

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, DC

<h1 style="margin:0;">FSIS DIRECTIVE</h1>	4630.3 Revision 2	9/16/21
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EMPLOYEES AS WITNESSES IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS

I. PURPOSE

This directive provides the procedures that Agency employees are to follow upon receipt of subpoenas, or any other formal or informal requests to provide verbal or written witness testimony arising out of, or related to, USDA employment. FSIS is reissuing this directive to reflect functions that are now the responsibility of the Office of Investigations, Enforcement and Audit (OIEA). Also, this revision updates procedures and approval processes that are the responsibility of the Office of the Administrator, the Office of the General Counsel (OGC), and the Under Secretary for Food Safety, as applicable.

II. CANCELLATION

FSIS Directive 4630.3, Revision 1, Witnesses in Judicial Proceedings, 1/22/08

III. BACKGROUND

A. This directive covers procedures to be implemented when an Agency employee is served with a subpoena, or otherwise sought for testimony in an official capacity including within proceedings in which the United States (U.S.) is a party and for those when the U.S. is not a party in a case.

B. Executive departments and other Federal agencies have been granted authority, under the Housekeeping Statute ([5 U.S.C. § 301](#)) to issue regulations setting out required procedures that must be implemented each time an employee is issued a subpoena, other order, or informal request to appear and provide witness testimony or agency records within judicial and administrative proceedings. In the *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), interpreting the Housekeeping Statute, the U.S. Supreme Court held that Federal agencies were properly authorized to issue regulations restricting how and when federal employees may comply with a subpoena or order to testify or provide agency records.

IV. APPEARANCE AS A WITNESS WHEN THE U.S. IS A PARTY IN THE CASE

A. A subpoena is not required for an FSIS employee to appear as a witness on behalf of the U.S. when the U.S. is a party in the case. In those cases, the employee is to obtain approval from his or her immediate supervisor. The immediate supervisor is to confer with the OIEA, Litigation and Enforcement Program Staff (LEPS) to ensure FSIS has no concerns with providing such approval.

B. Approval of the FSIS Administrator and OGC are required for an FSIS employee to appear as a witness for a party other than the U.S. when the U.S. is a party in the case. As a rule, a subpoena is also required. However, exceptions may be approved by the official or attorney representing FSIS or other government Agency in each case. The FSIS Administrator and OGC official will consult with the government's representative in each case. See Section VI. D. below for approval process.

V. SUBPOENAS TO PRODUCE RECORDS

Subpoenas to produce records, when the U.S. is not a party in the action, are deemed requests for records under the Freedom of Information Act (FOIA) and handled according to the rules for disclosure under that Act. As a rule, when the U.S. is a party, records requests will be handled in discovery. However, if an Agency employee receives a subpoena or other request for Agency documents, the employee should follow the procedures specified below.

VI. APPROVALS FOR APPEARANCE

A. All subpoenas and related requests for witness testimony that require FSIS approval are managed by OIEA/LEPS. All questions about the process or about anything related to requests for employee witness testimony are to be directed to OIEA/LEPS at (202) 418-8872, (202) 418-8846, or FSIS-Subpoena@usda.gov.

B. When an employee receives a subpoena or other type of written or verbal request to appear as a witness, produce records, disclose information, or discuss testimonies, he or she is to:

1. Immediately notify his or her supervisor by phone or e-mail and send the supervisor a copy of the subpoena and any accompanying documents;
2. Keep supervisory officials informed of activities transpiring because of the request and how it may affect the employee's work assignments;
3. Communicate with OIEA/LEPS before returning a receipt if a subpoena requires a return receipt upon service; and
4. Include a copy of any checks for witness fees or travel expenses that accompany a subpoena or other request, when sending the subpoena to the immediate supervisor. Employees may not retain any witness fees, expense checks or reimbursement for expenses incurred because of making an appearance.

C. The supervisor is to:

1. Send a copy of the subpoena, with any accompanying documents received, along with the full name, title, duty hours and telephone number for the employee whose testimony is sought to FSIS-Subpoena@usda.gov;
2. Obtain from the employee any checks for witness fees or travel expenses that accompanied a subpoena or other request, and contact OIEA/LEPS for additional guidance and instructions on where to mail the check and any supporting documents. Upon receipt, OIEA/LEPS is to void and return the check to the issuing attorney or party; and
3. Allow official time for the employee whose testimony is sought to correspond with OIEA/LEPS while processing the subpoena or request for testimony.

D. OIEA/LEPS is to:

1. Contact the Agency employee named in the subpoena to obtain pertinent background information. This includes information about the matter contested, the employee's involvement, and the anticipated testimony;

2. Contact the party seeking the employee's testimony to obtain a copy of the complaint filed in the case (if any), and to obtain details on the nature of the anticipated testimony;
3. Prepare a summary of the relevant information obtained and forward it with the subpoena and supporting documentation to the OIEA Assistant Administrator (AA) for review and a written recommendation as to whether the Administrator should approve the employee's testimony;
4. Communicate with and forward a copy of the subpoena and supporting documentation to OGC; and
5. Notify the employee and parties seeking the testimony of the Agency's and OGC's decision concerning whether the employee will appear as a witness or provide records. LEPS is to also keep the employee's supervisor updated on communications with the employee.

VII. ADMINISTRATOR (OR DESIGNEE), OGC, UNDER SECRETARY FOR FOOD SAFETY AND DEPARTMENT OF JUSTICE

A. The Administrator has authority to grant Agency approval for employees to provide witness testimony on behalf of parties other than the government. Decisions are to be based on a review of the subpoena, and relevant documents and information. The Administrator may delegate such authority in accordance with [7 CFR § 1.219](#).

B. OGC has authority to review the Agency decision. When OGC concurs with the Agency's decision, and the employee has been properly served with a subpoena, the employee may be authorized to testify.

C. The Under Secretary for Food Safety has the authority to approve decisions authorizing employees to provide sworn oral or written testimony without the issuance of a valid subpoena. In such instances, the OIEA AA will provide the relevant information to the Administrator for further dissemination and communication with the Under Secretary for Food Safety.

D. OIEA/LEPS is to convey all decisions. When not authorizing an employee to comply with a subpoena, summons, or other official order, if a party who served the subpoena does not withdraw it, OIEA/LEPS, through OGC, is to engage the Department of Justice to represent the Agency before a judge who has authority to quash the subpoena.

VIII. RESTRICTIONS FROM DISCLOSURE OF CERTAIN TYPES OF INFORMATION

A. An employee testifying in a judicial proceeding is not to disclose any record or material classified as "Top Secret," "Secret," or Controlled Unclassified Information or any other record or material not otherwise releasable under FOIA. Guidance on these matters may be obtained from OIEA/LEPS or FOIA staff.

B. If directed by the court or administrative agency or judge to disclose such records or material, the employee is to respectfully decline until permission is granted by FSIS. If permission is not granted, OIEA/LEPS is to notify all pertinent parties, including judges.

IX. TRAVEL EXPENSES AND WITNESS FEES

A. An employee who is authorized to make an appearance to provide witness testimony will be on official time and duty status and may be granted travel expenses consistent with USDA and Agency policy and regulations.

B. Employees may not retain any witness fees, expense checks or reimbursement for expenses

incurred because of making an appearance. Any payments received by employees must be forwarded to OIEA/LEPS.

X. QUESTIONS

Employees are to refer questions regarding this directive to their supervisor or to OIEA/LEPS at (202) 418-8872, (202) 418-8846 or FSIS-Subpoena@usda.gov.

A handwritten signature in black ink, appearing to read "Rachel A. Edelstein". The signature is fluid and cursive, with the first name "Rachel" being more prominent.

Assistant Administrator
Office of Policy and Program Development