

**Department of Energy**

Washington, DC 20585

May 3, 1996

**MEMORANDUM FOR HEADS OF ALL HEADQUARTERS ELEMENTS  
MANAGERS OF ALL OPERATIONS AND AREA OFFICES**

**FROM: ROBERT R. NORRHAUS**  
**GENERAL COUNSEL**

**SUBJECT: DISCOVERY PROCEDURES**

My office has developed the attached guidelines for the Department in responding to "discovery" requests for documents pursuant to litigation. Discovery is an important mechanism by which parties to litigation may obtain all information that could lead to the discovery of evidence admissible at a trial. Any request for documents in connection with litigation must receive immediate management attention so that the Department's interests are adequately protected and the parties to the case may obtain the information they need to pursue the litigation. These guidelines reflect the procedures announced at the March 6, 1996 quarterly meeting of field managers, and they were extensively discussed at an April 2, 1996 field counsel meeting.

Please review the attached guidelines and distribute it to all necessary personnel under your supervision. For headquarters elements, I am requesting that you designate a senior official in your office to work with my office in responding to requests for documents that are located here in Washington. Please forward that name to Marc Johnston, Deputy General Counsel for Litigation by May 15, 1996.

Any questions regarding the attachment should be addressed to Marc Johnston, who can be reached by phone at 586-2909 or by fax at 586-3437.

cc: All Chief Counsel  
Deputy General Counsel for Litigation



## Procedures For Responding To Discovery Requests

### I. Purpose

The purpose of these guidelines is to ensure that in responding to discovery requests, DOE responds timely to requests for documents and information in compliance with the applicable rules of civil procedure, including by producing relevant documents or, if appropriate, by filing objections or motions for protective order with the Court.

### II. Application

A. When DOE is a party litigant.

B. When request results from litigation to which DOE is not a party, but DOE is a potential source of relevant documents. See Fed. R. Civ. P. 45.

### III. Guidelines for chief legal officers

A. Significant discovery requests deserve senior management attention.

1. "Significant discovery requests" are those for which compliance costs \$2500 or more, or substantial personnel time, or which raise legal questions about the propriety of the requests, such as calling for documents or information that is privileged, not relevant, classified, overly broad, or the like.

2. Discovery requests can affect the Department as a whole. They can require massive allocation of resources, although sometimes only on a short-term or periodic basis.

B. When discovery requests are received by an Operations or Area Office (hereinafter "site")--

1. The chief legal officer should be in charge of the response in close coordination with the responsible attorney from the U.S. Attorney's Office or the Department of Justice.

2. The chief legal officer should obtain and coordinate all necessary assistance from the information/record management specialists at the site.

3. Upon receipt of a significant discovery request,

and in consultation with the Justice Department attorney representing the Government and the Deputy General Counsel for Litigation, the chief legal officer must immediately assess the due date under local rules for a response and assess whether to raise objections to the request or seek a motion for protective order with the Court.

a. Objections may arise from the fact the discovery request calls for information that is privileged (attorney/client, attorney work product, predecisional), covered by the Privacy Act, classified, not calculated to lead to the discovery of admissible evidence, or when the request is overly broad, harassing, unduly burdensome, or seeks irrelevant documents or information. Other limitations on discovery may exist by other statutes or common law, and under the Touhy regulations in cases where the Government is not a party. Consideration also should be given to filing an objection and/or motion for protective order to require the requesting party to bear the costs of responding to its request. See Fed. R. Civ. P. 45(c)(2)(B).

b. Whether or not to raise an objection turns on a legal judgment based on the nature of the request, the case at issue, and the availability of proper objections to the request. However, in all situations in which a full and complete response to a discovery request cannot or will not be timely made, an objection and/or protective order must be made in a timely manner.

c. All objections must be in writing, timely raised, and otherwise in compliance with the local rules of Court. Objections not raised are generally waived.

d. Even when objections are raised, the Department must commit to search for and produce all responsive documents or information not subject to an objection or privilege, and communicate this commitment in writing to the requestor or the Court, as appropriate.

4. If responsive documents are located at other sites,

a. The costs of compliance incurred by those other sites are the responsibility of your site.

b. The chief legal officer of the site that receives a discovery request should early on coordinate with the chief legal officer of the site holding responsive documents to ensure coordination of a response, including any appropriate objections and/or motion for a protective order, and that the site holding the documents quickly sends responsive documents to the chief legal officer at the situs of the case (who then may

forward the documents to the Justice Department and/or parties to the litigation).

c. Any conflicts or difficulties should be brought to the attention of the Deputy General Counsel for Litigation for quick resolution.

5. The chief legal officer should assure adequacy of the search for responsive documents, i.e., that all locations where the documents might reasonably be located are searched. Specifically, counsel, with the assistance of information management/records management, should identify all applicable or likely repositories, timely review the repositories, assure integration of effort on site, timely provide responsive information or documents to the requestor, Court, or attorney representing the Government. If you are assisting another chief legal officer who received a discovery request, then the documents and/or response should be sent to that chief legal officer.

a. Where possible, document in writing all efforts to comply with discovery request.

b. Always ensure that the attorney representing the government or the chief legal officer at the situs of the lawsuit sets forth in writing any agreements with the party or counsel requesting the discovery. For example, if counsel requesting documents agrees to an extension of time or a narrowing of the discovery request, confirm such agreement in writing. Never enter into an agreement regarding a discovery request unless you can and will fully meet the terms of the agreement.

#### IV. Discovery requests calling for classified information or unclassified controlled nuclear information ("UCNI")

A. If documents responsive to a discovery request contain potentially classified information or UCNI, the chief legal officer should consult with the site's lead classification officer about the nature of the request, and instruct the classification officer to inform the Office of Declassification (OD) at Headquarters about the discovery request.

B. Where more than one site is involved, or where the request is for large amounts of classified information, OD may need to coordinate or monitor the declassification review. In any event, such requests should be brought to the attention of the Deputy General Counsel for Litigation.

C. In all cases where classified information or UNCI is the subject of a discovery request, the chief legal officer should immediately assert a privilege, either through an objection or motion for protective order, under the Atomic Energy Act. In certain cases, assertion of the States Secrets privilege should also be considered, although that privilege must be asserted by the Secretary of Energy. For assistance, the chief legal officer should consult with the Deputy General Counsel for Litigation, the Assistant General Counsel for Defense Programs and National Security, or Deputy Assistant General Counsel for Information Law.

1. Other objections also should be asserted, if applicable, such as relevancy, burden, and overbreadth.

2. The attorney representing the government may want to enter into a written agreement with the requestor restricting the scope of the discovery request so as not to call for classified information or by placing other limits on the discovery request.

3. If classified documents must undergo substantial redaction that would render the document meaningless, government counsel should consider filing a motion for protective order with the Court on the ground that production would be pointless and needlessly impose costs on the government with no tangible benefit for any party.

E. Unless an objection or motion for protective order asserts that redaction and/or declassification is impossible, timely review of identified documents to redact classified portions or declassify, as appropriate, should be commenced. If the quantity of classified documents is small, this approach should be given high priority to ensure timely compliance with the discovery obligation in light of the rules of Court.

F. The chief legal officer, in consultation with the Deputy General Counsel for Litigation and Assistant General Counsel for Defense Programs, also may want to consider providing security clearances to representatives of the requestor in order to:

1. allow cleared representatives to review classified documents to identify relevant information for declassification review (establishing a clearly defined schedule for declassification review consistent with existing resources); or

2. allow cleared representatives to review classified documents in order to prepare unclassified reports or summaries.

## V. Role of the Office of General Counsel

A. The Deputy General Counsel for Litigation must immediately be provided with any discovery request that seeks documents located at DOE Headquarters, and also promptly should be sent an informational copy of any discovery request that involves more than one site or is otherwise significant.

B. The General Counsel's office is responsible for setting legal policy applicable to responding to discovery requests -- chief legal officers are responsible for implementation of that policy. The General Counsel's office also can assist when there is difficulty getting documents from another DOE site or a conflict involving another site.

C. If responsive documents are located at Headquarters, the Deputy General Counsel for Litigation will be responsible for ensuring that the responsive documents are sent to the chief legal officer. The Deputy General Counsel for Litigation can also work with the chief legal officer to ensure that appropriate objections are raised to the request.

VI. Any questions regarding this guidance should be referred to the Deputy General Counsel for Litigation.

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