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General Counsel

**RELEASING INFORMATION IN LITIGATION AND TESTIMONY BY
CURRENT AND FORMER DeCA PERSONNEL AS WITNESSES**



BY ORDER OF THE DIRECTOR

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AUTHORITY: Defense Commissary Agency Directives Management Program is established in compliance with DoD Directive 5105.55, Defense Commissary Agency (DeCA), November 1990.

HOW TO SUPPLEMENT: Lower echelon units may not supplement this directive.

HOW TO ORDER COPIES: Stores needing additional copies will submit requirements on DeCA Form 30-21 to Region/IM; Region/IM will consolidate Store and Region requirements on DeCA Form 30-21 and forward to HQ DeCA/IMSP.

SUMMARY: This directive governs release of information for use in litigation and testimony by DeCA personnel.

OFFICE OF PRIMARY RESPONSIBILITY (OPR): HQ DeCA/GC
COORDINATORS: HQ DeCA/IR/DP/DO/IM/IG/RM/DF/PL/AM/PA/PM/CCE/LL
DISTRIBUTION: DeCA Directorates\Staff Offices
DeCA Regions
DeCA Service Centers
DeCA Commissaries

1. **PURPOSE:** This DeCAD governs release of official information in litigation and testimony by current and former DeCA personnel as witnesses during litigation. It applies to all DeCA activities. It implements Department of Defense Directive (DoDD) 5405.2, 23 July 1985.

a. This DeCAD does not apply to the release of official information or testimony by DeCA personnel in the following situations:

(1) Before courts-martial convened by the authority of the military departments or in administrative proceedings conducted by or on behalf of a DOD component.

(2) Pursuant to administrative proceedings conducted by or on behalf of the Equal Employment Opportunity Commission or the Merit Systems Protection Board, or pursuant to a negotiated grievance procedure under a collective bargaining agreement to which the government is a party.

(3) As part of the assistance required according to the Defense Industrial Personnel Security Clearance Review Program under DoDD 5220.6.

(4) Pursuant to disclosure of information to federal, state, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DOD criminal investigative organization.

b. This DeCAD does not supersede or modify existing laws or DeCA programs governing the testimony of DeCA Personnel of the release of official DeCA information during grand jury proceedings, the release of official information not involved in litigation, or the release of official information pursuant to the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C., nor does this DeCAD preclude treating any written request for agency records that is not in the nature of legal process as a request according to the Freedom of Information Act or Privacy Act.

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

2. **DEFINITIONS:**

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

b. **Judicial Proceeding.** This term as used in this DeCAD means any action, suit, or other judicial proceeding, including condemnation, preliminary, informational, or other proceeding of a judicial nature. Examples of the latter include hearings and conferences before a committing court, magistrate, or commission; grand jury proceedings; and coroners' inquests. It also includes informational proceedings such as hearings and conferences conducted by a prosecuting attorney to determine whether an information or charge should be made in a particular case. The judicial proceeding may be in the District of Columbia; a state, territory, or possession of the United States, including the Commonwealth of Puerto Rico; areas and installations in the Republic of Panama made available to the United States under the Panama Canal Treaty of 1977 and related agreements (as described in Section 3(a) of the Panama Canal Act of 1979); or the Trust Territory of the Pacific Islands.

c. **Litigation.** All pretrial, trial, and post trial stages of actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), 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.

d. **Official Information.** All information of any kind, however stored, relates to information in the custody and control of DeCA, or was acquired by DeCA personnel as part of their official duties or because of their official status within DeCA while such personnel were employed by or on behalf of DeCA or on active duty with DeCA.

e. **Private Litigation.** Litigation in which the United States is not a party and in which it has no identifiable direct or indirect interest in the outcome.

3. **POLICY:** It is DeCA policy that official information should generally be made reasonably available for use in federal and state courts and by other governmental bodies unless the information is classified, or otherwise privileged or protected from public disclosure.

4. **RELEASE AUTHORITY FOR OFFICIAL INFORMATION:** The General Counsel, DeCA is responsible for determining whether official information may be released in litigation, whether DeCA personnel may appear and testify as witnesses in litigation or be interviewed or contacted pursuant to litigation, and any conditions that will be imposed on such release appearance, or contact.

5. **FACTORS TO CONSIDER:** In deciding whether to authorize the release or the testimony of DeCA personnel concerning official information, the following factors must be considered:

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

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

c. Whether the disclosure would violate a statute, executive order, or directive.

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

e. Whether the disclosure, except when in camera and necessary to assert a claim or privilege, would reveal information properly classified pursuant to the DoD Information Security Program under DOD 5200.1-R, unclassified technical data withheld from public release pursuant to DoDD 5230.25, or other matters exempt from unrestricted disclosure.

f. Whether disclosure would 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.

6. **LIMITATIONS ON RELEASE OF INFORMATION:**

a. When the United States is a party to litigation, official information relevant to the litigation may be released only when authorized by one of the following:

(1) The General Counsel, DeCA.

(2) The General Counsel, DoD.

(3) The US Attorney General or a US attorney.

b. Custodians who receive requests or demands for official information that might aid in a claim or litigation against the United States must consult the General Counsel, DeCA.

c. Classified official information is not released to courts or unauthorized persons under any circumstances unless the classification is removed by proper authority. If classified information is requested or demanded and cannot be declassified at lower levels, notify the General Counsel, DeCA. Pending a final decision as to the release of classified information, the person who receives the request or demand furnishes the requester, the court, or other authority with a copy of 32 CFR 97 (DoDD 5405.2) and this DeCAD; informs the requester, the court, or other authority that the request or demand is being reviewed; and seeks a stay of the request or demand pending a final determination.

7. **SENDING REQUESTS:** When a decision on release of official information is requested, provide the following information if it is readily obtainable:

- a. Name of litigation and parties.
- b. Name and location of the court or tribunal.
- c. Date the litigation began, and date of requested appearance.
- d. Name and address of requester and of party who has the requested official information.
- e. Type of action, subject matter, and a statement of the relevancy of the requested information.
- f. Copies of documents requested, or a complete description of them if they are bulky or numerous.
- g. Recommendation on release and any other pertinent information.

8. **REQUESTS OR DEMANDS FOR DEPOSITIONS OR STATEMENTS:** Request or demands to prospective or actual private litigation for statements or depositions, not involving expert testimony, of DeCA personnel concerning matters connected with their official duties may be granted, provided this DeCAD is followed. Prospective witnesses must consult with the General Counsel before providing statements or releasing official information to parties involved in private litigation. Statements and depositions are voluntary with the individual concerned, unless required by valid legal process or the order of competent military authority. For cases in which the United States is a party, follow the guidance of paragraph 6 or 11.

9. **AUTHENTICATION OF DOCUMENTS:** Official DeCA documents used in civil litigation are authenticated by certificate, rather than by the personal appearance and testimony of the custodian, where practical. Use the simplest authentication procedure permissible.

10. **RELEASE TO THE DEPARTMENT OF JUSTICE:** The Department of Justice and its US attorneys represent the government's interest in judicial proceedings involving DeCA. Unclassified official information that is not privileged should be released to the Department of Justice or the US attorney upon request. Requests for classified information or for other privileged official information are sent to the General Counsel, DeCA for decision.

11. **LITIGATION BEFORE THE BOARDS OF CONTRACT APPEALS:** Contracting officers

may grant requests for official information for use in litigation before the General Services or Armed Services Board of Contract Appeals as authorized by this DeCAD; the Federal Acquisition Regulation (FAR), Subpart 5.4; and applicable DoD Directives. Responses to any such requests must be coordinated with the assigned trial attorney.

12. COMPLIANCE WITH SUBPOENA:

a. When release of the subpoenaed information is prohibited by this DeCAD, the person receiving the subpoena appears and explains the matter to the court or to the attorney requesting the deposition. 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 General Counsel, DeCA for decision.

b. When a subpoena is served which calls for information that is classified or otherwise determined to be not releasable, the General Counsel will communicate with the counsel who requested the subpoena, explain the restrictions on release, tender releasable information, and suggest withdrawal of the subpoena.

13. WITNESSES IN PRIVATE LITIGATION:

a. DeCA personnel who are requested to appear and testify in their nonofficial capacity in private litigation in which the United States has no interest may be authorized to do so, if this DeCAD does not prohibit release of the requested information and there is no expense to the government.

b. Except as noted below, DeCA personnel testifying in their nonofficial capacity in private litigation may do so only in a non-duty status. For DeCA military personnel, supervisors may grant a pass or leave. DeCA civilian personnel may be absent to testify only on annual leave or leave without pay. The only exception for DeCA civilian personnel is court leave.

c. DeCA civilian personnel are authorized court leave as provided in 5 U.S.C. 6322 when they appear as witnesses in a nonofficial capacity on behalf of a private party in connection with any judicial proceeding to which the United States, the District of Columbia, or a state or local government is a party. Such witnesses on court leave must turn in fees for testifying to their servicing accounting and finance office. They are not authorized government travel expenses, but may keep reimbursements for expenses they receive from the court, or party, which caused the witness to be summoned.

d. DeCA personnel testifying in private litigation in their official capacity are in a duty status. Travel and transportation allowances are permitted only to the extent authorized by the Joint Travel Regulation (JTR).

14. WITNESSES IN CIVILIAN CRIMINAL PROCEEDINGS:

a. DeCA military personnel who are subpoenaed to appear and testify in state criminal proceedings, not directly involving the DeCA or its interests, may be granted permissive temporary duty, at no expense to the government. Military personnel returning from an overseas area to appear as a witness may be authorized to use space available military transportation, as authorized by DoDD 4515. 13.

b. DeCA military personnel who are subpoenaed or otherwise requested to appear and testify for a state government of a US territory or possession, of the government of the District of Columbia in state criminal proceedings in which the DeCA has a direct, particularly strong interest may be placed in a temporary duty status as authorized by the JTR, paragraph U7062. In addition to those items in paragraph 7, the report should indicate whether defendants or victims are military members or associated with the military community, whether the crime being prosecuted occurred on a military installation, whether

military personnel assisted in the investigation or referred the matter to state officials for prosecution, and recommendations as to travel is whether temporary duty travel is appropriate. The General Counsel, DeCA approves any use of temporary duty travel for such witnesses. Travel expenses are paid from funds available to the unit issuing orders.

c. DeCA civilian personnel who are subpoenaed to appear and testify in civilian criminal judicial proceedings may be granted court leave as authorized 5 U.S.C. 6322. Such witnesses must turn in fees for testifying to their accounting and finance office. They are not authorized government travel expenses but may keep reimbursements for travel and other expenses.

15. **WITNESSES IN LITIGATION INVOLVING THE UNITED STATES:** In these instances, the following rules apply:

a. When Department of Justice attorneys, including US attorneys and counsel employed on behalf of the Department of Justice, request the attendance of witnesses, and no temporary duty is required, honor the request if practicable. The General Counsel, DeCA should be advised of all such requests.

b. When Department of Justice attorneys, including US attorneys and counsel employed on behalf of the Department of Justice, request the attendance of witnesses and temporary duty is required, the attorney must request the witness directly through the Department of Justice Management Division's Special Authorizations Unit to ensure proper funding determinations are made according to 28 CFR 21.1. On notice from the Justice Department, the General Counsel, DeCA directs travel.

c. When foreign counsel employed by the Department of Justice request witnesses in foreign litigation and temporary duty is required, refer the request to the General Counsel, DeCA.

d. DeCA personnel who are requested or subpoenaed to testify on behalf of a private party engaged in litigation with the United States, including litigation before the Armed Services Board of Contract Appeals, will promptly report it to the General Counsel, DeCA. DeCA military personnel testifying in a nonofficial capacity are in a non-duty status while appearing and testifying. DeCA civilian personnel testifying in a judicial proceeding in a nonofficial capacity are granted court leave as provided in 5 U.S.C. 6322.

16. **TRAVEL EXPENSES OF WITNESSES:**

a. Title 28 U.S.C. 1821 and the JTR govern the entitlement to travel allowances for DeCA personnel required to appear as witnesses in litigation. JTR paragraphs U7060 and U7061 apply to military personnel, and JTR paragraph, C4504 applies to DeCA civilian personnel.

b. DeCA pays travel expenses for DeCA personnel assigned to DeCA activities who are required to appear as witnesses on behalf of the United States.

c. When DeCA military personnel are subpoenaed to appear as witnesses for a committee of the Congress, private individual, or a corporation, they do not received any allowances for travel from DeCA. Arrangements for payment should be made in advance between the witness and the party requesting the testimony.

d. If DeCA civilian personnel are called as witnesses to testify in their official capacity or produce official records on behalf of a party other than the United States, allowable travel expenses are paid by the unit issuing the orders for travel.

e. Since trials are frequently postponed or canceled after a witness has received orders, a

witness must not begin travel (except when the transportation management office determines common carrier scheduling requires it) more than 1 day before the date on which the witness is to report to the requesting US attorney. For these same reasons, witnesses must not be granted leave in conjunction with temporary duty where the leave is to be taken before testifying.

17. **TRAVEL OF WITNESSES TO OVERSEAS AREAS:** Requests for travel of witnesses to overseas areas to testify in foreign criminal cases are reported to the General Counsel, DeCA. DeCA funding for such travel is exceptional and must be supported by a determination that official purposes are served by the trip. Necessary official travel of witnesses in foreign criminal courts is normally funded by the requesting command.

18. **APPEARANCES IN STATE OR LOCAL LEGISLATIVE HEARINGS:** DeCA personnel who desire or are requested to make an appearance or give testimony, either in writing or personally, before state and local legislative bodies and advocate any position or advance any opinion on behalf of the DeCA on proposed, pending, or existing legislation must first obtain approval from the General Counsel, DeCA. Submit requests for approval through channels. Provide details regarding the proposed testimony. Normally, requests of this nature are only approved if there is a significant DeCA interest to be served by the appearance and there is no conflict of interest. Unless the primary purpose for the appearance is in furtherance of a DeCA or DOD objective, the expenses must be arranged between the witness and the body requesting his or her appearance.

19. **EXPERT OR OPINION TESTIMONY OF DeCA PERSONNEL:**

a. DeCA personnel do not provide, with or without compensation, opinion or expert testimony concerning official DeCA or DOD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. On a showing, by the requester, of unique circumstances and that the anticipated testimony will not be adverse to the interests of DeCA, the Department of Defense or the United States, the General Counsel, DeCA may grant special authorization for DeCA personnel to appear and testify as an expert witness in private litigation at no expense to the United States. If, despite the final determination of the General Counsel, DeCA, a court of competent jurisdiction, or other appropriate authority, orders the appearance and expert or opinion testimony of DeCA personnel, the personnel notify the General Counsel of such order. If the General Counsel determines that no further legal review of or challenge to the court's order will be sought, the affected DeCA personnel comply with the order. If directed by the appropriate DeCA official, however, the affected DeCA Personnel respectfully decline to comply with the demand. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

b. The reasons for the above rule include the DeCA's need to maintain strict impartiality in private litigation. If DeCA personnel provide expert or opinion testimony in private litigation, their current position and duty experience frequently are discussed. Therefore, their testimony is inextricably linked with the DeCA, and could easily create the impression that the DeCA favors a particular finding, even though it has no official interest in the outcome of the litigation.

c. Civilian counsel who desire expert or opinion testimony from DeCA personnel are advised to submit their request to the General Counsel, DeCA. The request should include:

- (1) Name of litigation and parties.
- (2) Name and location of the court or tribunal.
- (3) Date the litigation began and date of requested appearance.

- (4) Party for whom request is made.
- (5) Name, grade, position, and organization of witness who is to provide expert or opinion testimony.
- (6) Type of action, subject matter, and nature of testimony sought.
- (7) Detailed statement showing why an exception should be granted.

d. Because of the restrictions regarding expert and opinion testimony, DeCA personnel in nonofficial capacity should not provide expert review of evidence in private litigation where one of the parties in the litigation may request the DeCA personnel to provide expert or opinion testimony. After receiving approval of the General Counsel to testify as an expert, DeCA personnel may then engage in such expert review.

20. **EXPERT OR OPINION TESTIMONY AND RELEASE OF OFFICIAL INFORMATION BY FORMER DeCA PERSONNEL:** Former DeCA personnel may not provide expert or opinion testimony adverse to the United States in a matter in which they had a direct involvement while employed by the government or serving on active duty. In addition, former DeCA personnel may not release classified, or otherwise privileged official DOD information, in litigation without the approval of the General Counsel, DeCA.