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Law

CIVIL LITIGATION

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This instruction implements Air Force Policy Directive (AFPD) 51-3, *Civil Litigation* by setting guidelines for Air Force personnel dealing with litigation, tax disputes, and legal or administrative proceedings. It sets procedures for releasing information for use in litigation and sets in motion the procedures and service of legal process involving the Air Force, Air Force personnel performing official duties, and Air Force instrumentalities (including nonappropriated fund activities) in the United States and foreign countries.

This instruction directs collecting and maintaining information subject to the *Privacy Act of 1974* (hereinafter the Privacy Act), 5 United States Code, Section 552a, authorized by 10 U.S.C. 8013. System of records notices F051 AF JA D, Litigation Records (Except Patents), and F051 AFJA D, Patent Infringement and Litigation Records, apply.

The reporting requirements in this instruction are exempt from licensing in accordance with paragraph 2.11.8 of AFI 37-124, *The Information Collections and Reports (ICR) Management Program; Controlling Internal, Public, and Interagency Air Force Information Collections*.

**SUMMARY OF REVISIONS**

**This document is substantially revised and must be completely reviewed.**

This revision clarifies the guidance on processing representation requests (paragraph 1.3.); reorganizes Chapter 1 to add the related subject of indemnification requests (paragraph 1.4.); updates point of contact information for garnishment and other involuntary withholding of pay matters (paragraph 1.5.); clarifies the standards for Privacy Act protection of litigation report documents (paragraph 1.8.1.4.) and for the disclosures necessary to be made in litigation matters (paragraph 1.8.1.5.); adds a new format to aid in the creation of litigation reports (Figure 1.4.); adds, further explains some duties specific to handling claims litigation discovery requests and processing requests for representation in negligence cases (paragraphs 2.3. and 2.4.); provides substantial new information about the points of contact and distribution of litigation responsibility within AFLSA/JACL (paragraph 3.1.); updates point of contact and other information

**Section 9B—Release of Official Information**

**9.3. Release Authorities for Official Information.** The following personnel are the release authorities for official Air Force information in the following litigation situations:

9.3.1. SJAs are the release authorities for official, unclassified factual information in private litigation cases. In lieu of an available SJA, Secretariat personnel should consult with SAF/GC.

9.3.2. Likewise, Medical Law Consultants (MLCs) are the release authorities for official, unclassified factual information in private litigation, to the extent it involves the release of medical and other records and information within the custody, control or knowledge of their permanent station hospital and its personnel.

9.3.3. For official information to be used in litigation before the Armed Services Board of Contract Appeals, contracting officers, in consultation with the appropriate servicing SJA, are authorized to release such information per the *Federal Acquisition Regulation* (FAR), subpart 5.4., and applicable DoD directives and Air Force instructions. Responses to such requests must be coordinated with the assigned trial attorney at the AFMC LO/JAB, Wright-Patterson AFB OH 45433-5000.

9.3.4. The responsible AFLSA civil litigation division or HQ USAF/JAI (for official information to be released to, or used in, foreign courts) releases all official, unclassified Air Force information in cases in which the United States is a party or has a direct or indirect interest; they also make all such release decisions for cases in which the information could be used in a claim or litigation against the United States.

**9.4. Applicability to Former and Retired Air Force Personnel.** Former and retired Air Force personnel who have possession of or access to official Air Force information, including classified information, are also required to follow the procedures in this section to obtain permission from the Air Force to release such information.

**9.5. Factors in Releasing Official Information or Testimony.** Release authorities ensure requesters state in writing the nature and relevance of the official information they want and include as much detail as possible. The appropriate release authority then uses this information to evaluate the request in light of DoDD 5405.2 (32 C.F.R., Part 97) and *United States, ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Before releasing official information, release authorities consider these questions:

9.5.1. Is the demand or request unduly burdensome or otherwise irrelevant?

9.5.2. Does the demand or request specify remedial information that is inadmissible under the rules of evidence, or is the information otherwise inappropriate under the applicable court rules?

9.5.3. Would disclosing this information (including release in camera) be appropriate under the rules of procedure governing the case and under the relevant substantive law concerning the appropriate privilege?

9.5.4. Would disclosing the information violate any statute, executive order, regulation, or directive? Release documents subject to the Privacy Act only with consent of the individual or under a court order or subpoena specifically signed by a judge of a court of competent jurisdiction. Because an order against the United States is an order against the sovereign, what is considered to be a court of competent jurisdiction under the Privacy Act is subject to interpretation. [See 5 U.S.C. 552a(b)(11); *Doe v. DiGenova*, 779 F.2d 74 (D.C. Cir 1985); *Bosaw v. NTEU*, 887 F. Supp. 1199 (S.D. Ind. 1995);

and *Boron Oil Co. v. Downie*, 873 F. 2d 67 (4<sup>th</sup> Cir. 1989).] Please refer any questions to the appropriate civil litigation division.

9.5.5. Would disclosing the information, except in camera to assert a claim of privilege, reveal classified or other restricted information? Particularly, would it reveal:

9.5.5.1. Data under DoD 5200-1-R, *Information Security Program*, January 1997 or AFI 31-401, *Information Security Program Management*?

9.5.5.2. Unclassified technical data withheld from public release pursuant to DoD Directive 5230.25, *Withholding of Unclassified Technical Data From Public Disclosure*, November 6, 1984 (including Change 1, August 18, 1995)?

9.5.5.3. Privileged safety information or documents contained in safety investigation board (SIB) reports conducted under AFI 91-204, *Safety Investigations And Reports*, and restricted from public release by DoD Instruction 6055.7, *Accident Investigation, Reporting and Recordkeeping*, October 3, 2000?

9.5.5.4. Other matters exempt from unrestricted disclosure?

9.5.6. Would disclosure interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances?

**9.6. Classified Information.** No one, including release authorities, shall release classified official information to courts or unauthorized persons under any circumstances, unless proper authority first declassifies the material.

9.6.1. When requesters ask for classified information that classification authorities cannot declassify at lower levels, Air Force personnel, through their SJAs, shall notify the appropriate civil litigation division of AFLSA or HQ USAF/JAI (if a foreign court is involved).

9.6.2. Pending a final decision, the servicing SJA (or SAF/GC) shall ensure the requester, court, or other authority is furnished with a copy of Title 32, C.F.R., Part 97 (DoD Directive 5405.2) and this chapter and shall inform the requester that the request is under review. If necessary, SJAs will work to obtain a stay of the request or demand pending a final determination.

**9.7. Defending Denials.** For decisions denying official information within the authority of SJAs, SJAs are authorized to consult directly with local United States attorneys or DoJ litigation attorneys to defend such decisions from subpoenas, court orders, or other legal challenges before local, state or federal courts, administrative bodies or other tribunals. Before any such consultation, however, SJAs are first required to notify the appropriate civil litigation division of AFLSA or HQ USAF/JAI of the need to consult, providing a brief factual background of the case and giving the reasons for such consultation.

**9.8. Releasing Official Information to DoJ.** DoJ and its US Attorneys represent the government's interest in judicial proceedings involving the Air Force.

9.8.1. SJAs may release unclassified official information that is not privileged to DoJ or the US Attorney on request.

9.8.2. SJAs must send DOJ or US Attorney requests for classified information that cannot be declassified at lower levels, or for other privileged official information, to the responsible AFLSA civil litigation division or HQ USAF/JAI for a decision.

**9.9. Fees.** Persons releasing copies of records and other documentary material collect fees from the requester according to the fee schedule in Chapter 6 of DoD 5400.7-R/AF Supplement, *DOD Freedom of Information Act Program*, or 32 C.F.R. 97. 6(d).

**9.10. Sending Requests.** When an SJA requests a decision on releasing official information from an AFLSA civil litigation division or HQ USAF/JAI, he or she should provide the following information:

9.10.1. Name of litigation and parties.

9.10.2. Name and location of the court or tribunal.

9.10.3. Date the litigation began and date of requested appearance.

9.10.4. Name and address of requester and of party who has the requested official information.

9.10.5. Type of action, subject matter, and a statement of the relevancy of the requested information.

9.10.6. Copies of documents requested, or a complete description of them if they are bulky or numerous.

9.10.7. Recommendations on release and any other pertinent information.

#### **9.11. Complying With Subpoenas.**

9.11.1. SJAs give legal advice to Air Force personnel under subpoena to appear and testify concerning official information.

9.11.1.1. When the proper release authority prohibits releasing the subpoenaed information, and the information does not include Privacy Act (5 U.S.C. 552a) material, the person receiving the subpoena, with the assistance of the appropriate legal office, attempts to resolve the matter with the attorney requesting the information or issuing the subpoena, or appears and explains the matter to the court. When Privacy Act material is involved, the SJA's office should assist the subpoenaed person to:

9.11.1.1.1. Determine if a judge of a court of competent jurisdiction personally issued the subpoena; and

9.11.1.1.2. Make or negotiate an adequate response, or appear before the court, as appropriate.

9.11.1.1.3. Where another release authority has been involved, SJAs should also consult with that authority, as necessary or appropriate.

9.11.1.2. If the court or requesting attorney is not satisfied and persists in requesting the information, the witness respectfully asks for time to send the request to the appropriate AFLSA civil litigation division or HQ USAF/JAI for a final Air Force decision and possible assistance from DoJ.

9.11.1.3. Judge advocates may accompany and advise the witness concerning a problem on release of official information.