

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1703

Regulations Governing the Production of Office of the Director of National Intelligence Information or Material in Proceedings Before Federal, State, Local or Other Government Entity of Competent Jurisdiction

AGENCY: Office of the Director of National Intelligence.

ACTION: Final rule.

SUMMARY: This final regulation governs the procedures the ODNI will follow for the production of ODNI information or material in proceedings before federal, state, local or other government entity of competent jurisdiction.

DATES: *Effective Date:* March 18, 2009.

FOR FURTHER INFORMATION CONTACT: Tricia Wellman, (703) 275-2527.

SUPPLEMENTARY INFORMATION: The Office of the Director of National Intelligence (ODNI) was created by the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, 118 Stat. 3638. The ODNI began operations on April 22, 2005, the day after the first Director of National Intelligence took office. This regulation outlines the procedures current and former ODNI employees must follow when they receive a demand for ODNI information or material in connection with proceedings before federal, state, local or other government entity of competent jurisdiction. These regulations are typically called *Touhy* regulations because of the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), in which the Court held that an agency employee could not be held in contempt for refusing to disclose agency records or information when following the instructions of his or her supervisor.

The ODNI received no comments to its proposed regulation previously published on October 17, 2008 (73 FR 61772).

List of Subjects in 32 CFR Part 1703

Courts, Government employees.

■ Title 32 of the Code of Federal Regulations is amended by adding Part 1703 to read as follows:

PART 1703—PRODUCTION OF ODNI INFORMATION OR MATERIAL IN PROCEEDINGS BEFORE FEDERAL, STATE, LOCAL OR OTHER GOVERNMENT ENTITY OF COMPETENT JURISDICTION

Sec.

- 1703.1 Scope and purpose.
- 1703.2 Definitions.
- 1703.3 General.
- 1703.4 Procedure for production.
- 1703.5 Interpretation.

Authority: The Intelligence Reform and Terrorism Prevention Act of 2004, Public Law No. 108-458, 118 Stat. 3638 (2004); National Security Act of 1947, as amended, 50 U.S.C. 401 *et seq.*; Executive Order 12333, as amended; and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 1703.1 Scope and purpose.

This part sets forth the policy and procedures with respect to the production or disclosure of material contained in the files of the ODNI, information relating to or based upon material contained in the files of the ODNI, and information acquired by any person while such person was an employee of the ODNI as part of the performance of that person's official duties or because of that person's association with the ODNI.

§ 1703.2 Definitions.

The following definitions apply to this part:

Defenses: Any and all legal defenses, privileges or objections available to the ODNI in response to a demand.

Demand:

(1) Any subpoena, order or other legal summons issued by a federal, state, local or other government entity of competent jurisdiction with the authority to require a response on a particular matter or a request for appearance of an individual where a demand could issue.

(2) Any request for production or disclosure which may result in the issuance of a subpoena, order, or other legal process to compel production or disclosure.

DNI: The Director of National Intelligence.

General Counsel: The ODNI's General Counsel, Acting General Counsel or Deputy General Counsel.

ODNI: The Office of the Director of National Intelligence and all of its components, including, but not limited to, the Office of the National Counterintelligence Executive, the National Counterterrorism Center, the National Counterproliferation Center, the Program Manager for the Information Sharing Environment, and all national intelligence centers and program managers the DNI may establish.

ODNI Employee: Any current or former employee, contractor, independent contractor, assignee or detailee to the ODNI.

ODNI Information or Material: Information or material that is contained

in ODNI files, related to or based upon material contained in ODNI files or acquired by any ODNI employee as part of that employee's official duties or because of that employee's association with the ODNI.

OGC: The Office of the General Counsel of the ODNI.

OGC Attorney: Any attorney in the OGC.

Proceeding: Any matter before a court of law, administrative law judge, administrative tribunal or commission or other body that conducts legal or administrative proceedings, and includes all phases of the proceeding.

Production or Produce: The disclosure of ODNI information or material in response to a demand.

§ 1703.3 General.

(a) No ODNI employee shall respond to a demand for ODNI information or material without prior authorization as set forth in this part.

(b) This part is intended only to provide procedures for responding to demands for production of documents or information, and does not create any right or benefit, substantive or procedural, enforceable by any party against the United States.

§ 1703.4 Procedure for production.

(a) Whenever a demand is made for ODNI information or material, the employee who received the demand shall immediately notify OGC ((703) 275-2527). The OGC and the ODNI employee shall then follow the procedures set forth in this section.

(b) The OGC may assert any and all defenses before any search for potentially responsive ODNI information or material begins. Further, in its sole discretion the ODNI may decline to begin a search for potentially responsive ODNI information or material until a final and non-appealable disposition of any or all of the asserted defenses is made by the federal, state, local or government entity of competent jurisdiction. When the OGC determines that it is appropriate to search for potentially responsive ODNI information and material, the OGC will forward the demand to the appropriate ODNI offices or entities with responsibility for the ODNI information or material sought in the demand. Those ODNI offices or entities shall then search for and provide to the OGC all potentially responsive ODNI information and material. The OGC may then assert any and all defenses to the production of what it determines is responsive ODNI information or material.

(c) In reaching a decision on whether to produce responsive ODNI information or material, or to object to the demand, the OGC shall consider whether:

(1) Any relevant privileges are applicable;

(2) The applicable rules of discovery or procedure require production;

(3) Production would violate a statute, regulation, executive order or other provision of law;

(4) Production would violate a non-disclosure agreement;

(5) Production would be inconsistent with the ODNI's responsibility to protect intelligence sources and methods, or reveal classified information or state secrets;

(6) Production would violate a specific ODNI policy issuance or instruction; and

(7) Production would unduly interfere with the orderly conduct of ODNI functions.

(d) If oral or written testimony is sought by a demand in a case or matter in which the ODNI is not a party, a reasonably detailed description of the testimony sought in the form of an affidavit, or a written statement if that is not feasible, by the party seeking the testimony or its attorney must be furnished to the OGC.

(e) The OGC shall notify the appropriate employees of all decisions regarding responses to demands and provide advice and counsel for the implementation of the decisions.

(f) If response to a demand is required before a decision is made whether to provide responsive ODNI information or material, an OGC attorney will request that a Department of Justice attorney appear with the ODNI employee upon whom that demand has been made before the court or other competent authority and provide it with a copy of this regulation and inform the court or other authority as to the status of the demand. The court will be requested to stay the demand pending resolution by the ODNI. If the request for a stay is denied or there is a ruling that the demand must be complied with irrespective of instructions rendered in accordance with this Part, the employee upon whom the demand was made shall, if directed to do so by the General Counsel or its designee, respectfully decline to comply with the demand under the authority of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and this regulation.

(g) ODNI officials may delegate in writing any authority given to them in this Part to subordinate officials.

(h) Any individual or entity not an ODNI employee as defined in this Part

who receives a demand for the production or disclosure of ODNI information or material acquired because of that person's or entity's association with the ODNI should notify the OGC ((703) 275-2527) for guidance and assistance. In such cases the provisions of this regulation shall be applicable.

§ 1703.5 Interpretation.

Any questions concerning interpretation of this Regulation shall be referred to the OGC for resolution.

Corin R. Stone,

Acting General Counsel, Office of the Director of National Intelligence.

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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

United States Navy Restricted Area, Naval Support Activity, Panama City, FL

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Correcting amendments.

SUMMARY: The U.S. Army Corps of Engineers (Corps) published a document in the **Federal Register** on September 12, 2008 (73 FR 52926), revising the restricted areas at Naval Support Activity (NSA), Panama City (PC), Florida. The latitude of the shared point for the southeast point of restricted area BA-1 (Sec. 334.761(a)(2)) and the southwest point of restricted area BA-2 (Sec. 334.761(a)(3)) should have been provided as 30°10'32" N. This document corrects the final regulation by revising these actions.

DATES: *Effective date:* March 18, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC at 202-761-4922 or Mr. Jon Griffin, U.S. Army Corps of Engineers, Jacksonville District, Regulatory Division at 904-232-1680.

SUPPLEMENTARY INFORMATION: On September 12, 2008, (73 FR 52926) the Corps published a final rule establishing ten restricted areas at Naval Support Activity (NSA), Panama City (PC), Florida. In that final rule, the shared point at the southeast point of Area BA-1 (§ 334.761(a)(2)) and the southwest point of Area BA-2 (§ 334.761(a)(3)) overlap a portion of Area BA-3

(§ 334.761(a)(4)) by one second. To correct this error, the southeast point of Area BA-1 and the southwest point of Area BA-2 are changed to 30°10'32" N, with no change in the longitudinal value.

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

■ Accordingly, 33 CFR part 334 is amended by making the following correcting amendments:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

■ 2. In § 334.761, revise paragraphs (a)(2) and (a)(3) to read as follows:

§ 334.761 Naval Support Activity Panama City; St. Andrews Bay; restricted areas.

* * * * *

(a) * * *

(2) *Area BA-1.* The area is bounded by a line directly connecting the following coordinates (listed by latitude, then longitude): Northwest point—30°11'14" N, 085°44'59" W; Northeast point—30°11'13" N, 085°44'32" W; Southeast point—30°10'32" N, 085°44'32" W; Southwest point—30°10'32" N, 085°44'59" W, then northerly to point of origin.

(3) *Area BA-2.* The area is bounded by a line directly connecting the following coordinates (listed by latitude, then longitude): Northwest point—30°11'13" N, 085°44'32" W; Northeast point—30°11'07" N, 085°44'01" W; Southeast point—30°10'32" N, 085°44'00" W; Southwest point—30°10'32" N, 085°44'32" W, then northerly to point of origin.

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Dated: *March 9, 2009.*

Michael Ensich,

Chief, Operations, Directorate of Civil Works.

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AN03

The Dr. James Allen Veteran Vision Equity Act of 2007

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.