



Smithsonian
Institution

SMITHSONIAN DIRECTIVE 113,

July 24, 2012

RESPONDING TO SUBPOENAS AND REQUESTS FOR EXPERT WITNESS SERVICES

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I. Purpose

This Smithsonian Directive (SD) provides a uniform administrative policy and procedures for handling Subpoenas issued to the Smithsonian Institution (Smithsonian) or its employees or other individuals as defined below (Covered Persons). Although the Smithsonian responds to written requests for Smithsonian information in a manner that is consistent with the principles of disclosure under the Freedom of Information Act as described more fully in SD 807, a request that is submitted in the form of a Subpoena or that seeks Expert Witness services involves a specific litigation process and imposes certain legal obligations and deadlines. Under this SD, the Smithsonian will respond to Subpoenas and requests for Expert Witness services in a uniform and impartial manner that is consistent with applicable laws, regulations, and rules of judicial and administrative entities.

II. Scope

This SD applies to Subpoenas issued to the Smithsonian or Covered Persons for information acquired by the Covered Person while performing official duties or because of the Covered Person's position or association with the Smithsonian. This SD applies to Subpoenas issued in connection with proceedings pending before federal or state courts and administrative bodies. It applies to Subpoenas for documents (*subpoena duces tecum*) or testimony

II. Scope (continued) (*subpoena ad testificandum*). This SD further applies to requests directed to a Covered Person for Expert Witness services.

This SD does not apply to:

- Requests for testimony or documents from the United States Congress¹ or United States Government Accountability Office;
- Requests for Smithsonian records submitted by members of the public²;
- Subpoenas served on Covered Persons in their private or non-Smithsonian capacities. In particular, this SD does not apply to Covered Persons who voluntarily testify on their own time or on approved leave status as private citizens concerning facts or events that do not relate to their duties at the Smithsonian or to Smithsonian activities and functions. Such Covered Persons should state for the record that their testimony in such cases represents their own views and is not the official position of the Smithsonian;
- Claims against employee wages³; or
- Demands issued by foreign courts.

Nothing in this SD is intended to impede the appropriate disclosure of information to United States federal, state, local, and foreign law enforcement, prosecutive, or regulatory agencies.

This SD is procedural in nature, not substantive; it does not create any benefit, privilege, or right, whether substantive or procedural, that a party may rely upon in any legal proceeding against the United States or the

¹ Congressional correspondence should be shared with the Office of Government Relations and handled pursuant to SD 812, Government Relations.

² Such requests should be submitted to the Office of General Counsel pursuant to SD 807, Requests for Smithsonian Institution Information.

³ Requests for claims against employee wages should be handled pursuant to SD 116, Claims Against Employee Wages, and its appendices.

II. Scope (continued) Smithsonian or its officers. In providing these procedures, the Smithsonian does not waive the sovereign immunity of the United States. If the party issuing a Subpoena fails to comply with applicable laws, regulations, policies, and procedures, however, that could be a basis for denial.

III. Roles and Responsibilities

Covered Persons are responsible for compliance with this SD, including by providing to the General Counsel immediate notification of any Subpoena or request for expert witness services received and for supplying truthful and accurate information to the best of their personal knowledge.

The General Counsel represents the Smithsonian and shall advise Covered Persons regarding their responsibilities under this SD. The General Counsel is responsible for taking appropriate actions under this SD, and has the power to authorize or deny Covered Person testimony and production of documents. The General Counsel may negotiate with the party who issued the Subpoena in order to refine or limit the demands. The General Counsel shall coordinate with, and seek the assistance of, the United States Department of Justice, including United States Attorney's Offices, as appropriate, to address requests for Expert Witness services, to prepare objections, or to file motions, including but not limited to motions to remove a matter to federal court, quash a Subpoena, or obtain a protective order. The General Counsel may delegate his or her responsibilities as appropriate.

The Inspector General is responsible for performing the functions assigned to the General Counsel under this SD with respect to Subpoenas or requests for Expert Witness services that are directed to the Smithsonian Office of the Inspector General or a Covered Person employed by the Smithsonian Office of the Inspector General.

Employees with Authority to Award Contracts or Grants and Enter Other Agreements on Behalf of the Smithsonian Institution: Smithsonian employees who have this authority are responsible for notifying

III. Roles and Responsibilities
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contractors, grantors, and recipients of externally funded sub-grant and sub-contract awards of the applicable requirements in SD 113. Such notification may be accomplished by including a reference to this SD in agreements or awards, or by other means as determined appropriate and effective.

IV. Policy

No Covered Person may testify or produce Smithsonian records or information in response to a Subpoena without prior written approval from the General Counsel pursuant to this SD.

No Covered Person may serve as an Expert Witness without written prior approval from the General Counsel unless such testimony would not violate any of the principles or standards set forth in SD 103, Smithsonian Institution Standards of Conduct, and either:

- (i) in consultation with the Department of Justice, the General Counsel as ethics officer determined that the Covered Person's service as an Expert Witness is in the interest of the United States; or
- (ii) the General Counsel as ethics officer determined that the requested testimony does not relate to the Covered Person's official duties.

5 Code of Federal Regulations (C.F.R.) §2635.805; 18 United States Code (U.S.C.) § 207; SD 103 §8(a).

If a Covered Person receives a Subpoena or request for Expert Witness services that seeks documents or information created under a memorandum of understanding or similar written agreement between the Smithsonian and a U.S. federal agency, the Covered Person shall notify the Smithsonian and the agency by sending the Subpoena or request to the contact persons or representatives designated in the agreement; such designated persons shall notify their respective Office of General Counsel and those offices shall confer regarding the appropriate response to the Subpoena or request.

IV. Policy (continued) Covered Persons who testify or provide Smithsonian records or information in violation of this SD may be subject to disciplinary action or other appropriate action(s).

V. Definitions

Covered Persons: All employees, regents, officers, members of advisory boards, Fellows, interns, research associates, adjunct scientists or researchers, volunteers, and contractors of the Smithsonian, whether current or former.

Expert Witness: An Expert Witness provides testimony and/or reports based on his or her scientific, technical, or other specialized knowledge in order to assist the trier of fact in understanding the evidence or determining a fact in issue; such witness must be qualified by the court. Fed. R. Evid. 702. Ordinarily, an Expert Witness is not subpoenaed; instead, the Expert Witness is retained under a contract and paid a fee for his or her services.

General Counsel: The General Counsel of the Smithsonian or a person to whom the General Counsel has delegated authority under this SD.

Subpoena: An order commanding the recipient to appear at a particular time and place, and to provide documents or testimony, often under penalty for non-compliance.

VI. Procedures

Instructions for Submission of Subpoenas and Requests for Expert Witness Services on the Smithsonian

Subpoenas must be served directly on the General Counsel, whose contact information is available at www.si.edu/ogc.

As a trust instrumentality of the United States, the Smithsonian is not subject to state court process, and may not be subject to Subpoena by federal or state

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administrative bodies; if the proceeding is pending in a state court or administrative body, the requestor must make a request for Smithsonian records under SD 807.

In addition to complying with applicable procedural and substantive laws, regulations, and rules, all Subpoenas and requests for Expert Witness services must be accompanied by a declaration or other sworn statement containing a:

- Complete list of parties to the proceeding and identification of any known relationship the listed parties have with the Smithsonian, or to the Smithsonian's mission or programs, or to the United States;
- Showing that the desired documents or testimony cannot reasonably be obtained from a more convenient, less burdensome, or less expensive source and are not cumulative or duplicative; and
- Showing of appropriateness, including that providing the testimony would not cause the Smithsonian any undue burden or expense, require disclosure of privileged information, trade secrets, or confidential, sensitive, or private information, impede the Smithsonian's ability to conduct official business, reduce the Smithsonian's impartiality, involve the Smithsonian in issues unrelated to its mission or programs, expend public resources for private purposes, or have a negative cumulative effect on Smithsonian resources.

If the Subpoena or request for Expert Witness services seeks testimony, the declaration or other sworn statement must also contain a:

- Summary of the testimony sought and its relevance to the pending proceeding. If the Smithsonian grants authorization for testimony, unless otherwise agreed in writing, the authorization will be limited to the scope of the demand as summarized in the declaration or other sworn statement; and

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- Showing that no record could be provided and used in lieu of Covered Person testimony.

Failure to comply with these instructions may result in delay and/or a determination not to authorize testimony or production of documents.

Smithsonian Procedures upon Receipt of Request for Expert Witness Services

A Covered Person receiving a request for Expert Witness services must notify the General Counsel immediately.

The General Counsel is responsible for taking appropriate actions under this SD and has the power to authorize or deny requests where appropriate. The General Counsel may delegate his or her responsibilities as appropriate.

The General Counsel may coordinate with, and seek the assistance of, the United States Department of Justice, including the United States Attorney's Offices, as needed regarding the authorization or denial of requests, preparing objections, and/or filing appropriate motions. The General Counsel and/or the United States Department of Justice will communicate decisions authorizing or denying the request in writing to the party making the request.

Smithsonian Procedures upon Receipt of Subpoena

A Covered Person receiving a Subpoena must notify the General Counsel immediately.

The General Counsel is responsible for taking appropriate actions under this SD and has the power to authorize or deny production or testimony where appropriate. The General Counsel may delegate his or her responsibilities as appropriate.

The General Counsel may negotiate with the demander to refine or limit the Subpoena as appropriate.

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The General Counsel shall coordinate with, and seek the assistance of, the United States Department of Justice, including the United States Attorney's Offices, to prepare objections and file appropriate motions, including motions to remove the matter to federal court, quash the Subpoena, or obtain a protective order.

In evaluating a Subpoena, the Smithsonian may consider whether the Subpoena would:

- Cause the Smithsonian undue burden;
- Seek unreasonably cumulative or duplicative information;
- Seek information obtainable from a more convenient, less burdensome, or less expensive source;
- Require the disclosure of privileged information, trade secrets, or confidential, sensitive, or private information;
- Impose a burden or expense on the Smithsonian not outweighed by the likely benefit of compliance;
- Be necessary to prevent a miscarriage of justice;
- Further a Smithsonian interest in the decision that may be rendered in the proceeding;
- Be in the best interest of the Smithsonian or the United States;
- Be appropriate under Rule 45 of the Federal Rules of Civil Procedure and/or rules of procedure governing the proceeding in which the Subpoena arose;
- Be appropriate under relevant substantive law concerning privileges, immunity, and privacy;
- Violate a statute, regulation, rule of procedure, or the rights of a third party;

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- Reveal investigatory records compiled for law-enforcement purposes, and interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired;
- Impede the Smithsonian's ability to conduct official business;
- Reduce the Smithsonian's impartiality;
- Involve the Smithsonian in issues that are unrelated to its mission and programs;
- Expend public resources for private purposes;
- Have a negative cumulative effect on Smithsonian resources; and
- Fulfill the purposes of this SD.

The General Counsel or the Assistant United States Attorney or other Department of Justice attorney responsible for defending the Subpoena matter will communicate decisions authorizing or denying a Subpoena in writing to the party who caused the Subpoena to be issued.

Procedure in the Event the Smithsonian Has Not Made a Decision at the Time a Response Is Required

If authorization has not been granted or denied by the time a response is required, either the General Counsel or the Assistant United States Attorney or other Department of Justice attorney responsible for defending the Subpoena matter will provide the competent authority in the proceeding from which the Subpoena arose with a copy of this SD, inform the authority that the Subpoena is under review, and seek a stay of the Subpoena pending final determination.

VI. Procedures
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Procedure in Case of Denial

In those cases in which the Smithsonian has issued a denial of a Subpoena, either the General Counsel or the Assistant United States Attorney or other Department of Justice attorney responsible for defending the Subpoena matter will provide the competent authority in the proceeding in which the Subpoena arose with the applicable reasons therefore, including as appropriate a copy of this SD, and on behalf of the Smithsonian (i) respectfully decline to comply with the Subpoena, (ii) affirmatively take all necessary or appropriate actions, including without limitation motions practice, to have the Subpoena quashed or withdrawn, and (iii) oppose any action to enforce the Subpoena or to find the Smithsonian or any Covered Person in contempt for failure to comply with the Subpoena. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

Fees

The Smithsonian will charge costs, including travel expenses, for employees to testify or produce documents under the relevant substantive and procedural laws and regulations. Estimated costs must be paid in advance by check or money order payable to the Smithsonian Institution. Upon determination of the precise costs, the Smithsonian either (i) will reimburse the party that caused the Subpoena to be issued for any overpayment or (ii) will charge the party that caused the Subpoena to be issued for any underpayment, which charges must be paid within 10 business days by check payable to the Smithsonian Institution at the address specified in writing.

CANCELLATION:
INQUIRIES:
RETENTION:

Not Applicable
Office of General Counsel (OGC)
Indefinite. Subject to review for currency 24 months from date of issue