimize the possibility of involving the MSPB in issues unrelated to its responsibilities, promote uniformity in responding to such subpoenas and like requests, and maintain the impartiality of the MSPB in matters that are in dispute between other parties. It will also serve the MSPB's interest in protecting sensitive, confidential, and privileged information and records that are generated in fulfillment of the MSPB's statutory responsibilities.

This rule is internal and procedural rather than substantive. It does not create a right to obtain official records or the official testimony of an MSPB employee nor does it create any additional right or privilege not already available to MSPB to deny any demand or request for testimony or documents. Failure to comply with the procedures set out in these regulations would be a basis for denying a demand or request submitted to the MSPB.

#### List of Subjects in 5 CFR Part 1216

Administrative practice and procedure.

For the reasons stated in the preamble, the Merit Systems Protection Board proposes to amend 5 CFR, chapter II as set forth below:

**PART 1211—[RESERVED]**

**PART 1212—[RESERVED]**

**PART 1213—[RESERVED]**

**PART 1214—[RESERVED]**

**PART 1215—[RESERVED]**

#### PART 1216—TESTIMONY BY MSPB EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

##### Subpart A—General Provisions

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## 1216.103 Definitions.

**Subpart B—Demands or Requests for Testimony and Production of Documents**

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- 1216.202 Factors the MSPB will consider.
- 1216.203 Filing requirements for litigants seeking documents or testimony.
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- 1216.207 Restrictions that apply to testimony.
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- 1216.209 Procedure when a decision is not made prior to the time a response is required.
- 1216.210 Procedure in the event of an adverse ruling.

**Subpart C—Schedule of Fees**

- 1216.301 Fees.

**Subpart D—Penalties**

- 1216.401 Penalties.

**Authority:** 5 U.S.C. § 1204(h); 31 U.S.C. § 9701.

**Subpart A—General Provisions****§ 1216.101 Scope and Purpose.**

(a) These regulations establish policy, assign responsibilities and prescribe procedures with respect to:

(1) the production or disclosure of official information or records by MSPB employees, advisors, and consultants; and

(2) the testimony of current and former MSPB employees, advisors, and consultants relating to official information, official duties, or the MSPB's records, in connection with federal or state litigation in which the MSPB is not a party.

(b) The MSPB intends these provisions to:

(1) Conserve the time of MSPB employees for conducting official business;

(2) Minimize the involvement of MSPB employees in issues unrelated to MSPB's mission;

(3) Maintain the impartiality of MSPB employees in disputes between private litigants; and

(4) Protect sensitive, confidential information and the deliberative processes of the MSPB.

(c) In providing for these requirements, the MSPB does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of MSPB. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

**§ 1216.102 Applicability.**

This part applies to demands and requests to current and former employees, advisors, and consultants for factual or expert testimony relating to official information or official duties or for production of official records or information, in legal proceedings in which the MSPB is not a named party. This part does not apply to:

(a) Demands upon or requests for an MSPB 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 the MSPB;

(b) Demands upon or requests for a former MSPB employee to testify as to matters in which the former employee was not directly or materially involved while at the MSPB;

(c) 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; or

(d) Congressional demands and requests for testimony, records or information.

**§ 1216.103 Definitions.**

The following definitions apply to this part.

(a) *Demand* means an order, subpoena, 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 MSPB employee in a legal proceeding.

(b) *General Counsel* means the General Counsel of the MSPB or a person to whom the General Counsel has delegated authority under this part.

(c) *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.

(d) *MSPB* means the Merit Systems Protection Board.

(e) *MSPB employee* or *employee* means:

(L) (i) Any current or former employee of the MSPB;

(ii) Any other individual hired through contractual agreement by or on behalf of the MSPB or who has performed or is performing services under such an agreement for the MSPB; and

(iii) Any individual who served or is serving in any consulting or advisory capacity to the MSPB, whether formal or informal.

(2) This definition does not include: Persons who are no longer employed by the MSPB and who agree to testify

about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the MSPB.

(f) *Records or official records and information* means:

All information in the custody and control of the MSPB, relating to information in the custody and control of the MSPB, or acquired by an MSPB employee in the performance of his or her official duties or because of his or her official status, while the individual was employed by or on behalf of the MSPB.

(g) *Request* means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority

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

**Subpart B—Demands or Requests for Testimony and Production of Documents****§ 1216.201 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 General Counsel.

**§ 1216.202 Factors the MSPB will consider.**

The General Counsel, in his or her sole 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 General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) Allowing such testimony or production of records would assist or hinder the MSPB in performing its statutory duties;

(d) Allowing such testimony or production of records would be in the best interest of the MSPB or the United States;

(e) The records or testimony can be obtained from other sources;

(f) 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;

(g) Disclosure would violate a statute, Executive Order or regulation;

(h) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(i) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;

(j) Disclosure would result in the MSPB appearing to favor one litigant over another;

(k) Whether the request was served before the demand;

(l) A substantial Government interest is implicated;

(m) The demand or request is within the authority of the party making it; and

(n) The demand or request is sufficiently specific to be answered.

#### **§ 1216.203 Filing requirements for litigants seeking documents or testimony.**

A litigant must comply with the following requirements when filing a request for official records and information or testimony under Subpart 1216. A request should be filed before a demand.

(a) The request must be in writing and must be submitted to the Clerk of the Board who will immediately forward the request to the General Counsel.

(b) The 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 necessary 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 any need to maintain the confidentiality of the information and outweighs the burden on the MSPB 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 MSPB employee, such as a retained expert;

(6) If testimony is requested, the intended use of the 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 for each MSPB employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

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

(d) The request should be submitted at least 30 days before the date that records or testimony is required. Requests submitted in less than 30 days before records or testimony is 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 General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

(f) The request should state that the requester will provide a copy of the MSPB employee's statement free of charge and that the requester will permit the MSPB to have a representative present during the employee's testimony.

#### **§ 1216.204 Service of requests or demands.**

Requests or demands for official records or information or testimony under this Subpart must be served on the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0002 by mail, fax, or e-mail and clearly marked "Part 1216 Request for Testimony or Official Records in Legal Proceedings." The request or demand will be immediately forwarded to the General Counsel for processing.

#### **§ 1216.205 Processing requests or demands.**

(a) After receiving service of a request or demand for testimony, the General Counsel will review the 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 produce official records and information.

(b) Absent exigent circumstances, the MSPB will issue a determination within 30 days from the date the request is received.

(c) The General Counsel may grant a waiver of any procedure described by this Subpart where a waiver is considered necessary to promote a significant interest of the MSPB or the United States, or for other good cause.

(d) *Certification (authentication) of copies of records.* The MSPB may certify that records are true copies in order to facilitate their use as evidence. If a requester seeks certification, the requester must request certified copies from the MSPB at least 30 days before the date they will be needed. The request should be sent to the Clerk of the Board.

#### **§ 1216.206 Final determination.**

The General Counsel makes the final determination on demands or requests to employees for production of official records and information or testimony in litigation in which the MSPB is not a party. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and, when appropriate, the court or other competent authority of the final determination, the reasons for the grant or denial of the request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an MSPB employee. The General Counsel's decision exhausts administrative remedies for discovery of the information.

#### **§ 1216.207 Restrictions that apply to testimony.**

(a) The General Counsel may impose conditions or restrictions on the testimony of MSPB employees including, for example:

(1) Limiting the areas of testimony;

(2) Requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;

(3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The MSPB 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 General Counsel, the employee shall not:

(1) Disclose confidential or privileged information; or

(2) For a current MSPB employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the MSPB unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to the MSPB's approval.

#### **§ 1216.208 Restrictions that apply to released records.**

(a) The General 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 General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the MSPB may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original MSPB records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official MSPB records, nor may they be marked or altered. In lieu of the original records, certified copies may be presented for evidentiary purposes.

#### **§ 1216.209 Procedure when a decision is not made prior to the time a response is required.**

If a response to a demand or request is required before the General Counsel can make the determination referred to in § 1216.206, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the request is being reviewed, provide an estimate as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

#### **§ 1216.210 Procedure in the event of an adverse ruling.**

If the court or other competent authority fails to stay a demand or request, the employee upon whom the

demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

### **Subpart C—Schedule of Fees**

#### **§ 1216.301 Fees.**

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the MSPB.

(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 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, allowances, and benefits). Fees for duplication will be the same as those charged by the MSPB in its Freedom of Information Act regulations at 5 CFR Part 1204.

(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 and on 28 U.S.C. 1821, as applicable. Such fees will include cost of time spent by the witness to prepare for testimony, in travel and for attendance in the legal proceeding, plus travel costs.

(d) *Payment of fees.* A requester must pay witness fees for current MSPB employees and any record certification fees by submitting to the Clerk of the Board a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony of former MSPB employees, the requester must pay applicable fees directly to the former MSPB employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(f) *De minimis fees.* Fees will not be assessed if the total charge would be \$10.00 or less.

### **Subpart D—Penalties**

#### **§ 1216.401 Penalties.**

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the MSPB, or as ordered by a Federal court after the MSPB has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former MSPB employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current MSPB employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

Dated: December 12, 2005.

**Bentley M. Roberts, Jr.,**

*Clerk of the Board.*

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**BILLING CODE 7400-01-P**

## **DEPARTMENT OF AGRICULTURE**

### **Commodity Credit Corporation**

#### **7 CFR Part 1496**

#### **RIN 0560-AH39**

### **Procurement of Commodities for Foreign Donation**

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would adopt new procedures to be used by the Commodity Credit Corporation (CCC) in the evaluation of bids in connection with the procurement of commodities for donation overseas. In general, CCC proposes to amend the existing regulations to provide for the simultaneous review of commodity and ocean freight offers when evaluating lowest-landed cost options in connection with the procurement of commodities. This proposed rule would enhance bidding opportunities for potential vendors while allowing CCC to more efficiently acquire commodities.

**DATES:** Comments on this proposed rule must be received on or before January 17, 2006 in order to be assured consideration. Comments on the information collections in this proposed rule must be received by February 14, 2006 in order to be assured consideration.

**ADDRESSES:** CCC invites interested persons to submit comments on this proposed rule and on the collection of information. Comments may be