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SECRETARY OF THE AIR FORCE**

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Law

CIVIL LITIGATION

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Provide guidance to Judge Advocates, Commanders and other Air Force personnel, as well as contractors and the public on civil litigation and civil court matters involving the Air Force or Air Force personnel.

This Air Force Instruction (AFI) implements Headquarters Air Force Mission Directive (HAF MD) 1-14, *General Counsel and The Judge Advocate General* (29 Dec 2016), and Air Force Policy Directive (AFPD) 51-3, *Civil Litigation*, by providing guidelines on matters in civil litigation involving the Air Force or Air Force personnel before courts and administrative bodies and in other legal proceedings. This publication does not create any right or benefit, substantive or procedural, enforceable at law against the United States, DoD, or the Air Force. This publication applies to all Air Force personnel, including Air Force civilian employees, service members, and contractors as well as organizations in the Regular Air Force (RegAF), Air National Guard (ANG) in federal, not state status, Air Force Reserve (AFR) and Civil Air Patrol (CAP) units when operating as an auxiliary of the Air Force. This publication requires the collection and maintenance of information protected by the Privacy Act of 1974 authorized by Sec. 552(a). The applicable System of Records Notices, F051 AF JA H—Litigation Records (Except Patents) and F051 AFJA D—Patent Infringement and Litigation Records, are available at <http://dpcl.d.defense.gov/Privacy/SORNs.aspx>. The reporting requirements in this instruction are exempt from licensing in accordance with AFI 33-324, *The Air Force Information Collections and Reports Management Program*. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition

Schedule located in the Air Force Records Information Management System. Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the AF Form 847, *Recommendation for Change of Publication*. Route AF Forms 847 from the field through the appropriate functional chains of command. With the exception of Chapter 5, dealing with foreign civil litigation involving the United States Air Force, this publication may not be supplemented or further implemented/extended. The authorities to waive wing/unit level requirements in this publication are identified with a Tier number (T-0, T-1, T-2, and T-3) following the compliance statement. See AFI 33-360, *Publications and Forms Management*, for a description of the authorities associated with Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternatively, to the requestor's commander for non-tiered compliance items.

SUMMARY OF CHANGES

This document has been substantially revised and must be completely reviewed. Chapter headings from publication dated 20 June 2002 have been changed, information has been consolidated, and processes have been standardized to make the publication easier to follow. This document incorporates both administrative and interim changes. The administrative changes do not alter the legal meaning or interpretation of the original document. The administrative changes modify the responsible offices and their names, but not their missions. This revision also incorporates operational changes within the Air Force Legal Operations Agency (AFLOA), referencing the establishment of Commercial, Contract, Environmental, Tort Claims, Utility, and Labor Law Field Support Centers. Chapter 4 was added to provide guidance on electronic discovery prompted by the 1 December 2016 changes to the Federal Rules of Civil Procedure (Fed. R. Civ. P). Chapter 5 was added to consolidate issues involving foreign civil litigation involving the United States Air Force in one location within this Air Force Instruction.

Chapter 1— ROLES AND RESPONSIBILITIES	7
1.1. Roles and Responsibilities.....	7
1.2. Responsibilities of the Litigation Divisions.	8
1.3. Responsibilities of Managing Attorneys.....	8
1.4. Responsibilities of Base-Level/Service Staff Judge Advocates (SJAs).	9
1.5. Responsibilities of DoJ and USAO to Represent the Air Force and Air Force Officials Sued in Their Official Capacities.	11
1.6. Responsibilities of Air Force Personnel, Offices, Units, and Activities.....	11
1.7. General Litigation Responsibilities of AFLOA/JACC.....	12
1.8. The Aviation and Admiralty Law Branch (JACC/AALB).	13
1.9. The Medical Law Branch (JACC-MLB).	13
1.10. The General Torts Branch (JACC-GTB).	13

1.11.	The Foreign Torts and Litigation Branch (JACC-FTLB).	13
1.12.	Base-Level/Servicing SJA Reporting Requirements.	13
1.13.	General Litigation Responsibilities of AFLOA/JACE.	13
1.14.	The Environmental Litigation Center (JACE-LC).	13
1.15.	The Utility Law Field Support Center (JACE-ULFSC).	14
1.16.	JACE Base-Level/Servicing SJA Reporting Requirements.	14
1.17.	Additional Base-Level/Servicing SJA Substantive Requirements.	15
1.18.	General Litigation Responsibilities of AFLOA/JACL.	15
1.19.	The Labor Law Field Support Center (JACL-LLFSC).	15
1.20.	The Military Personnel Branch (JACL-MP).	16
1.21.	The Information Litigation Branch (JACL-IL).	16
1.22.	Base-Level/Servicing SJA Reporting Requirements.	16
1.23.	Additional Base-Level/Servicing SJA Substantive Requirements.	17
Chapter 2— GENERAL PROVISIONS		19
2.1.	General Applicability.	19
2.2.	Litigation Reports.	19
2.3.	Administrative Records.	20
2.4.	Authenticating Air Force Official Information.	21
2.5.	Third Party Litigation.	22
2.6.	Requests by Air Force Personnel for Legal Representation by DoJ or by Private Counsel at Government Expense.	23
2.7.	Requests for Indemnification.	24
2.8.	Service Members Serving on State and Local Juries.	25
2.9.	Administrative Pay Withholdings and Garnishments against Service Members and Employees.	27
2.10.	Service of Process.	27
Figure 2.1.	Recommended Format for Litigation Report.	28
Figure 2.2.	Sample AF Form 44 Format for Authenticating Official Records.	33
Figure 2.3.	Sample AF Form 44 Format for Certifying Custodian Who Does Not Have the Official Records Requested.	34

Chapter 3—	RELEASING OR PROVIDING INFORMATION IN CIVIL LITIGATION AND OTHER PROCEEDINGS	35
3.1.	Background.	35
3.2.	Guiding Principle.	35
3.3.	Terms.	35
3.4.	Applicability and Scope.....	37
3.5.	Initial Receipt of a Demand or Request.	38
3.6.	Required Contents of Demand or Request.	38
3.7.	Base-Level/Service SJA Processing.	38
3.8.	Factors to Consider and Decisions by Release Authorities.	39
3.9.	Defending Decisions of Release Authorities.	42
3.10.	DoJ and USAO Requests for Witnesses.	43
3.11.	Wear of Uniform.....	44
3.12.	Appearing at State or Local Legislative Hearings.	44
3.13.	Expert or Opinion Testimony, Review, or Consulting by Covered Personnel.	44
3.14.	Course of Treatment Testimony.	46
3.15.	Application to Former and Retired Air Force Personnel.	46
Chapter 4—	CIVIL DISCOVERY AND THE LITIGATION HOLD/PRESERVATION NOTICE PROCESS	47
4.1.	Purpose.	47
4.2.	Background.	47
4.3.	Applicability.	48
4.4.	Scope.	48
4.5.	AF/JA Roles and Responsibilities.	49
4.6.	SAF/CIO A6 Roles and Responsibilities.	51
4.7.	Commander Roles and Responsibilities.	52
4.8.	Air Force Personnel Roles and Responsibilities.	53
4.9.	When to Initiate the Discovery/Litigation Hold Process.	53
4.10.	Proportionality.	54

4.11. Early Involvement and Consultation. 54

4.12. General Guidance for Drafting and Issuing a Search Request & Litigation Hold Notice. 54

4.13. Search Request & Litigation Hold Notice Distribution. 55

4.14. Administrator ESI Searches. 56

4.15. Search Methodologies. 56

4.16. Disaster Recovery/Backup Tapes and Servers. 56

4.17. Compliance. 56

4.18. Processing, Reviewing, Analyzing and Producing Documents. 57

4.19. Lifting the Litigation Hold. 57

4.20. Cost of Compliance. 57

Figure 4.1. Format for AFRO Litigation Hold Memorandum. 58

Figure 4.2. Format for Individual Litigation Hold Memorandum..... 60

Chapter 5— FOREIGN CIVIL PROCEEDINGS AFFECTING U.S. INTERESTS 63

5.1. Notice of Proceedings. 63

5.2. Air Force Legal Offices. 63

5.3. Non-Legal Air Force Offices. 63

5.4. Avoid Representation of Accepting Service on behalf of the United States. 63

5.5. Report to the DoJ OFL. 64

5.6. Protection of Reports. 64

5.7. Judge Advocate General Unified Automated Reporting System (JAGUARS) Reporting Requirement. 64

5.8. Responsibility for Proceedings. 65

5.9. Support to Host Nation for Proceeding. 65

5.10. Federal or State Domestic Suits against Individuals in Their Individual Capacity While Located in Foreign Jurisdictions. 65

5.11. Service of Process for Matters Brought Against the United States in Foreign Jurisdictions. 66

5.12. Refrain from Actions Before Coordinating with the DoJ OFL. 66

5.13. Litigation Report. 66

5.14.	Conveying Agency Positions.	66
5.15.	Assertions of Immunity from Foreign Jurisdiction.	67
5.16.	DoJ OFL Hiring of Local Counsel.	67
5.17.	Need for Ongoing Support to DoJ OFL.	68
5.18.	Legal Representation for Air Force Military Members and Civilian Employees Sued in Their Official Capacity for Actions Performed in the Scope of Employment.	68
5.19.	Legal Representation for Air Force Military Members and Civilian Employees Sued in Their Personal Capacity for Actions Performed in the Scope of Their Employment.	68
5.20.	Requests for Indemnification.	68
5.21.	Requests for Testimony.	68
5.22.	Requests for Documents.	69
5.23.	Release Authorities for Official Information: Testimony and Documents.	70
5.24.	Witness Travel Funding.	70
5.25.	Garnishment and Attachment Proceedings in Foreign Jurisdictions.	70
5.26.	Lawsuits in Foreign Courts: Suits or Criminal Complaints Initiated by the U. S.	71
5.27.	Wear of the Uniform.	71
5.28.	Supplementation Authorized.	71
Attachment 1— GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION		72

Chapter 1

ROLES AND RESPONSIBILITIES

1.1. Roles and Responsibilities.

1.1.1. In accordance with HAF MD 1-14, The Judge Advocate General (TJAG) and the Air Force General Counsel (SAF/GC) shall closely collaborate to:

1.1.1.1. Carry out Air Force policies concerning civil litigation before courts and administrative bodies and policies concerning Air Force involvement in civilian court matters.

1.1.1.2. Take actions necessary to protect the Air Force's interests in civil litigation and interaction with civil judicial and administrative systems, including legal disputes and other legal matters that involve Air Force activities in the United States and in foreign countries.

1.1.2. In those matters for which TJAG is responsible, TJAG will:

1.1.2.1. Protect Air Force interests in civil litigation before courts and administrative bodies, in other legal proceedings, and in matters where litigation is expected.

1.1.2.2. Maintain close liaison with the responsible Department of Justice (DoJ) Division or United States Attorney offices (USAO) in litigation and administrative forums to:

1.1.2.2.1. Make recommendations on behalf of the Air Force to DoJ and the USAO regarding initiating legal actions and appeals.

1.1.2.2.2. Obtain and preserve evidence, including electronically stored information potentially relevant to pending or reasonably expected litigation.

1.1.2.2.3. Prepare pleadings and briefs.

1.1.2.2.4. Compile and evaluate evidence.

1.1.2.2.5. Litigate or assist in the litigation of pending matters.

1.1.2.2.6. Make recommendations on behalf of the Air Force to DoJ and the USAO regarding offering or accepting proposed compromises or settlements of pending litigation or controversies involving the Air Force.

1.1.2.3. Coordinate closely with other Department of Defense (DoD) agencies, and other federal agencies, as needed, to ensure consistent legal positions and to procure evidence to support the government's position.

1.1.2.4. Negotiate with federal, state, and municipal regulatory bodies and advocate Air Force interests before administrative and quasi-judicial proceedings, to include drafting and submitting pleadings, briefs, and presenting evidence.

1.1.2.5. Delegate to AFLOA the authority to initiate or take actions pertaining to TJAG's litigation responsibilities unless TJAG or TJAG's designee approves a command subordinate to HQ USAF to take such actions.

1.1.2.6. Retain authority unto him/herself (or an authorized designee) to appoint, from the Regular Air Force, civilian, and reserve JAG ranks, an individual to appear or represent the Air Force in civil judicial or administrative (foreign or domestic) action.

1.1.2.7. Fulfill the above-listed responsibilities through the Litigation Divisions.

1.2. Responsibilities of the Litigation Divisions. The Litigation Divisions consist of the headquarters offices and Field Support Centers. These Divisions are found within the Civil Law and Litigation Directorate (AFLOA/JAC), and the Acquisition Law and Litigation Directorate (AF/JAQ).

1.2.1. In General. The Litigation Divisions are responsible for the oversight and management of civil court and administrative litigation, and matters in which litigation is reasonably expected, on behalf of the Air Force. The Litigation Divisions assign Managing Attorneys to litigate matters and to work with DoJ to ensure adequate representation of Air Force interests.

1.2.2. AFLOA/JAC. The Civil Law and Litigation Directorate is responsible, under this instruction, for Air Force civil litigation that does not involve acquisition or commercial matters.

1.2.2.1. Claims and Tort Litigation Division (AFLOA/JACC). The roles and responsibilities of AFLOA/JACC are covered at Paragraph 1.7 and Chapter 5 for foreign civil litigation.

1.2.2.2. Environmental Law and Litigation Division (AFLOA/JACE). The roles and responsibilities of AFLOA/JACE are covered at Paragraph 1.14.

1.2.2.3. General Litigation Division (AFLOA/JACL). The roles and responsibilities of AFLOA/JACL are covered at Paragraph 1.18. In addition, the Chief of AFLOA/JACL is authorized to accept service of process for the Secretary of the Air Force and the Department of the Air Force pursuant to the provisions of 32 Code of Federal Regulations (C.F.R.) Sec. 257.5(d).

1.2.2.4. Litigation Support Center (AFLOA/JAC-LSC). AFLOA/JAC-LSC is responsible for providing litigation support services, particularly electronic document management capabilities, to the litigation divisions. The Chief, AFLOA/JAC-LSC, is responsible for providing electronic discovery advice and support for the Air Force.

1.2.3. AF/JAQ and AFLOA/JAQ. The Headquarters Air Force Acquisition Law and Litigation Directorate (AF/JAQ) develops policy, plans, and programs; establishes requirements; and provides resources to support the Air Force's acquisition and commercial law mission. The Commercial Law and Litigation Directorate (AFLOA/JAQ) is responsible for Air Force acquisition and commercial litigation.

1.2.4. AF/JAO. Headquarters Operations and International Law Division is responsible for operational and international law for AF/JA. AFLOA litigation divisions and Air Force component commands abroad will coordinate foreign civil litigation matters with AF/JAO as needed.

1.3. Responsibilities of Managing Attorneys.

1.3.1. The Air Force attorney designated by TJAG, or his authorized designee, to represent the Air Force as discussed in Paragraph 1.1.2.6. above is referred to throughout this Instruction as the Managing Attorney.

1.3.1.1. Managing Attorneys are specifically authorized by TJAG to assist DoJ and USAOs in carrying out their responsibility to represent the Air Force and its officials in all

stages of litigation, including settlement negotiations, drafting of pleadings, pretrial hearings, discovery, motion practice, trials, and appeals.

1.3.1.2. Managing Attorneys are specifically authorized to represent the Air Force in matters where DoJ or the USAO delegates the authority, in accordance with 28 U.S.C. Sec. 515, *Authority for Legal Proceedings; Commission, Oath and Salary for Special Attorneys*, appoints the Managing Attorney as a Special Assistant U.S. Attorney, or otherwise permits the representation.

1.3.1.3. All DoJ and USAO requests for information, draft responses thereto, or communications about a particular matter should be routed through the Managing Attorney assigned by the responsible litigation division.

1.3.2. In General. Managing attorneys, as well as case paralegals under their supervision, are agency counsel, or authorized Air Force representatives, in litigated matters or when litigation is reasonably expected. As such, Managing Attorneys ensure the Air Force meets its litigation obligations under applicable case law, statutes, rules, and regulations.

1.3.3. Specific responsibilities.

1.3.3.1. Communications. The Managing Attorney has responsibility for all Air Force communications with DoJ, the USAO, other counsel and parties, and the courts.

1.3.3.2. Substantive Legal Work. In conjunction with DoJ, where appropriate, the Managing Attorney drafts and reviews pleadings, conducts all phases of discovery, releases official information in response to discovery requests, develops and executes trial and alternative dispute resolution strategies, makes settlement recommendations, briefs management and stakeholders (parties with an interest in the matter), obtains management and stakeholder input when appropriate, makes appearances as authorized or delegated authority permits, and otherwise serves as agency counsel.

1.3.4. Representation. Managing Attorneys may appear as agency counsel for the Air Force in a civil judicial or administrative action. Under 28 U.S.C. Sec.516, *Conduct of Litigation Reserved to Department of Justice*, DoJ must appoint a Managing Attorney in cases where direct representation of the United States in a state or federal court is involved. (See Paragraph 1.5.).

1.4. Responsibilities of Base-Level/Servicing Staff Judge Advocates (SJAs). The office providing legal support to any Air Force unit or organization assumes the responsibilities of the base-level/servicing SJA. For Air Staff clients, the JA Directorate provides legal support. For Secretariat clients, the SAF/GC provides legal support.

1.4.1. Litigation Reporting Requirements.

1.4.1.1. Base-level/servicing SJAs must immediately report to the responsible litigation division when the Air Force or any of its instrumentalities are involved in, or reasonably anticipate becoming involved in:

1.4.1.1.1. Federal, state, or foreign court litigation (T-1);

1.4.1.1.2. Administrative proceedings and litigation (T-1); or

1.4.1.1.3. Matters in which Air Force officials are personally sued for actions taken within their official capacity (T-1).

1.4.1.2. Base-level/servicing SJAs should report such instances initially by either sending an e-mail to the workflow address of the litigation division responsible for handling the respective cases or calling that litigation division, as identified below in this Chapter. Servicing SJAs should confirm receipt of notices sent to Litigation Divisions.

1.4.1.2.1. Reports must include any pertinent information (e.g., complaint, petition, application, summons, demand letter, other legal notice, etc.) as an electronic attachment to the e-mail. Retain all original documents, including envelopes with mail delivery markings. (T-1)

1.4.1.2.2. Base-level/servicing SJAs should provide e-mail notifications to any Managing Attorney, if one is known.

1.4.1.3. Exigent Circumstances.

1.4.1.3.1. If the matter involves a temporary restraining order (TRO), preliminary injunction (PI), Writ of Habeas Corpus, or some other time-critical matter, base-level/servicing SJAs must also make immediate telephone contact with the responsible litigation division. (T-1)

1.4.1.3.2. Though exigencies may require direct contact between the base-level/servicing SJA and DoJ or the USAO, base-level/servicing SJAs must ensure that the Responsible Litigation Division is promptly notified so the Division has the opportunity to provide advice and recommendations to DoJ and the USAO. (T-1) The base-level/servicing SJA does not have authority to agree to any form of injunctive relief or other legal restraints against the United States.

1.4.1.4. The reporting base-level/servicing SJA must ensure the responsible litigation division receives the initial report or notice of litigation. (T-1)

1.4.1.5. Base-level SJAs must notify their Numbered Air Force (NAF) SJA and Major Command (MAJCOM) SJA of new or anticipated litigation. (T-2)

1.4.1.6. The reporting base-level/servicing SJA must provide continuing notifications to the responsible Litigation Division and/or Managing Attorney as directed and as important case developments occur. (T-1)

1.4.2. Substantive Litigation Requirements.

1.4.2.1. Base-level/servicing SJAs must consult with the litigation division or Managing Attorney and promptly act to prevent the routine destruction of potentially relevant material, including (ESI). (T-0) (*See* Chapter 4 for information on preservation obligations).

1.4.2.2. Litigation Reports. Base-level/servicing SJAs must:

1.4.2.2.1. Contact the Managing Attorney to determine whether a formal litigation report is required. (T-1)

1.4.2.2.2. Prepare a formal litigation report, if required, as directed by Paragraph 2.2 below. (T-1)

1.4.2.3. Discovery Responses and Requirements. Base-level/servicing SJAs must:

1.4.2.3.1. Assist the Managing Attorney to locate individuals within the Air Force with knowledge about the facts and circumstances of the matter, and to obtain information through interviews, discovery verifications, declarations, or arranging depositions. (T-1)

1.4.2.3.2. Assist the Managing Attorney to search for, preserve, and collect potentially relevant information in the possession, custody, or control of offices, units, and individuals within the Air Force. (T-1)

1.4.2.4. Communication with External Parties.

1.4.2.4.1. Communications with DoJ and USAO personnel will normally be made by the Managing Attorney. Communications with opposing counsel and parties, and the courts, will be made by the Managing Attorney. Base-level/servicing SJAs and staff should not have regular communications with DoJ or USAO about on-going cases or matters without the express authorization of the Managing Attorney.

1.4.2.4.2. Exceptional circumstances.

1.4.2.4.2.1. Alerting DoJ or USAO. Only in the most extreme circumstances, such as where failure to act immediately may result in prejudice to the Air Force's rights, and after unsuccessful efforts to contact the Managing Attorney and the appropriate Litigation Division, an SJA may alert DoJ or the USAO about a case. SJAs should obtain the name of the DoJ or USAO attorney who will be assigned to the matter to represent the Air Force and immediately provide this name to the responsible Litigation Division.

1.4.2.4.2.2. Initial information. An SJA may contact DoJ or the USAO to obtain initial information, including the effective date of service, a factual background, or procedural history, if needed, to make a report to the appropriate Litigation Division.

1.4.2.4.2.3. Obtaining a Continuance. An SJA may contact DoJ or the USAO if the date set for a hearing does not allow enough time for the Litigation Division or the Managing Attorney to contact DoJ or the USAO to obtain representation. In taking such actions, an SJA does not make a representative appearance in court or take any legal position on the underlying substantive issues in the case. An SJA should also immediately contact the responsible Litigation Division and provide information on DoJ or USAO personnel assigned to the matter.

1.5. Responsibilities of DoJ and USAO to Represent the Air Force and Air Force Officials Sued in Their Official Capacities. Under the direction of the Attorney General, DoJ and the USAOs have the primary statutory responsibility to represent the Air Force and its officials sued in their official capacities (28 U.S.C. Secs. 516 -519) (but *see* Chapter 5 for matters involving foreign courts or claims).

1.6. Responsibilities of Air Force Personnel, Offices, Units, and Activities.

1.6.1. For purposes of this Instruction, "Air Force personnel" includes active component members of the military, Air Force Reserve members in duty or training status, Air National Guard members in federal service or on Title 10 orders, and civilian employees. NOTE: Contractors and contractor personnel are not "Air Force personnel"; however, their

information and assistance are often critical to perform the functions listed in this instruction. Before tasking a contractor to perform the functions of this instruction, consult with the relevant contracting officer and contract attorney to ensure the proper contracting and fiscal authorities are used to order and reimburse contractor involvement.

1.6.2. Reporting Actual or Threatened Litigation. Air Force personnel (and contract personnel as required) must immediately notify the base-level/servicing SJA of actual litigation (e.g., receipt of a summons, complaint, subpoena, deposition notice, written discovery, etc.) or threatened litigation (e.g., receipt of an oral or written, informal demand or claim) involving Air Force interests and matters where Air Force officials are personally sued for actions taken in their official capacity. (T-3)

1.6.3. Initial Preparation. Air Force personnel (and contract personnel as required) shall assist the Managing Attorney in providing initial information about the matter, including facts and circumstances, the nature of any complaint or claim, and the identity of any potential witnesses or evidence. Air Force personnel (and contract personnel as required) shall also assist base SJAs by providing information needed for any litigation report. (T-1)

1.6.4. Discovery Responses and Production. Air Force personnel (and contract personnel as required) shall assist the Managing Attorney in providing responses to formal, written discovery requests (e.g., interrogatories, requests for production, requests for admissions, and deposition on written questions). *See* Fed. R. Civ. P. 26-37. (T-1) Air Force personnel (and contract personnel as required) will take actions as requested by the Managing Attorney, including, but not limited to:

1.6.4.1. Searching for, preserving, and providing all potentially relevant facts, documents, records, ESI, other information and evidence, and the identity of potential witnesses. (T-0)

1.6.4.2. Substantiating the adequacy of their searches or the quality of the information they provide in the form of declarations or certifications. (T-0)

1.6.4.3. Executing discovery verifications as a person having personal knowledge of the information provided. (T-0)

1.6.5. Depositions, Expert Testimony, and Persons Most Knowledgeable. Air Force personnel (and contract personnel, as required) may be called upon to provide, under oath, information within their personal knowledge at a deposition; to provide expert opinions on certain matters because of their specialized knowledge, skill, experience, training, or education; or to testify on behalf of the Air Force as the person most knowledgeable on a particular subject.

1.6.6. Trial/Hearing Preparation and Attendance. Air Force personnel (and contract personnel as required) shall provide documents, information, and data to assist in developing the facts for a trial or hearing and must attend such proceedings in order to provide live testimony if requested by the Managing Attorney. (T-0)

1.7. General Litigation Responsibilities of AFLOA/JACC.

1.7.1. AFLOA/JACC performs Air Force oversight, management, and agency counsel functions for court and administrative litigation related to tort claims statutes.

1.7.1.1. If the tort claim arises out of an alleged environmental condition, such as exposure to asbestos; mold; perfluorinated compounds (PFCs); lead-based paint; hazardous

substances; etc., the oversight, management, and agency counsel functions for court and administrative litigation related to the FTCA, MCA, and other claims statutes not addressed in this instruction are performed by AFLOA/JACE-LC. In these environmental tort cases, comply with the provisions of Chapter 4.

1.7.2. AFLOA/JACC includes, as litigation components: the Aviation and Admiralty Law Branch, the Medical Law Branch, the General Torts Branch, and the Foreign Torts and Litigation Branch.

1.8. The Aviation and Admiralty Law Branch (JACC/AALB). The JACC-AALB handles litigation involving, but not limited to: air operations and aircraft mishaps (e.g., sonic boom claims, low overflight claims, wrongful death claims stemming from crashes and damage caused by accident debris).

1.9. The Medical Law Branch (JACC-MLB). The JACC-MLB handles litigation involving, but not limited to: medical-legal issues, medical malpractice actions, privileging of medical personnel, and the Health Insurance Portability and Accountability Act (HIPAA) privacy rule.

1.10. The General Torts Branch (JACC-GTB). The JACC-GTB handles litigation involving, but not limited to: all other tort-based matters arising in the United States or in U.S. territories having an Assistant United States Attorney (AUSA) presence.

1.11. The Foreign Torts and Litigation Branch (JACC-FTLB). The JACC-FTLB handles litigation involving, but not limited to: all other tort-based matters arising in foreign countries. See Chapter 5 below, for more details.

1.12. Base-Level/Servicing SJA Reporting Requirements. Base-level/servicing SJAs must:

1.12.1. Comply with the litigation reporting requirements in Chapter 1 and 2. (T-1) Provide electronic notifications and delivery of materials to usaf.pentagon.af-ja.mbx.afloa-jacc-workflow@mail.mil. (T-1) Provide telephone notifications to DSN 612-4620 (commercial 240-612-4620). (T-1)

1.13. General Litigation Responsibilities of AFLOA/JACE.

1.13.1. AFLOA/JACE performs Air Force oversight, management, and agency counsel functions for court litigation, administrative hearings, and compliance matters related to environmental and land use laws, rules, and regulations.

1.13.2. AFLOA/JACE is organized into two main litigation components: The Environmental Litigation Center (JACE-LC) and the Utility Law Field Support Center (JACE-ULFSC).

1.14. The Environmental Litigation Center (JACE-LC). The JACE-LC handles litigation involving, but not limited to:

1.14.1. Land valuation and land use rights.

1.14.2. Environmental torts.

1.14.3. Affirmative litigation arising where the Air Force is seeking to recover costs incurred due to environmental cleanup of Air Force property.

1.14.4. Defensive litigation arising as a result of environmental contamination and cleanup alleged, in part, to be caused by Air Force actions

1.14.5. Litigation involving endangered species, marine mammals, Native American graves or artifacts found on Air Force property, and historic or culturally significant artifacts found on Air Force property.

1.14.6. Litigation involving air pollution, drinking, surface, or ground water, occupational safety or health issues involving the use of hazardous substances in the workplace

1.14.7. Litigation involving Air Force planning and basing of new missions such as aircraft beddowns and changes to training ranges.

1.14.8. Litigation involving attempts by local political subdivisions of a State (e.g., municipality) to alter their existing governing boundaries in a manner that might incorporate Air Force real property within their boundaries.

1.14.9. Environmental-Related Criminal Action. Allegations by a federal, state, or local regulatory authority that Air Force personnel committed a criminal violation of an environmental statute or regulation.

1.14.10. Encroachment and Sustainment. State or local government actions that are inconsistent with the Air Installation Compatible Use Zone (AICUZ) study or that may negatively impact the installation or its capability to perform mission activities; state, local or regional administrative board consideration of the placement of electrical power lines or power-generating facilities near an installation or Air Force resources; and proposals to establish landfills or waterfowl habitats near operational runways that might pose a substantial bird strike hazard.

1.14.11. Enforcement Actions, Notices of Violation, Fines and Penalties. Allegations in a written notice of violation or noncompliance by federal, state, or local regulatory agency that the Air Force violated an environmental law, rule, or regulation; administrative hearings on disputes concerning compliance orders; requests for declaratory rulings by an administrative law judge; assertions that Air Force actions or activities subject it to the payment of fines or penalties.

1.14.12. Environmental Fees (e.g. Fee/Tax) Issues. Questions concerning whether an environmental fee is really a non-payable tax because it is: discriminatory in either application or effect; assessed under a statute in which federal sovereign immunity has not been clearly and unambiguously waived; disproportionate to the intended service or use; or is a financial assurance fee.

1.14.13. Comments on Proposed Legislation and Rule-Making Proceedings. When state or local legislative bodies seek Air Force comments on proposed or existing laws, rules, or regulations related to the environment.

1.15. The Utility Law Field Support Center (JACE-ULFSC). The JACE-ULFSC handles litigation involving, but not limited to: significant utility rate changes and other substantive utility rate issues—regardless of dollar amount—that may affect mission accomplishment, involving electricity, telephone, natural gas, water or wastewater services, including utility rate negotiations, utility privatization rates, renewable energy matters project development, and energy conservation project implementation.

1.16. JACE Base-Level/Servicing SJA Reporting Requirements. Base-level/servicing SJAs must:

1.16.1. Comply with the litigation reporting requirements in Chapter 1 and 2. (T-1) Provide electronic notifications and delivery of material on all matters under Paragraph 4.2. to JACE at usaf.pentagon.af-ja-mbx.afloa-jace.workflow@mail.mil. (T-1) Provide telephone notifications to DSN 612-4680 (commercial 240-612-4680).

1.16.2. For matters handled by the ULFSC, comply with the litigation reporting requirements in Chapter 1 and 2. (T-1) Provide electronic notifications and delivery of materials to ULFSC.Tyndall@us.af.mil. Provide telephone notifications to DSN 523-6217 (commercial 850-283-6217). (T-1)

1.16.2.1. Reportable utility rate matters are those that could result in annual rate changes for the installation, including apparent rate decreases. The ULFSC evaluates the rate change to determine whether the change involves a significant increase or a rate design or tariff change that may be detrimental to the DoD.

1.17. Additional Base-Level/Servicing SJA Substantive Requirements. Base-level/servicing SJAs must:

1.17.1. Route all settlements of administrative actions where the terms of the settlement include provisions for the payment of fines, stipulated penalties, suspended fines, or involve supplemental environmental projects to AFLOA/JACE. (T-1) The AFLOA/JACE Division Chief must approve any such agreement and any modifications of such agreements. (T-1) This authority may not be delegated.

1.18. General Litigation Responsibilities of AFLOA/JACL.

1.18.1. AFLOA/JACL performs Air Force oversight, management, and agency counsel functions for court and administrative litigation related to labor and employment law and civilian personnel matters, military personnel issues, information law, tax disputes, rights to financial privacy, and Constitutional and non-Federal Tort Claims Act (FTCA)-related personal tort cases. AFLOA/JACL also handles most litigation and administrative matters not specifically handled by any of the other Litigation Divisions (as specified in Chapter 1).

1.18.2. AFLOA/JACL is organized into three main litigation components: the Labor Law Field Support Center (JACL-LLFSC), the Military Personnel Branch (JACL-MP), and the Information Litigation Branch (JACL-IL). If unsure which litigation unit is the appropriate POC, contact the JACL main number at DSN 612-4700 (commercial: 240-612-4700).

1.19. The Labor Law Field Support Center (JACL-LLFSC). The JACL-LLFSC handles litigation involving, but not limited to: formal complaints of discrimination before the Equal Employment Opportunity Commission (EEOC); adverse civilian personnel actions or other appealable matters appealed to the Merit Systems Protection Board (MSPB); administrative labor matters, including unfair labor practices (ULP) before the Federal Labor Relations Authority (FLRA) and proceedings before the Federal Services Impasses Panel (FSIP); and labor and employment litigation in state and federal courts.

1.19.1. Specific Labor and Employment Law Delegation to Non-AFLOA Legal Offices.

1.19.1.1. HQ AFMC/JA, Hill AFB SJA, Robins AFB SJA, Tinker AFB SJA, Wright-Patterson AFB SJA, and Air Force Reserve Command (AFRC) installations with an assigned active duty SJA retain responsibility for individual EEOC and MSPB cases involving assigned personnel and FLRA litigation (including FSIP proceedings).

1.19.1.2. The National Guard Bureau retains responsibility for defending administrative and federal court litigation for all employment and labor law matters involving civilian employees assigned to National Guard organizations.

1.19.1.3. For any delegated matter the LLFSC identifies as having potential Air Force-wide significance, the LLFSC will contact HQ AFMC/JA, Air Force Reserve Command, or the National Guard Bureau to coordinate the appropriate office to handle the matter.

1.19.1.4. In other matters, with the concurrence of the base-level/servicing SJA, the LLFSC may designate an experienced installation labor and employment lawyer to represent the Air Force before administrative bodies.

1.19.2. Resources permitting, the LLFSC may also provide assistance in other labor and employment or civilian personnel matters falling outside of its primary mission areas, such as arbitrations under collective bargaining agreements. Base-level/servicing SJAs interested in LLFSC assistance in such cases should first inquire by phone about the availability of an LLFSC attorney. Follow verbal requests for assistance with a written memo or e-mail request that includes the reason for the request and a fund citation the LLFSC can use to cover its costs associated with the matter. Send a litigation report, if required, (prepared according to Chapter 1), as soon as possible. (T-1)

1.20. The Military Personnel Branch (JACL-MP). The JACL-MP Branch handles litigation involving, but not limited to: administrative discharge, assignments, reenlistment, involuntary separation, active duty service commitment, recall to active duty, dress and appearance, conscientious objectors, promotions, active duty or reserve status, the use of other courts or administrative bodies to dispute the outcome of courts-martial or other actions under the Uniform Code of Military Justice (UCMJ), religious accommodation and Establishment Clause issues, pay, retirement, and disability matters.

1.21. The Information Litigation Branch (JACL-IL). The JACL-IL Branch handles litigation involving, but not limited to: Freedom of Information Act (FOIA) and Privacy Act (PA) litigation, FOIA/PA administrative appeals forwarded to the designated Air Force representative Secretary of the Air Force General Counsel Office, Fiscal, Ethics and Administrative Law Division (SAF/GCA) for a decision, tax disputes, constitutional and personal torts not covered under the FTCA, Right to Financial Privacy Act (RFPA), and requests for Government representation when individually-named current or former employees were acting within the scope of their employment.

1.22. Base-Level/Servicing SJA Reporting Requirements. Base-level/servicing SJAs must:

1.22.1. For matters handled by the JACL-LLFSC: Comply with the litigation reporting requirements in Chapter 1 and 2. (T-1) Except for cases arising at installations described in Paragraph 1.19.1. above, provide electronic notifications and delivery of materials as follows:

1.22.1.1. For proposed disciplinary and adverse action matters which could be appealed to the MSPB and all MSPB administrative litigation matters, send to: usaf.pentagon.af-ja.mbx.afloa-llfsc-mspb-branch@mail.mil. (T-1)

1.22.1.2. For EEOC matters and matters relating to federal litigation, send to: usaf.pentagon.af-ja.mbx.ORG-AFLOA-LLFSC-Emp-Discr@mail.mil. (T-1)

1.22.1.3. For ULPs, class action matters, and other FLRA matters, provide telephone notifications to DSN 612-4700 (commercial 240-612-4700): (T-1)

1.22.2. For labor and employment matters handled by other organizations with delegated authority as identified in Paragraph 1.19.1 above, comply with the litigation reporting requirements in Chapter 1 and 2. Make telephone notification to the appropriate organization as indicated below:

1.22.2.1. For Air Force Material Command, Hill AFB, Robins AFB, Tinker AFB or Wright-Patterson AFB, contact DSN 787-6513 or commercial (937) 257-6513.

1.22.2.2. For Air Force Reserve Command installations, contact DSN 497-1582 or commercial (478) 327-1582.

1.22.2.3. For National Guard Bureau issues, contact DSN 327-2699 or (703) 607-2699.

1.22.3. For matters handled by the JACL-MP Branch: Comply with the litigation reporting requirements in Chapter 1 and 2. (T-1) Provide telephone notifications to DSN 612-4700 (commercial 240-612-4700). (T-1)

1.22.4. For matters handled by the JACL-IL Branch: Comply with the litigation reporting requirements in Chapter 1 and 2. (T-1) Provide telephone notifications to DSN 612-4700 (commercial 240-612-4700). (T-1)

1.22.4.1. In FOIA litigation, the Air Force only has 30 days to answer a complaint, not the normal 60-day period allowed for other litigation under Fed. R. Civ. P. 12(a)(2), so prompt reporting is required.

1.22.4.2. In tax disputes, whether in litigation or not, report all matters concerning:

1.22.4.2.1. The validity or refund of taxes against property or transactions of the Air Force, its instrumentalities, non-appropriated fund instrumentalities, and contractors. (SAF/GCR handles matters involving contractor responsibility).

1.22.4.2.2. Taxes imposed on Air Force personnel that raise issues under 10 U.S.C. Sec 4001, *Residence for Tax Purposes*

1.23. Additional Base-Level/Service SJA Substantive Requirements. Base-level/service SAs must:

1.23.1. For matters handled by the JACL-LLFSC: Consult the Managing Attorney for any special requirements in administrative matters.

1.23.1.1. In matters where JACL-LLFSC has not represented the Air Force at the administrative stage:

1.23.1.1.1. Compile and send all materials from any administrative tribunal, including transcripts of any administrative hearings, if they were made. (T-1)

1.23.1.1.2. Send a complete copy of all employee personnel files, if relevant to the matter, including disciplinary actions with supporting documentation, EEO counselor reports, a chronology of EEO counselor contacts, and operative collective bargaining agreements. (T-1) (**NOTE:** Do not send original employee personnel files, unless specifically asked to by an LLFSC attorney).

- 1.23.1.1.3. Include the name and contact information of the responsible supervisor, deciding official, and civilian personnel specialist in Section IX, *Rule 26(a) (1) Initial Disclosures*, of the litigation report. (T-1)
- 1.23.1.1.4. Compile and send an administrative record (*see* Paragraph 2.3.). (T-1)
- 1.23.2. For matters handled by the JACL-IL Branch:
 - 1.23.2.1. In FOIA litigation, include the name and contact information of the responsible FOIA/PA officer in Section IX, *Rule 26(a) (1) Initial Disclosures*, of the litigation report. (T-1)
 - 1.23.2.2. In Right to Financial Privacy Act (RFPA) litigation, ensure the litigation report includes a copy of all documentation substantiating Air Force compliance with 12 U.S.C. Secs. 3401-3422, *Right to Financial Privacy Act*, including required notice and other procedural requirements. (T-1)

Chapter 2

GENERAL PROVISIONS

2.1. General Applicability. The provisions in this Chapter are of general applicability to all matters handled by the Litigation Divisions. Legal offices should follow these provisions, unless specifically instructed otherwise in subsequent Chapters of this Instruction, in other authoritative guidance, or by the Litigation Division or Managing Attorney in a particular case. If the matter is administrative in nature, please consult the rules of the court or administrative board involved in the case and / or the Managing Attorney.

2.2. Litigation Reports.

2.2.1. Provide the information contained at the back of this Chapter at Figure 2.1 and any other information requested by the Managing Attorney. (T-1) (**NOTE:** If a portion of the sample litigation report does not apply to the litigation matter, say as much in the litigation report).

2.2.2. Prepare, handle, and appropriately mark the litigation report to identify any applicable privilege (e.g., attorney-client privilege or attorney work-product) or other sensitive contents (information protected under the Privacy Act). (T-1) If classified information is involved in the matter, consult the local security manager to ensure proper protocols are followed. Consult the Managing Attorney to determine if a separate classified version of the litigation report is required and contact the local security manager to determine the best means of conveying the classified report. (T-1)

2.2.3. Documentation.

2.2.3.1. If an administrative record is required with submission of the litigation report, prepare it as directed in Paragraph 2.3. (T-1)

2.2.3.2. If authentication of records is required with submission of the litigation report, do so in accordance with the procedures in Paragraph 2.4. below. (T-1)

2.2.3.3. If an original document consists of ESI, preserve the document in its original file format with associated metadata. (T-1) Send a copy of the ESI, in its original file format with associated metadata, along with the litigation report. (T-1) (**NOTE:** For assistance preserving ESI, contact the Base Records Manager (BRM)).

2.2.3.4. If documents are subject to a privilege, segregate those documents and prepare a privilege log. (T-1) The privilege log shall describe the nature of the documents and communications, without revealing privileged or protected information so other parties will be able to assess the claim of privilege. *See* Federal Rules of Civil Procedure (Fed. R. Civ. P.) 26(b) (5). (T-1)

2.2.4. Base-level/servicing legal offices should keep a file copy of all material for future reference regardless of ordinary disposition schedules, until the Managing Attorney authorizes destruction.

2.2.5. Base-level/servicing legal offices should submit the litigation report and all material electronically, or as otherwise directed, to the responsible Litigation Division by the deadline given by that Division.

2.2.6. If all of the required material cannot be sent with the report by the deadline:

- 2.2.6.1. Send an interim report that includes what materials are available. (T-1)
- 2.2.6.2. Explain where to find the missing material, what is being done to preserve or obtain the material, and when the material will be sent. (T-1)
- 2.2.6.3. When the missing or additional material has been obtained, send the material with an amended report. (T-1)
- 2.2.6.4. If the required material is unavailable or if the material is not under the custody and control of the local reporting authorities, explain why and send the report without such materials. (T-1)

2.3. Administrative Records. Some cases or claims are decided based on the Air Force's administrative record. The administrative record is a collection of material that documents the Air Force's decision-making process and the basis for the decision being challenged. The content and format of an administrative record often varies depending on the type of case at issue and specific forum or local rules. Because of this, personnel must assemble the administrative record using the guidelines of this Paragraph and the directions of the Litigation Division or Managing Attorney. (T-1)

2.3.1. Responsibility for Compiling. The responsibility for compiling the administrative record belongs to the Air Force office taking the action resulting in litigation. (T-2)

2.3.2. Contents of Administrative Record. The administrative record is the gathering of all material that documents the Air Force's decision-making process on a given issue which is the source of a dispute with another party. The content and format of an administrative record often varies depending on the type of case at issue. In addition to the general guidance found in this Instruction, the specific guidance of the Litigation Division or Managing Attorney should be followed when compiling the administrative record. (T-1)

2.3.3. Preparation of an Administrative Record. When preparing an administrative record, the functional office responsible for compilation, in consultation with its base-level/servicing SJA, takes the following actions:

- 2.3.3.1. Obtain and preserve all information related to the matter challenged. (T-0)
- 2.3.3.2. Ensure other units, offices, commands, contractors, etc., are consulted for information to include in the administrative record and to preserve it by preventing its routine retirement or destruction. (T-0)
- 2.3.3.3. Ensure all Privacy Act material is fully protected and appropriately marked. (T-0)
- 2.3.3.4. Arrange all information in a logical, consistent format.
- 2.3.3.5. When practical, delete multiple copies of the same material.
- 2.3.3.6. Keep originals of all information (both paper and ESI) and provide copies for the administrative record. (T-1) The originals may be required at a later date by a court or for another party to inspect. Store originals as appropriate, depending on their classification level.
- 2.3.3.7. Segregate and mark any privileged material (including the litigation report) in the administrative record and prepare a privilege log. (T-0) The privilege log must describe the nature of the documents and other communications, without revealing information

itself privileged or protected, so that other parties will be able to assess whether the claim is valid. *See* Fed. R. Civ. P. 26(b) (5).

2.3.3.8. Base-level/servicing SJAs should retain a complete copy of the administrative record along with the litigation report to facilitate future work on the case.

2.3.3.9. Have the appropriate custodian of the information, or other qualified person, authenticate the material as directed in Paragraph 2.4. below. (T-1)

2.3.3.10. Form of Administrative Record. An administrative record should either be compiled in an electronic or a paper format. Again, this may depend on the type of case or rules of a particular forum. Because of this, use the format that the Litigation Division or Managing Attorney directs.

2.4. Authenticating Air Force Official Information.

2.4.1. Terms.

2.4.1.1. “Official Information” is all information in any format, however stored, that relates to the affairs of the Air Force or its personnel; that is in the possession, custody, or control of the Air Force; or that relates to information in the possession, custody, or control of the Air Force; that was acquired by Air Force personnel as part of their official duties or because of their official status while on active duty, employed, or under contract. Official information that is the property of the Air Force but is in the possession, custody, or control of another federal agency is also included in this definition.

2.4.1.2. “Custodian” is a person in charge of an office in which official Air Force records are filed by law, regulation, or custom; a person so designated by proper authority; and, for certain purposes such as maintaining real property or equipment accountability for a given installation or office, a person who has possession, custody, or control of official Air Force information for use in official duties.

2.4.2. Custodians of official information should consult their base-level/servicing SJA or the responsible Litigation Division on preparing AF Form 44, *Certificate of Records*, and the material to be authenticated. (T-1) Samples of both a Form 44 indicating the official has the requested documents and a Form 44 to be used in a situation where the official does not have the requested documents in his or her possession can be found at Figures 2.2(a) and (b) at the end of this Chapter.

2.4.3. Authenticating Official Information under the Air Force Seal. When the Managing Attorney determines that the Air Force will authenticate official information under seal, the custodian of the information, must:

2.4.3.1. Prepare an AF Form 44. (T-1)

2.4.3.1.1. Complete the first certificate (top half) of AF Form 44, indicating the material provided is a true copy of official records or information, the location where the material is maintained, and a description of the material provided.

2.4.3.1.2. Sign the top half of the form, noting his or her title, unit, and duty location. (T-1)

2.4.3.1.3. The Secretary of the Air Force or designee (usually SAF/AA) signs under the second certificate (the bottom part of the form) and affixes the Air Force seal to the

AF Form 44. (T-1) This procedure satisfies Fed. R. Civ. P. 44, so that courts or other tribunals will allow official Air Force records to be admitted as evidence and usually satisfies state jurisdiction requirements as well.

2.4.3.2. Physically prepare the material to be authenticated using the same guidelines for the preparation of Administrative Records found in Paragraph 2.3. above. (T-1)

2.4.4. Authenticating Official Information with Declaration. When the Managing Attorney determines that the Air Force should authenticate official information using a declaration, the custodian of the information shall work with the Managing Attorney to prepare a written declaration that will be accepted by a federal court and meet the requirements of a hearsay exception under Federal Rules of Evidence (Fed. R. Evid.) 803 and the authentication requirements of Fed. R. Evid. 902 and be accepted by court. (T-0)

2.4.5. Sending Authenticated Official Information. The custodian of the information shall:

2.4.5.1. Prepare one master AF Form 44 or custodial declaration, encompassing each volume as well as a separate AF Form 44 or custodial declaration for each volume of authenticated information, if there are multiple volumes. Attach each such form or declaration to the front of the volume it is meant to authenticate. (T-1)

2.4.5.2. Prepare a master index for all volumes and, if there are multiple volumes, a separate index for each volume and insert behind the AF Form 44 or custodial declaration. (T-1)

2.4.5.3. Ensure that the description of the information on the AF Form 44 or custodial declaration accurately describes the material (e.g., "This is Volume II of III, pages 101-200"). (T-1)

2.4.5.4. Not fill in the bottom of the AF Form 44 or attach a seal—that will be accomplished by the Secretary of the Air Force or his or her designee. (T-1)

2.4.5.5. Forward the AF Forms 44 and custodial declarations together with the material being authenticated, to the responsible Litigation Division. (T-1)

2.4.5.6. Submit only copies of the material that need authentication. (T-1)

2.5. Third Party Litigation. Third party litigation involves individuals who do not have a direct connection with a matter or transaction, but who might have relevant information or otherwise may be affected by the litigation.

2.5.1. Air Force obligations as a Third Party. Third party involvement may require the Air Force to take certain actions such as complying with discovery requests or responding to court orders.

2.5.1.1. Base-level/servicing SJAs must report third party litigation to the responsible Litigation Division. (T-1)

2.5.1.2. If it appears that the third party matter will not result in liability for the Air Force, litigation reports are generally not required unless the responsible Litigation Division requests one.

2.5.1.3. Handle subpoenas or information requests in accordance with DoDD 5405.2, *Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses*, and Chapter 3 of this Instruction. (T-0)

2.6. Requests by Air Force Personnel for Legal Representation by DoJ or by Private Counsel at Government Expense. (*NOTE*: Requests for representation in Office of Special Counsel Investigations are governed by AFI 51-1102, *Cooperation with the Office of Special Counsel*.)

2.6.1. Past or present Air Force personnel may request legal representation by DoJ if they are named as individual defendants in civil or criminal proceedings, including in foreign legal proceedings, for acts or omissions arising from the performance of their official Air Force duties, *see* 28 C.F.R. Sec 50.15). (*NOTE*: Because personnel sued in their individual capacity may have only twenty (20) or fewer days to respond to a complaint, time is of the essence in processing these requests). Such personnel should consult with their base-level servicing SJA for assistance.

2.6.1.1. Usually, DoJ will not defend an individual against a federal criminal action. (*But see* 28 C.F.R. Sec. 50.16 and Paragraph 2.6.2.).

2.6.1.2. Under limited circumstances (for example, when an issue is involved that significantly affects AF operations or missions), Air Force contractors sued by third parties may request government representation. Base-level/servicing SJAs who receive a request by Air Force contractors for DoJ representation must forward it to AFLOA/JAQ. (T-1)

2.6.1.3. Attorney-client privileged information should not be forwarded with a request unless absolutely necessary. In such an instance, base-level/servicing SJAs should only forward privileged information with the written consent of the requester and the prior approval and knowledge of the receiving Litigation Division.

2.6.1.4. An individual who wants DoJ representation should prepare the following:

2.6.1.4.1. A written request for DoJ representation. (T-0)

2.6.1.4.2. A statement detailing the facts of the litigation including the requestor's actual and alleged involvement in the case. (T-0)

2.6.1.4.3. A copy of the Complaint and other court documents related to the case. (T-0)

2.6.1.4.4. A statement from the requester's supervisor detailing the requester's official Air Force duties and status of requester at the relevant time. (T-0)

2.6.1.5. Air Force personnel may request, from their base-level/servicing SJA, the assistance of an Air Force attorney in preparing the request for DoJ representation.

2.6.1.5.1. Just requesting such assistance does not create an attorney-client relationship. However, if an Air Force attorney helps prepare the request, an attorney-client relationship will exist between the Air Force attorney and the requesting Air Force personnel until one of two events occurs: (1) DoJ either decides to provide the requested representation or declines to provide the representation, or (2) the assistance is voluntarily terminated by requestor or the attorney, or both.

2.6.1.5.2. Communications and confidences shared between the Air Force attorney and the requesting Air Force personnel for purposes of preparing the request shall be

privileged. (T-0) Air Force personnel who are required to have access to such privileged information for the purpose of processing the request are also required to maintain the privilege. (T-0)

2.6.1.5.3. SJAs should exercise caution in assigning personnel to process requests for DoJ representation to avoid conflicts of interest that may disqualify themselves or their staff attorneys from administering military justice, advising on civilian personnel actions, or investigating and adjudicating claims against the Air Force.

2.6.1.6. All documentation by Air Force personnel requesting DoJ representation shall be forwarded to the responsible Litigation Division. (T-1) (**NOTE:** See Chapter 1 for information on the litigation subject matter coverage of the various Litigation Divisions). Officials in the Secretariat should send requests to SAF/GC for processing.

2.6.2. Alternatively, representation of Air Force personnel by private counsel at federal expense, or with reimbursement of private counsel fees, may be provided in appropriate circumstances at the discretion of the Attorney General (*see* 28 C.F.R. Sec. 50.16). Requests for such representation should be made in the same manner, and are subject to the same protections, as requests under Paragraph 2.6.1. The amount of reimbursement is determined through fee schedules set by the appropriate DoJ litigation division.

2.6.3. The government will not be responsible for the expenses of individuals who hire private counsel without express prior authorization. The government may, in its discretion, make an exception in extreme circumstances, such as when the individual makes a timely request, the government has failed to act, and the individual faces an imminent legal compromise because s/he was not represented by counsel.

2.7. Requests for Indemnification.

2.7.1. The Air Force usually cannot indemnify (reimburse for a loss already suffered) Air Force personnel for any verdict, judgment, settlement, or other monetary award entered against them in their personal capacities. The Air Force will consider a request for indemnification if:

2.7.1.1. The conduct giving rise to the verdict, judgment, settlement, or award was within the member's or employee's scope of employment; and

2.7.1.2. It is in the interest of the United States to indemnify the individual.

2.7.2. The Air Force member or employee seeking indemnification should submit a signed, written request to his or her base-level/servicing SJA and include:

2.7.2.1. Copies of all documents, if any, proving liability. (T-1)

2.7.2.2. An explanation of how the conduct that created the liability was within the requester's scope of employment or official duties. (T-1)

2.7.2.3. An explanation of how indemnification would be in the interest of the United States. (T-1)

2.7.2.4. A statement indicating if the requester has insurance or any other source of indemnification, and whether the requester has sought indemnification from such source. (T-1)

2.7.2.5. The following declaration: "I understand that the Air Force's acceptance of this request for indemnification for processing in accordance with AFI 51-301 does not constitute an acceptance of any obligation by the Air Force to make such indemnification. Any indemnification that the Air Force might make is a permissive action taken solely in the interest of the United States and not for my personal benefit." (T-1)

2.7.3. The base-level/servicing SJA provides a recommendation specifically addressing each requirement of Paragraphs 2.7.1. and 2.7.2., then sends the request and recommendation through command channels to the responsible Litigation Division. (T-1) Recommendations from the MAJCOM/FOA/DRU SJA are particularly important. The MAJCOM, FOA, or DRU SJA must coordinate its recommendation with its Financial Management Office. (T-1)

2.7.3.1. If there is insufficient time to submit an indemnification request through normal channels, submit the request directly to the General Litigation Division (AFLOA/JACL), which coordinates with the appropriate SJAs.

2.7.4. The responsible Litigation Division staffs the request and recommendations to the appropriate Secretarial designee for a decision.

2.7.4.1. Indemnity decisions by the Secretarial designee are final and not subject to appeal of any kind.

2.7.4.2. If approved, the MAJCOM/FOA/DRU pays the indemnification unless SAF/FM decides to pay using HAF-level funding.

2.8. Service Members Serving on State and Local Juries.

2.8.1. For purposes of this Paragraph, the following meanings apply:

2.8.1.1. "State" means each of the 50 United States, US Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

2.8.1.2. "Local" means political subdivision of a state, including, but not limited to, counties and municipalities.

2.8.1.3. "Active Duty" means full-time duty in the active military service of the United States. This includes full-time training duty, annual training duty, active duty for training, and attending a service school while on active military service.

2.8.1.4. "Operating Forces" means forces whose primary missions are participating in and supporting actual combat. This includes forces scheduled to deploy or that are in a deployed status to a stateside tasking.

2.8.2. Legal Authority for Exemption. Under 10 U.S.C. Sec. 982, Air Force members may be exempt from jury duty under certain circumstances.

2.8.2.1. DoD Instruction (DoDI) 5525.08, Paragraph 6.3, categorically exempts all general and flag officers, commanding officers, and all military personnel assigned to the operating forces, in training status, or personnel stationed outside the United States from serving on a state or local jury.

2.8.2.2. In addition, DoDI 5525.08, Paragraph 6.1, generally exempts military members from jury duty when it:

2.8.2.2.1. Unreasonably interferes with their military duties; or

2.8.2.2.2. Adversely affects the readiness of a unit, command, or activity to which the member is assigned.

2.8.2.3. In determining whether the jury duty would meet one of these exemptions, decision makers may consider, among other factors, the travel time that would be required of a member between his or her duty location and the place where the jury duty would be served, the potential effect such travel time would have on the member's ability to return to productive military duties, and the possible length of time the member would be away from the unit if selected for jury duty.

2.8.3. Procedures for Obtaining an Exemption from Jury Duty. When an Air Force member on active duty receives a summons to state or local jury duty, the member shall immediately inform his or her immediate commander, who will consult with his or her base-level/servicing SJA. (T-3)

2.8.3.1. If the member is exempt under DoDI 5525.08, Paragraph 6.3., the immediate commander or designee shall notify the issuing state or local official. (T-3)

2.8.3.2. If the member is not exempt under DoDI 5525.08, Paragraph 6.3., the immediate commander decides if the general exemption under DoDI 5525.08, Paragraph 6.1., applies.

2.8.3.2.1. If the immediate commander decides an exemption is inapplicable, the member must comply with the jury duty summons. (T-3)

2.8.3.2.2. If the immediate commander decides an exemption applies to the member, the immediate commander forwards a request for approval of such exemption to the special court-martial convening authority, who makes the decision using the statutory criteria outlined in Paragraph 2.8.2.2. (T-3)

2.8.3.3. The special court-martial convening authority may decide that:

2.8.3.3.1. Exemption is inappropriate and instruct the member to comply with the jury duty summons.

2.8.3.3.2. Exemption is appropriate and notify the issuing state or local official the exemption has been granted.

2.8.3.4. Include these items of information in a written notice of exemption: "(Grade and Name), a member of the United States Air Force on active duty, has been summoned to perform jury duty (when, where, and on what jury). Under 10 U.S.C. Sec. 982, DoDI 5525.08, and Air Force Instruction 51-301, this member has been determined by the Secretary of the Air Force or an authorized designee as exempt from duty on the jury in question because such jury service would unreasonably interfere with the performance of the member's military duties or would adversely affect the readiness of the unit, command, or activity to which the member is assigned. Under 10 U.S.C. Sec. 982(b), this determination is conclusive." (T-3)

2.8.4. Do not charge jury duty service against leave or deduct pay or entitlements for the period of service.

2.8.5. All fees for jury service to military members who are on active duty at the time of their jury service are payable to the US Treasury.

2.8.6. Military members may receive, and keep, reimbursement from the state or local jury authority for expenses incurred in the performance of jury duty while on active duty, such as transportation costs or parking fees.

2.9. Administrative Pay Withholdings and Garnishments against Service Members and Employees.

2.9.1. The following offices handle notices of garnishment, to the extent allowed by state and local law, for alimony and child support under 42 U.S.C. Sec. 659, *Consent by United States to Income Withholding, Garnishment, and Similar Proceedings for Enforcement of Child Support and Alimony Obligations*, and for private commercial debt, under 5 U.S.C. Sec. 5520a, *Garnishment of Pay*:

2.9.1.1. Regular Air Force, Reserve, Air National Guard, retired military members, and civilian employees of appropriated fund activities: Garnishment Operations Directorate, DFAS - Cleveland Center (DFAS-CL-L), Code L, P.O. Box 998002, Cleveland, OH 44199-8002, (216) 522-5301 or DSN 580-5301. (**NOTE:** This office also handles inquiries about divisions of retired pay under 10 U.S.C. Sec. 1408, *Payment of Retired or Retainer Pay in Compliance with Court Orders*.)

2.9.1.2. Non-appropriated fund civilian employees of Air Force installation exchanges: Headquarters Army and Air Force Exchange Service (HQ AAFES), Attention: GC-G&R, P.O. 650060, Dallas TX 75265-0060, (214) 312-4760 or DSN 967-4760.

2.9.1.3. Civilian employees of all other Air Force non-appropriated fund instrumentalities: Office of Legal Counsel, Air Force Services Activity, 2261 Hughes Avenue, Suite 156 Lackland AFB, San Antonio TX 78236-9852, (210) 395-7398 or DSN 969-7398.

2.9.2. Non-Garnishment-Related Withholdings. For non-garnishment-related administrative pay withholdings for debts owed to the federal government, contact:

2.9.2.1. For current Air Force, Air Force Reserve, and Air National Guard (ANG) members: Customer Service, Military Pay Division of the Defense Finance and Accounting Service, Cleveland Center, Code HGA, DFAS-Indianapolis Center, 8899 East 56th Street, Indianapolis, IN 46249, (888) 332-7411.

2.9.2.2. For former Air Force, Air Force Reserve, and ANG members: Customer Service, Debt and Claims Management Division of the Defense Finance and Accounting Service, DFAS-Indianapolis Center, 8899 East 56th Street, Indianapolis, IN 46249-0875, (800) 962-0648.

2.10. Service of Process.

2.10.1. Domestic Suits against United States Government Agencies and Instrumentalities. Service of process upon the United States and its agencies, corporations, officers or employees in Federal court is governed by Federal Rules of Civil Procedure (Fed. R. Civ.P.) 4(i).

2.10.1.1. Regardless of whether the requirements of Fed. R. Civ. P. 4(i) have been met, upon receipt of any process, the base level/servicing SJA must immediately notify the responsible Litigation Division and comply with the provisions of Paragraph 1.4.(T-1)

2.10.1.2. The base level/servicing SJA may not waive (or set aside) the requirements on the other party to properly serve the complaint on the United States as found in Fed. R. Civ. P. 4(i) without the express approval of DoJ and the Managing Attorney. (T-1)

2.10.2. Domestic Suits against Individuals in their Individual Capacity.

2.10.2.1. Service of process upon Air Force personnel in their individual capacity for an act or omission not occurring in connection with duties performed on the United States' behalf (e.g., landlord-tenant disputes, family law proceedings, non-duty related automobile accidents, etc.) is no different than service of process upon any other American citizen. Typically, the rules of civil procedure of the court that has jurisdiction over the litigation determines the type of service required for a particular legal action.

2.10.2.2. In some cases, service of process may be accomplished through registered mail. If that option is not available, then personal service of the documents upon the member may be required.

2.10.2.2.1. Within the United States, personal service of process upon Air Force personnel who live or work on a military installation is ordinarily accomplished by a civilian process server (typically a local law enforcement official or privately-hired contract server). This person gains access to Air Force personnel on the installation by contacting the installation Security Forces or base-level/servicing SJA's office, who then makes arrangements with the member to accept the legal documents.

2.10.2.2.2. While Air Force personnel may not serve legal process themselves, the members of the Security Forces and SJA's office routinely act as intermediaries by facilitating the voluntary acceptance of service of process or by escorting process servers onto the installation to effect service of process in accordance with local laws.

2.10.2.2.3. If facilitating voluntary acceptance of service of process, members of the Security Forces and SJA's office should make clear that they are acting only as a conduit and not a process server. If the subject is unwilling to voluntarily accept service, the process server will have to effect personal service.

Figure 2.1. Recommended Format for Litigation Report.

MEMORANDUM FOR AFLOA/JAC_
1500 West Perimeter Road, Suite ____
Joint Base Andrews, MD 20762-6604

FROM: 999 XW/JA
77 Erewhon St
Anybase, USA 55555-9999

SUBJECT: Litigation Report, *Plaintiff(s) v. Defendant(s)*, Case Docket #

[This notice should be on the report: **ATTORNEY WORK PRODUCT, COMMUNICATION: This document has been prepared in the course of litigation. All or portions of it may be privileged as attorney work product or attorney-client communications.**]

[This notice should also be included when social security numbers or other private identifying information about any person, or personal information from an Air Force system of records is included in the report: **PRIVACY ACT WARNING NOTICE: Personal identification information and/or Privacy Act information from an Air Force system of records is included. Please safeguard this document in accordance with Privacy Act requirements.**]

I. Introduction

Introduce the general case information (e.g., the forum and docket number), its nature (i.e., civil or criminal), type (e.g., EEO discrimination, contract dispute, medical malpractice, tort claim, environmental, FOIA appeal), and preview critical facts. If a civil case, include the amount of all damages and equitable relief sought. If a criminal case, briefly describe each offense alleged and the maximum sentence possible for each. This Paragraph can also preview the major legal issues and recommendations regarding the case (i.e., pursue, defend, settle, etc.).

II. Party and Representative Information

Provide information concerning the parties to the litigation and their representatives. Include:

- a. The complete individual or organizational name, address, and telephone number of each party (plaintiff, defendant, or cross-party) and at least one representative for each organizational party.
- b. The name, address, and telephone number of each attorney representing each party, including any attorneys who have begun representing the United States or the Air Force.
- c. The name, address, and telephone number of the court or administrative forum involved.
- d. In foreign civil court litigation, a recommendation on which qualified local counsel (preferably bilingual) DOJ should retain to handle the case. Choose a counsel from the list of attorneys maintained by the nearest U.S. Embassy or Consulate.

III. Service Information

When the Air Force is sued, because of the critical impact on jurisdiction, the timing of the answer, and possible affirmative defenses, provide details regarding service of process for known defendants. If proper service did not occur, explain the circumstances of how the reporting unit came to know of the litigation. Include:

- a. Name, title, and telephone number of individual served.
- b. Date, time, and location of service (e.g., home, office, mailroom, USAO, etc.).
- c. Method of service (e.g., in person by sheriff's deputy, private process server, or other agent of the plaintiff(s); by first-class or express mail, etc.).
- d. Whether service was properly made and whether the proper defendant was served.

- e. Electronic copies of all materials served, including envelope information.
- f. If a criminal matter, state whether an arrest was made, if the affected defendant is still in custody (and where), or if the defendant has been released, along with the terms of that release (i.e., on own recognizance, into custody and control of another, or by bail bond, along with the amount of the bond).

IV. Complaint Filing/Answer Due Date/Other Litigation Status Information

When the Air Force needs to file a complaint or an answer, provide the filing deadline. Include information about the status of the litigation or other known or anticipated deadlines or hearing dates. A non-exclusive list of examples of the information to provide includes:

- a. Known or anticipated statute of limitations filing deadline or answer due date.
- b. Known or anticipated dates for any emergency hearings on a temporary restraining order (TRO) or for other emergency relief. (**NOTE:** Also coordinate with the responsible Litigation Division by telephone as soon as possible).
- c. Known or anticipated dates of any status conferences with the judge, hearing officer, or other tribunal head.
- d. Known or anticipated deadlines for discovery.
- e. Known or anticipated deadlines for the filing of counter-claims, jury demands, dispositive motions or affirmative defenses.
- f. In a criminal case, known or anticipated dates of any arraignment, preliminary hearing, etc.

V. Procedural History/Previous Actions

Detail all previous administrative actions taken or litigation activities that have occurred in the matter. Also, discuss any associated, related, or companion cases. Non-exclusive examples of information to be included here are:

- a. Previous claims adjudications;
- b. A chronology reflecting the processing of an underlying Freedom of Information Act (FOIA) or Privacy Act (PA) request;
- c. Prior Merit Systems Protection Board (MSPB), Federal Labor Relations Authority (FLRA), Equal Employment Opportunity Commission (EEOC), Armed Services Board of Contract Appeals (ASBCA) or General Accounting Office (GAO) proceedings or appeals;
- d. Previous state or federal court litigation (e.g., civil, criminal, courts-martial); and
- e. Civilian or military administrative disciplinary actions involving any party or witness.

VI. Case Facts

Provide all relevant information about the facts and issues in the litigation. For instance, provide the time, date, location, parties to, and circumstances of any accident or other triggering event or incident; or provide the date, decision maker, and circumstances of a final

agency administrative action. Include all facts relevant to a decision on whether an Air Force employee was acting within the scope of his or her employment.

VII. Legal Analysis

Provide a full legal analysis of the case, including applicable statutes, regulations, or case law, including any local or foreign laws (including any applicable local ordinance), if appropriate. Address the legal elements of all causes of action, claims, defenses, setoffs, cross-claims, counter-claims, etc.

VIII. Proposed Complaint or Answer

For affirmative litigation, provide an allegation-by-allegation set of inputs and supporting factual allegations sufficient to state a cause of action for any applicable theory of recovery (i.e., jurisdiction, venue, party status, and legal elements). Also, provide any justification for why the United States should pursue any affirmative action. For defensive litigation, provide an allegation-by-allegation response to the assertions contained in the complaint (i.e., admit, deny, neither, and, as necessary, an explanation for each proposed answer), including facts to support the response. Also, include any affirmative defenses and supporting factual assertions.

IX. Rule 26(a)(1) Initial Disclosures

Provide information necessary to meet the United States' obligations under Fed. R. Civ. P. 26(a).

X. Paper and Electronic Discovery

Provide the names, addresses, and contact telephone numbers of all base records managers/custodians and information technology personnel who are available to assist in locating, producing, and preserving papers, documents, and electronically stored information relevant to the litigation. This includes persons with knowledge of local and individual records management practices, electronic systems architecture and storage, and those through whom litigation holds on papers, documents, and electronically stored information have been implemented.

XI. Requests for Representation

If any defendant makes, or is anticipated to make, a request for representation by the United States, provide applicable details here. (**NOTE:** Copies of the documentation for a request for representation should be included with the report, but the request for representation itself should be processed separately).

XII. Government Indemnity Right(s)

Describe any rights the government may have to be held harmless or otherwise indemnified in the event of an adverse judgment against it. Include all sources, such as contractor or other insurance, bonds, warranties, or guaranty agreements.

XIII. Recommendation

Finally, give your opinion as to whether a full pursuit or defense of the litigation is warranted, settlement sought, or some other strategy pursued. If settlement is recommended,

propose the reasonable and/or maximum settlement terms.

SIGNATURE BLOCK OF PERSON WHO
PREPARED THE REPORT IF OTHER THAN
THE SJA.

(Comments and/or concurrence, as necessary).

SIGNATURE BLOCK, Grade, USAF
Staff Judge Advocate

4 Attachments:

1. Complaint Received/Draft Complaint and/or Answer
2. Potential Exhibits and Evidentiary Items
3. Representation Requests
4. Other Relevant Documents

Figure 2.2. Sample AF Form 44 Format for Authenticating Official Records.

United States of America
 DEPARTMENT OF THE AIR FORCE

Barksdale AFB, LA 7 August , 2000
(Place) (Date)

I HEREBY CERTIFY that the attached copies, listed below, are true copies of the following official records maintained in Military Personnel Records Section, 301st Mission Support Squadron, 301st Air Base Group:

Unfavorable Information File of Thomas Doe

John Smith
 Chief, Military Personnel Records Section
 301st Mission Support Squadron
 Barksdale AFB, LA 71110

I HEREBY CERTIFY that _____, who
 signed the foregoing certificate, is the _____,
 _____, and
 that to their certification as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, _____,
 Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and
 my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the
 City of Washington, this _____ day of _____, _____.

Secretary of the Air Force

By _____
Administrative Assistant

AF FORM 44, 19960601 (EF-V3) PREVIOUS EDITIONS ARE OBSOLETE.

Figure 2.3. Sample AF Form 44 Format for Certifying Custodian Who Does Not Have the Official Records Requested.

United States of America
 DEPARTMENT OF THE AIR FORCE

Maxwell AFB, AL 21 May , 2000
(Place) (Date)

I HEREBY CERTIFY that I made, or caused to be made, a thorough and diligent search for any and all medical records of Senior Airman Stuart A. Doe containing blood alcohol testing results. No such records exist within those records of which I am the custodian. If such records existed, they would be within the records system of which I am the custodian.

Richard Roe, SMSgt, USAF
 Chief, Medical Records Section
 50th Medical Group
 Maxwell AFB, AL 36112

I HEREBY CERTIFY that _____, who
 signed the foregoing certificate, is the _____,
 _____, and
 that to their certification as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, _____,
 Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the
 City of Washington, this _____ day of _____, _____.

Secretary of the Air Force

By _____
Administrative Assistant

AF FORM 44, 19960601 (EF-V3) PREVIOUS EDITIONS ARE OBSOLETE.

Chapter 3

RELEASING OR PROVIDING INFORMATION IN CIVIL LITIGATION AND OTHER PROCEEDINGS

3.1. Background. Parties to litigation often want access to official Air Force information (Official Information, as defined in Paragraph 3.3.4. below) or want Air Force personnel (or other Covered Personnel) to testify about information they learned in their official duty capacities. This Chapter describes the process for releasing Official Information in the context of civil litigation and other proceedings before governmental bodies and the process for approving testimony by Covered Personnel.

3.2. Guiding Principle. Official Information generally should be made reasonably available for use in federal, state, and foreign civil courts and other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

3.3. Terms. For purposes of this Chapter, the following meanings apply:

3.3.1. “Covered Personnel” includes:

3.3.1.1. Air Force personnel as defined in Chapter 1, Paragraph 1.6.1, of this Instruction.

3.3.1.2. Air Force Academy cadets.

3.3.1.3. Retired, and former Air Force personnel (where a matter involves events occurring during a time when the individual was employed by the Air Force), including:

3.3.1.3.1. Non-appropriated fund activity employees.

3.3.1.3.2. Direct hire and indirect hire non-U.S. nationals who perform services in foreign locations for the United States.

3.3.1.3.3. Although contractors and contractor personnel are not “Air Force personnel,” they may be tasked to perform functions under this Instruction. “Covered personnel” may also include contractor and subcontractor personnel or former contractor personnel, where the issues or events occurred when the current or former contractor individual worked on an Air Force contract. Before tasking a contractor to perform the functions of this instruction, consult with the relevant contracting officer and contract attorney to ensure the proper contracting and fiscal authorities are used to order and reimburse contractor assistance in these activities. (T-1)

3.3.2. “Demand” is an attorney or court-issued subpoena, order, or other command of a court of competent jurisdiction, or other specific authority, for testimony of Covered Personnel or for the production, disclosure, or release of Official Information.

3.3.3. “Litigation” is the legal process by which cases, controversies, or disputes are resolved and includes pretrial (such as discovery requests or depositions) and post-trial actions (such as appeals). Litigation refers to matters conducted before local, state, federal or foreign courts, as well as commissions, boards, and administrative tribunals, and is governed by established rules applicable to the particular forum. For purposes of this instruction, litigation also includes matters not yet in a formal proceeding, but for which litigation is reasonably expected

3.3.4. “Official Information” is information of any kind, however stored, that is in the possession, custody, or control of covered personnel; that relates to information in the possession, custody, or control of covered personnel; and that was acquired by covered personnel as part of their official duties or because of their official status while on active duty, employed, or under contract. Information that is the property of the Air Force but is in the possession, custody, or control of another federal agency is also included in this definition.

3.3.5. “Non-Official Information” is all information that does not meet the criteria of Official Information. Non-Official Information includes information or facts that Covered Personnel obtained, possess, or have control of, that is not related to their Air Force duties. (**NOTE:** Other parties may wish to have Covered Personnel Testify about Non-Official Information. Process such requests pursuant to paragraph 3.10 of this chapter.)

3.3.6. “Release Authority” is the official with the delegated authority to determine what Official Information may be released in response to a Demand or Request. See Chapter 5 for guidance on releases in foreign civil litigation or other foreign civil proceedings. The following are the Release Authorities for Official Information:

3.3.6.1. Headquarters Air Force, Administrative Law Directorate (HQ AF/JAA) is the Release Authority for Official Information released during appearances by Covered Personnel before state and local legislative bodies, including expert or opinion testimony.

3.3.6.2. AFLOA/JAC is the Release Authority for Official Information released through expert or opinion testimony, review, or consulting by Covered Personnel for matters in civil litigation.

3.3.6.3. AFLOA/JAQ is the Release Authority for Official Information released through expert opinion testimony, review, or consulting by Covered Personnel for matters in commercial litigation.

3.3.6.4. The chief of the responsible Litigation Division, or his or her designee, including the Managing Attorney assigned to a case (unless directed otherwise by higher supervisory authority), is the Release Authority:

3.3.6.4.1. When the United States is a party to the litigation.

3.3.6.4.2. When the United States is not a party to the litigation, but has a direct or indirect legal, contractual, financial, administrative, or mission-related interest. The responsible Litigation Division is the one that would handle the matter if the United States was a party. In the absence of a clearly defined responsible Litigation Division, the Release Authority is AFLOA/JACL.

3.3.6.5. Medical Law Consultants (MLCs) are the Release Authorities for medical records and other Official Information within the possession, custody, or control of permanent station hospitals to which the MLC is assigned. MLCs are the Release Authorities for testimony by medical providers and other hospital personnel assigned to the MLC’s permanent station hospital on factual matters of which they have personal knowledge.

3.3.6.6. Contracting officers, in consultation with the base-level/servicing SJA, are Release Authorities for Official Information in the contract file. Contracting officers should coordinate such releases with an AFLOA/JAQ Managing Attorney.

3.3.6.7. Base-level/servicing SJAs are the Release Authority in all other matters.

3.3.7. “Request” is an informal request to interview Covered Personnel; have Covered Personnel provide a declaration, affidavit, or testimony; or for the production, disclosure, or release of Official Information.

3.3.8. “Testimony,” “Testifying,” or “Testimonial” means by live witness verbal statements at a deposition, trial, or hearing. The method of testimony can include in-person, telephonic, Video Teleconference (VTC), or similar method. The term also includes declarations and affidavits. For purposes of these procedures, it also includes witness interviews.

3.4. Applicability and Scope.

3.4.1. The procedures in this Chapter apply to a Demand or Request seeking the production or release of, or testimony related to, Official Information for use in preparing for or conducting litigation.

3.4.1.1. These procedures also apply when the DoD delegates to the Air Force responsibility as executive agent for a particular case or subject matter area.

3.4.1.2. Where the United States has not waived its sovereign immunity in a forum (e.g., state courts, certain administrative tribunals, local administrative agencies, etc.), it is not subject to that forum’s compulsory legal process. Process Demands for Official Information in these situations under this Chapter.

3.4.2. The procedures in this Chapter do not apply:

3.4.2.1. To a Demand or Request seeking the production or release of information that is not Official Information.

3.4.2.1.1. Covered Personnel may consult with base-level/servicing SJAs to determine whether the Demand or Release seeks Official Information.

3.4.2.1.2. Base-level/servicing SJAs should ensure Covered Personnel seeking a determination on whether a Demand or Release seeks Official Information are aware of the Air Force policy that personnel are to maintain strict impartiality as to matters in private litigation.

3.4.2.2. In situations where the United States is a party to the litigation and the forum has applicable release or discovery rules, the Managing Attorney assigned to the matter makes release decisions utilizing the forum rules and applying the considerations of this Chapter as internal guidance.

3.4.2.3. To requests by other federal government counsel in litigation conducted on behalf of the United States, including DoJ and USAO attorneys.

3.4.2.4. To courts-martial convened by the authority of the Military Departments or in administrative proceedings conducted by or on behalf of a DoD Component.

3.4.2.5. To disclosing information to federal, state, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

3.4.2.6. To security-clearance adjudicative proceedings, including those conducted in accordance with DoD Directive 5220.6.

3.4.2.7. To administrative proceedings conducted by or for a DoD Component.

3.4.2.8. To administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.

3.4.2.9. To negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.

3.5. Initial Receipt of a Demand or Request. Covered Personnel receiving a demand or request for official information or testimony must immediately provide it to the base-level/servicing SJA for processing. (T-1) Former Air Force personnel should provide it to the base-level/servicing SJA of the unit to which they were assigned or the nearest installation. (T-1)

3.6. Required Contents of Demand or Request. Base-level/servicing legal office personnel must ensure the demand or request is in writing and states the nature and relevance of the Official Information or testimony sought with as much specificity as possible. (T-1) Unless otherwise indicated, the writing may be in the form of a discovery request or a subpoena signed by a judge, court clerk, or attorney, even if the United States is not subject to that specific forum or legal process. The Demand or Request must include:

3.6.1. Name of the litigation and parties; (T-1)

3.6.2. Name and location of the court or tribunal; (T-1)

3.6.3. Date the litigation or proceedings began; (T-1)

3.6.4. Date of the desired release and/or appearance; (T-1)

3.6.5. Name and address of the person or party making the Demand or Request; (T-1)

3.6.6. If known, the location of the Official Information and/or the identity and contact information of the potential witness; (T-1) and

3.6.7. If the requester seeks expert or opinion testimony, review, or consultation, a detailed statement showing why the Air Force should grant an exception to the general rule prohibiting Covered Personnel from providing such information, except on behalf of the United States or for a party that DoJ represents. (*See* Paragraph 3.13.2.). (T-1)

3.7. Base-Level/Servicing SJA Processing. Upon receipt of a demand or request for official information and/or testimony, the base-level/servicing SJA ensures it provides the information outlined in Paragraph 3.6. (T-1) If not, the base level/servicing SJA will inform the requester of the deficiencies and the requirements of this instruction that make the request deficient and will ask the requester to re-submit the request. (T-1)

3.7.1. If the base-level/servicing SJA is the Release Authority, he or she will consider the factors applicable in making a release determination and issue a decision. (T-1)

3.7.2. Otherwise, the base-level/servicing SJA forwards the Demand or Request to the proper Release Authority, who will consider the factors applicable in making a release determination and issue a decision. (T-1) If the base-level/servicing SJA forwards a Demand or Request to another Release Authority, he or she should include:

3.7.2.1. Copies of any Official Information sought (preferably in electronic format), or a complete description of it, if bulky or numerous;

3.7.2.2. A detailed description of any testimony sought;

- 3.7.2.3. Recommendations on the release of any Official Information or testimony; and
- 3.7.2.4. Any other pertinent information.

3.8. Factors to Consider and Decisions by Release Authorities.

3.8.1. The Release Authority evaluates the Demand or Request in light of DoDD 5405.2, and this Instruction. (T-0) Release Authorities should base their decision concerning a Demand or Request on all available facts and circumstances involved and should consider whether:

- 3.8.1.1. The Demand or Request seeks information that is irrelevant or overbroad.
- 3.8.1.2. Complying with the Demand or Request would be unduly burdensome.
- 3.8.1.3. Disclosing or using the information would be otherwise inappropriate under forum rules.
- 3.8.1.4. Disclosing or using the information would violate any statute, Executive Order, regulation, directive, or policy. For example:

- 3.8.1.4.1. Documents subject to the Privacy Act shall be released to third parties only as authorized by the Privacy Act. (**NOTE:** Where the Privacy Act permits release of information pursuant to an order or specifically approved by a court of competent jurisdiction, the order must be approved by a judge of that court. Orders and subpoenas issued by the clerk of a court, a grand jury, or an attorney for a party litigant, even if in the name of the court, are insufficient.). *See, AFI 33-332, Air Force Privacy and Civil Liberties Program.*

- 3.8.1.4.2. Protected health information maintained by a covered entity or business associate under HIPAA shall be released only in accordance with AFI 41-210, *Tricare Operations and Patient Administration Functions.*

- 3.8.1.4.3. Proprietary and source selection sensitive information should be reviewed to determine whether the Air Force might be subject to liability for its disclosure or if such release might seriously interfere with a solicitation.

3.8.1.5. Disclosing the information, except *in camera* (in private, with the judge) to assert a claim of privilege, would reveal classified or other restricted information. Particularly, whether release would reveal:

- 3.8.1.5.1. Information properly classified and protected under AFI 16-1404, *Air Force Information Security Program.*

- 3.8.1.5.2. Unclassified technical data withheld from public release pursuant to AFD 61-2, *Management of Scientific and Technical Information*, 22 U.S.C. Secs. 2751 - 2799aa-2, *Arms Export Control Act*, *Export Administration Act of 1979*, 50 U.S.C. Secs 4601-4623 or similar laws.

- 3.8.1.5.3. Privileged safety information or documents contained in safety investigation board (SIB) reports. *See, AFI 91-204, Safety Investigations and Hazard Reporting.*

- 3.8.1.5.4. Other matters exempt from unrestricted disclosure.

3.8.1.6. Disclosing the information would interfere with ongoing enforcement proceedings, compromise a constitutional right, reveal the identity of an intelligence source

or confidential informant, divulge a trade secret or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

3.8.1.7. The Demand or Request specifies remedial information that is inadmissible under the rules of evidence, or is otherwise inappropriate under the applicable rules.

3.8.2. Classified Information.

3.8.2.1. No one, including Release Authorities, shall release classified Official Information to courts, tribunals, other Federal Government counsel (including DoJ), or any unauthorized person under any circumstances, unless authorized by the proper security office or a proper authority first declassifies the material. (T-0)

3.8.2.1.1. To obtain release authorization from the proper security office, it is usually required that:

3.8.2.1.1.1. Any recipient of classified information completes the necessary background investigation and receives the appropriate level of clearance. (**NOTE:** However, members of the U.S. Supreme Court, the Federal judiciary and the Supreme Courts of the individual States do not require security clearances. They may be granted access to DoD classified information to the extent necessary to adjudicate cases being heard before these individual courts. *See DoD Manual 5200.02, Procedures for the DoD Personnel Security Program, Para 4.10.*)

3.8.2.1.1.2. Any recipient of classified information has a need to know. In litigation this would be met through a demonstration of the relevance of the material to a matter in dispute and for which no other evidence is reasonably available.

3.8.2.1.1.3. Any recipient of classified information executes a non-disclosure agreement.

3.8.2.1.2. Exactly who in the litigation should be provided with access to the classified information may be presented as an issue to the judge.

3.8.2.1.3. Managing attorneys, after consulting with their supervisor, should work with DoJ to determine whether it would be appropriate to request the judge to issue a protective order further governing the handling of the classified information.

3.8.2.2. When a Demand or Request seeks classified Official Information that classification authorities cannot declassify at lower levels, Air Force personnel, through their base-level/servicing SJAs, shall notify the responsible Litigation Division. (T-1)

3.8.2.3. If it is determined that declassification will be pursued, pending a final decision on the declassification, the Release Authority shall ensure the requester, court, tribunal, or other authority is furnished with a copy of DoDD 5405.2 and this Chapter and shall inform the requester that the request is under review. If necessary, Release Authorities will attempt to obtain a delay in the decision regarding the Demand or Request, pending a final determination on declassification and releasability. (T-0)

3.8.2.4. Release Authorities should consult AFI 16-1404, *Air Force Information Security Program*.

3.8.2.5. The sole release authority for Restricted Data (RD) and Formally Restricted Data (FRD) is the Department of Energy (DoE), so consult with that agency as required. *See*, AFPD 13-5, *Air Force Nuclear Mission*

3.8.2.6. Nothing in this subsection, Chapter, or Instruction shall in any way impact the Government's ability to assert the State Secret privilege (a privilege, that when properly invoked, will allow the Air Force to avoid providing documents or testimony about matters involving military secrets), any other privilege, or any other bar to release.

3.8.3. Limitations on the Release of Official Information.

3.8.3.1. Release Authorities may impose limitations on the release of Official Information as to its form, content, or use. Limitations may include, but are not limited to: releasing information in paper or non-native electronic formats; redacting information due to privilege or some other protection; approving only limited topics to be covered in testimony; ensuring all parties acknowledge witnesses do not bind the United States or the Air Force, if appropriate; and any other reasonable limitations or restrictions.

3.8.3.2. Covered Personnel may produce, disclose, release, comment upon, or testify concerning only those matters that the requester specifies in writing and which the proper Release Authority specifically approves, except under an order of a court of competent jurisdiction. Air Force personnel do not give opinion or expert testimony without specific approval (*see* Paragraph 3.13.2.).

3.8.3.3. Judge Advocates or civilian Air Force attorneys may accompany witnesses to the interview, deposition, or hearing and advise them concerning the release of Official Information and the assertion of any applicable privileges or protections held by the Air Force. Air Force attorneys may instruct Covered Personnel to not answer a question in order to protect privileged information or restricted Official Information not approved for release.

3.8.4. Fees. Release Authorities may collect fees from the requester before releasing copies of records and other documentary material in accordance with DoD 7000.14-R, *DoD Financial Management Regulations (FMRs)*, Vol. 11A, Chapter 4. (**NOTE:** If fees will be collected, Release Authorities should communicate the amount and rationale to the requester before beginning the search for information). Reimbursable expenses may include:

3.8.4.1. Materials and equipment used to search for, copy, and produce responsive information.

3.8.4.2. Personnel time spent processing and responding to the request or demand.

3.8.4.3. Attorney time spent assisting with the government's response, to include reviewing the Request or Demand and the potentially responsive information.

3.8.5. Communicating the Release Decision.

3.8.5.1. Release Authorities communicate decisions to the requester in writing, providing the basis for the decision, and any limitations on the release. (T-1) The release of Official Information and testimony is limited to that approved in the written decision. (T-1)

3.8.5.2. Where the released Official Information is contained in documents, provide authenticated copies as described in Paragraph 2.4, or whatever alternative is agreeable, to the people and hearing officials involved in the matter.

3.9. Defending Decisions of Release Authorities.

3.9.1. Defending Approvals. Release Authorities should be able to justify approving a release of information, not only in case the requester complains, but also because others may complain that the materials are sensitive or require protection.

3.9.2. Defending Denials of Requests. There is no right to appeal the denial of a request for Official Information, as defined at 3.3.7. of this Chapter. If the requester asks about how to contest the denial, the Release Authority will advise the person that a formal FOIA request can be filed through the appropriate FOIA Requester Service Center. *See AFMAN 33-302, Freedom of Information Act Program* at Paragraph 3.1.

3.9.3. Defending Denials of Demands. Because a Demand involves a subpoena or other form of mandatory legal process, oftentimes a decision to deny the release must be defended in court.

3.9.3.1. Before denying a Demand, Release Authorities should first determine if the Demand constitutes an order from a court of competent jurisdiction. For purposes of this Chapter, a court of competent jurisdiction is:

3.9.3.1.1. In all cases, a federal court with authority to compel the United States to act or not act and with authority over the subject matter of the suit, or in a forum where the United States is otherwise under authority of the court's action.

3.9.3.1.2. In cases where a federal law authorizes the release of certain information only upon an order or subpoena specifically approved by a court of competent jurisdiction (e.g., the Privacy Act and HIPAA), the court of any State, the District of Columbia, Territory, or Possession of the United States, including the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands, with subject matter jurisdiction over the dispute in litigation or, put differently, with authority over the thing in dispute. Subject matter jurisdiction means the court has authority to hear cases involving disputes over specific types of issues such as divorces, contracts, etc.

3.9.3.2. Where the Demand is issued by a court of competent jurisdiction, the Release Authority should attempt to comply with the Demand, as best as possible, applying the considerations of this Chapter as internal guidance.

3.9.3.2.1. Where compliance is not possible (e.g., disclosing classified or privileged information), or the Release Authority determines that he or she should deny the Demand, the provisions in Paragraph 3.9.3.3. below should be followed.

3.9.3.2.2. There is a judicial split in authority whether the United States is subject to a third party subpoena under Federal Rules of Civil Procedure (Fed. R. Civ. P.) 45. A Rule 45 situation would occur when the Air Force is neither the plaintiff nor the defendant in the matter giving rise to the subpoena). Release Authorities handling Rule 45 subpoenas should immediately check the law in the Circuit in question.

3.9.3.3. Where the Demand is not issued by a court of competent jurisdiction (e.g., State courts (except as outlined in Paragraph 3.9.3.1.2., above), certain administrative tribunals,

local administrative agencies, attorneys, etc.), the United States cannot be forced to respond to that Demand.

3.9.3.3.1. In these situations, the Release Authority attempts to resolve the matter with the issuing party or entity, informs them that the United States is not subject to the legal process or cannot otherwise comply, asks that they voluntarily withdraw the Demand, and directs them to this Chapter for more information. (T-1)

3.9.3.3.2. If the issuing party or entity will not voluntarily withdraw the Demand, the Release Authority, or its designee, negotiates an acceptable release with the requester, or contacts DoJ litigation attorneys or the local USAO to file a motion to quash (or stop the Demand, avoiding the need for the Air Force to respond).(T-1)

3.9.3.4. Release Authorities are authorized to consult directly with DoJ litigation attorneys or the local USAO to defend a decision to deny the release of information or to bring a motion to quash any Demand or other legal process seeking to compel the production of Official Information or testimony. (**NOTE:** Consultation with DoJ or the USAO may only be conducted by attorneys. Thus, Release Authorities who are not attorneys (e.g., contracting officers) must consult with DoJ or the USAO through their base-level/servicing SJA or an attorney with the responsible Litigation Division). (T-1).

3.9.3.4.1. Base-level/servicing SJAs, acting as Release Authorities must first:

3.9.3.4.1.1. Notify the responsible Litigation Division of the need to consult DoJ litigation counsel or the local USAO. (T-1)

3.9.3.4.1.2. Provide a brief factual background of the case, a summary of the Official Information requested, and the rationale for the denial. (T-1)

3.9.3.4.2. Air Force attorneys may accompany witnesses to the court or tribunal and advise them concerning the release of Official Information. They may also serve as witnesses to explain these regulations, but may not represent the United States before the judge of the court in question, unless otherwise approved by DoJ or the local USAO. (T-0).

3.9.3.5. Release Authorities may direct Covered Personnel not to comply with a Demand, in which case affected Covered Personnel must respectfully decline to comply, *see* DoDD 5405.2. (**NOTE:** If the appropriate Release Authority is not at the responsible Litigation Division level (e.g., contracting officers, MLCs, base-level/servicing SJAs), he or she should consult attorneys with the responsible Litigation Division on not complying with a Demand. (T-1) If consulted, the responsible Litigation Division will advise on the propriety of non-compliance.

3.10. DoJ and USAO Requests for Witnesses.

3.10.1. When DoJ or a USAO requests a witness, the Release Authority will try to oblige the request, if the appearance requires no temporary duty orders, does not unnecessarily burden the Air Force, does not involve the release of classified information, or otherwise cause a significant negative impact the Air Force mission.

3.10.2. Normally, DoJ will fund Air Force witnesses under these circumstances but, if DoJ declines to fund such witnesses' travel expenses, the Air Force pays the travel expenses for

Covered Personnel assigned to Air Force activities whom the responsible Litigation Division determines should appear as a trial witness for the United States. (T-1)

3.10.2.1. The Litigation Divisions do not fund witness travel expenses.

3.10.2.2. The unit to which the witness is assigned at the time of the request issues travel orders and pays travel expenses, even if the incident arose from a previous assignment. (T-1)

3.10.2.3. If the witness is currently en route to a new permanent assignment, the gaining unit issues travel orders and pays travel expenses. (T-1)

3.10.3. Base-level/servicing SJAs should consult with the Litigation Division that would be responsible for the subject matter of the dispute for further guidance. (T-1)

3.11. Wear of Uniform.

3.11.1. Covered Personnel who are military members on active duty and who are testifying in a non-official or private capacity should not wear their uniform while so testifying.

3.11.2. Covered Personnel who are military members on active duty and who are testifying in their official capacity are considered to be in duty status and may wear their uniform. Refer to local court procedure and custom when deciding whether to wear the uniform.

3.12. Appearing at State or Local Legislative Hearings. Covered Personnel providing Official Information, personally or in writing, before state and local legislative bodies must obtain prior approval from HQ USAF/JAA. (T-1)

3.12.1. Submit approval requests through command channels detailing the proposed testimony. HQ USAF/JAA normally approves this type of request only:

3.12.1.1. To serve a significant Air Force interest.

3.12.1.2. When no conflict of interest exists.

3.12.2. Unless providing the Official Information is in support of an Air Force or DoD objective, the witness or the legislative body will pay travel expenses.

3.13. Expert or Opinion Testimony, Review, or Consulting by Covered Personnel.

3.13.1. The Air Force should maintain strict impartiality in litigation where it is not a party and has no direct or indirect interest.

3.13.1.1. If Covered Personnel provide expert or opinion testimony, review, or consulting in litigation, such actions frequently require discussing their current position and duty experience. This can easily create the impression that the Air Force favors a particular party or finding, even though it has no official interest in the outcome of the litigation. Furthermore, the efforts of the litigants to obtain such expert or opinion testimony, review, or consulting may interfere with the normal duty functions of Covered Personnel.

3.13.1.2. For these reasons, the provisions in Paragraph 3.13 also apply to Covered Personnel providing expert or opinion testimony, review, or consulting in their purely private, non-official capacity.

3.13.2. As a general rule, Covered Personnel do not provide opinion or expert testimony in litigation concerning Air Force or DoD Official Information, subjects, or activities, except on behalf of the United States or for a party that DoJ represents.

3.13.2.1. Under unique circumstances, and when testimony will not adversely affect the interests of the Air Force or the United States, AFLOA/JAC or AFLOA/JAQ may grant authorization for Covered Personnel to appear and testify as an expert witness in litigation for another party at no expense to the United States.

3.13.2.1.1. Anyone seeking such special authorization, including individuals, parties, and attorneys, must submit the Demand or Request to the appropriate base-level/servicing SJA. (T-3) The Demand or Request should meet the requirements of Paragraph 3.5.

3.13.2.1.2. The base-level/servicing SJA must review the request and send it with a recommendation for approval or disapproval to the responsible Litigation Division, which may deny the request, or forward it with a recommendation for approval to AFLOA/JAC for civil litigation matters or AFLOA/JAQ for commercial or acquisition litigation matters. (*See* Paragraph 3.6.) (T-1)

3.13.2.1.3. In determining whether a unique circumstance or exceptional need exists, AFLOA/JAC (for civil law matters) or AFLOA/JAQ (for acquisition or commercial law matters) shall evaluate each request individually. Factors considered include, but are not limited to, whether:

3.13.2.1.3.1. The litigation involves a matter of significant public interest;

3.13.2.1.3.2. The proposed testimony relates to the Covered Personnel's duty or employment or derives from a government mission or asset;

3.13.2.1.3.3. The proposed testimony might result in the Covered Personnel's personal financial gain;

3.13.2.1.3.4. The Covered Personnel's area of expertise was obtained predominately from his or her Air Force training and employment;

3.13.2.1.3.5. The Covered Personnel's expert witness testimony would interfere with his normal duties or employment;

3.13.2.1.3.6. The approval of the testimony is consistent with restrictions and ethical obligations found in DoD 5500.07-R, Part 2-200, *Joint Ethics Regulation*.

3.13.2.1.3.7. One of the other parties in the litigation may request expert or opinion testimony from Covered Personnel.

3.13.2.1.3.8. The proposed testimony might cause another party or finder of fact to inappropriately believe the Air Force favors a particular finding or outcome.

3.13.2.1.3.9. The United States has already taken an official position on the subject of the proposed testimony.

3.13.2.1.3.10. The potential cumulative burden on the Air Force in processing similar requests.

3.13.2.1.4. If, despite a denial by AFLOA/JAC or AFLOA/JAQ, judicial or other appropriate governmental authorities order Covered Personnel to appear and testify, AFLOA/JAC or AFLOA/JAQ shall be notified. (T-1)

3.13.2.1.4.1. If AFLOA/JAC or AFLOA/JAQ decide not to seek further legal review or challenge to the court's order, AFLOA/JAC or AFLOA/JAQ will instruct the Covered Personnel to comply with the Demand.

3.13.2.1.4.2. Alternatively, AFLOA/JAC or AFLOA/JAQ may direct Covered Personnel not to comply with a Demand, in which case affected Covered Personnel must respectfully decline to comply. *See*, DoDD 5405.2.

3.14. Course of Treatment Testimony. The Air Force does not usually consider course of treatment testimony by a treating medical provider to be expert or opinion testimony. A treating medical provider may testify as to his or her examination, treatment, and prognosis for a patient. However, if the scope or direction of the medical provider's testimony is expected or likely to go beyond these areas into others involving the medical provider's professional opinion or specialized knowledge, the medical provider may not provide expert or opinion testimony, except as expressly approved under Paragraph 3.13 above.

3.15. Application to Former and Retired Air Force Personnel. These provisions apply to former and retired Air Force members and employees. Accordingly, they may not provide expert or opinion testimony about any matter in which they had a direct involvement while employed by the government or serving on active duty, except as expressly approved under Paragraph 3.13 above.

Chapter 4

CIVIL DISCOVERY AND THE LITIGATION HOLD/PRESERVATION NOTICE PROCESS

4.1. Purpose. This Chapter establishes and provides guidance on procedures to ensure the Air Force is equipped to meet its discovery obligations to search for, identify, preserve, and collect documents, tangible things, and Electronically Stored Information (ESI) and to properly place litigation holds for the same during litigation or in matters that the Air Force reasonably expects to litigate. Definitions for discovery and litigation hold/preservation notice can be found in the Terms Section of Attachment 1 to this AFI.

4.2. Background. The Federal Rules of Civil Procedure (Fed. R. Civ. P.), including the 2006 and 2015 Amendments that apply explicitly to ESI, provide a framework for addressing the Air Force's legal obligations to produce information during the discovery process and when litigation is expected.

4.2.1. Information needs.

4.2.1.1. The Discovery Phase of Civil Litigation. In civil litigation, the Air Force must often participate in "discovery," the process by which a party obtains information from other parties.

4.2.1.1.1. Preservation Obligations. Under the Fed. R. Civ. P. and case law, the Air Force has a legal duty to search for and preserve information that may be relevant to the issues in a case. This duty arises as soon as litigation is reasonably expected and may exist before any case is actually filed.

4.2.1.1.2. Written Discovery. The Fed. R. Civ. P. govern several formalized methods of conducting discovery, including: initial disclosures of all facts, documents, and witnesses that support any claim or defense; depositions; interrogatories; requests for production of documents; and requests for admissions (requests that a party admit something so it need not be proven in trial).

4.2.1.2. Other Needs. The Air Force also has frequent needs to search for, preserve, and produce information for analysis and other purposes, such as media or congressional inquiries and Freedom of Information Act (FOIA) requests, and to make day-to-day business and command decisions for the Air Force. These needs arise independent of any litigation.

4.2.2. Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b). This means a party could request documents that are difficult to find and turn over if those documents are critical to being able to prove their case. Parties must search for and to preserve potentially discoverable documents, tangible things and ESI when litigation is reasonably expected. (T-0) Also, the Fed. R. Civ. P. impose penalties when parties fail to preserve information in time or if done in time, don't do it adequately. A failure to conduct a reasonable search of or preserve material could result in one or more court-ordered sanctions, including:

4.2.2.1. Imposing monetary penalties in an amount to cover expenses, including attorneys' fees, caused by the failure;

4.2.2.2. Drawing an adverse inference against the Air Force concerning the material it failed to preserve;

4.2.2.3. Precluding the Air Force from introducing certain evidence or calling certain witnesses;

4.2.2.4. Issuing a terminating sanction or adverse finding (i.e., a court order against the Air Force on an issue or the merits of a case); and

4.2.2.5. Holding the Air Force and Air Force officials in contempt.

4.3. Applicability. These procedures apply to Air Force personnel at all levels of the Air Force. The preservation obligations described in this document with respect to litigation holds supersede any conflicting Air Force policy, guidance, or instructions, including record retention and destruction policies and practices found in AFI 33-364, *Records Disposition Procedures and Responsibilities*. Other legal obligations (such as those imposed by the Federal Records Act, the FOIA, and the Privacy Act) to preserve information may also apply.

4.4. Scope. The duty to preserve is broader than the duty to produce, and all Air Force personnel must make reasonable efforts to locate and preserve all potentially relevant information. (T-0) Air Force obligations to search for and identify, preserve, and collect information and materials in discovery apply to all Air Force personnel and to all information, to include classified and unclassified information and draft documents, regardless of whether the information is considered an official record. (T-0)

4.4.1. Classified items. Air Force personnel shall search for, identify, and preserve potentially relevant information regardless of its classification. (T-0) However, only personnel with the requisite security clearances can conduct a search of classified information. (T-0)

4.4.1.1. If classified information is identified as potentially relevant, it must be preserved and referenced in a manner consistent with its classification. Care must be taken not to preserve or store classified information in an unsecure environment or on non-classified networks. (T-0)

4.4.1.2. If classified information needs to be collected at a later stage in the discovery process, it may only be transmitted in a manner consistent with its classification. Do not to transmit classified information to an unauthorized recipient or in an unauthorized manner. (T-0)

4.4.2. ESI. Most information generated by individuals, units, and organizations is now maintained in electronic format. ESI is stored on servers, databases, functional systems, information technology systems, networks, hard drives, portable storage devices, smart phones and other digital mediums. To meet its discovery obligations, Air Force personnel must search these locations for potentially relevant information, if contacted to do so. (T-0)

4.4.2.1. Personnel searching to meet discovery requirements do not need to get special permission from individual users to search servers, databases, networks, hard drives, or portable storage devices for ESI. Air Force information system user agreements, Air Force records management policy, common law, developing case law, and the Fed. R. Civ. P. provide the legal basis for the discovery/litigation hold process in civil suits.

4.4.2.2. AFI 17-130, *Air Force Cybersecurity Program Management*, requires Air Force information systems users to sign AF Form 4394, *Air Force User Agreement Statement*—

Notice and Consent Provision, before using these systems. Form 4394 is a user acknowledgement that the systems are provided for U.S. Government use only. The acknowledgement goes on to say the systems belong to the U.S. Government and that most information on the systems is not considered as private to the user. The user acknowledges that the systems may be searched and communications on the systems disclosed for any U.S. Government-authorized purpose.

4.4.2.3. In law enforcement/criminal investigation matters, special authority may be required. However, no special authority is required to access stored network data in civil litigation.

4.4.3. Law Enforcement and Defense Functions. The requirement to search for, identify, and preserve potentially relevant information includes law enforcement (e.g., Security Forces, Air Force Office of Special Investigations, Military Prosecutors) and defense functions (e.g., Area Defense Counsel). (T-0)

4.4.3.1. Special exemptions or privileges may apply to information maintained by law enforcement (e.g., investigatory/law enforcement file privilege, informant privilege, confidential report privilege, attorney-client privilege, attorney work-product doctrine) or defense functions (e.g., attorney-client privilege, attorney work-product doctrine). These exemptions or privileges may preclude or prohibit the collection and production of protected information; however, they do not relieve the Air Force of its initial obligations to search for, identify, and preserve such information.

4.4.3.2. Requiring law enforcement and defense functions to comply with the initial civil discovery/litigation hold procedures of searching for, identifying, and preserving potentially relevant information does not constitute an unauthorized search of that information.

4.4.3.3. Affected law enforcement and defense functions may assert any special exemptions or privileges, if necessary, at the collection and production phases of the civil discovery process. Privileges may be limited or qualified, and even absolute privileges may be waived. The existence of an exemption or privilege and its scope are subject to judicial review and determination.

4.5. AF/JA Roles and Responsibilities. AF/JA is responsible for all legal matters concerning the development and implementation of Air Force civil discovery practices and the Litigation Hold/Preservation Notice processes.

4.5.1. Litigation Divisions:

4.5.1.1. In conjunction with the Litigation Support Center, should participate in a standing working group with the Secretary of the Air Force and Information Dominance and Chief Information Officer (SAF/CIO A6) representatives. The working group will periodically review Air Force civil discovery and Litigation Hold/Preservation Notice practices for consistency with legal and technological developments and recommend changes when necessary. (T-0)

4.5.1.2. In conjunction with the Litigation Support Center, should develop and provide training to ensure that Air Force litigation attorneys understand and are capable of performing all civil discovery and Litigation Hold/Preservation Notice processes required

by law. Supervisors shall ensure that personnel assigned to handle discovery matters meet these criteria. (T-0)

4.5.1.3. Should assign a Managing Attorney to each matter to handle all pre-litigation and case-related duties, including civil discovery and Litigation Hold/Preservation Notice processes, if necessary.

4.5.1.4. Should coordinate case management duties with other Air Force legal offices that may have roles in the conduct or oversight of litigation or that designate a Coordinating Attorney to assist in discovery efforts.

4.5.1.5. May contact a MAJCOM/DRU/FOA or base-level/servicing SJA to request additional legal support or staffing.

4.5.2. The Managing Attorney:

4.5.2.1. Provides legal advice and serves as the primary contact on all legal issues relating to civil discovery and Litigation Hold/Preservation Notice processes.

4.5.2.2. Has primary responsibility for the Air Force civil discovery process, including tasking others to provide information needed to answer or develop written discovery requests.

4.5.2.3. Determines when to implement a Litigation Hold/Preservation Notice.

4.5.2.4. When appropriate, issues a Litigation Hold/Preservation Notice in consultation with the Litigation Support Center and/or the Air Force Records Officer (AFRO), monitors the issuance, and helps to adapt the process as necessary to address any deficiencies, changes in technology, or processing requirements.

4.5.2.5. Provides a copy of the Litigation Hold/Preservation Notice to the Litigation Support Center and the respective base-level/servicing SJA for tracking.

4.5.2.6. Works with records professionals and Network Operations Elements (NOEs) to further refine a Litigation Hold/Preservation Notice in a reasonable manner that minimizes the burden on Air Force resources while still complying with discovery obligations and elevates issues that cannot be resolved through appropriate command channels.

4.5.2.7. Requests additional legal support or staffing from the chief of the responsible Litigation Division, who will contact and coordinate any such assistance with respective MAJCOM/DRU/FOA or base-level/servicing SJAs and with other Directorates or Divisions.

4.5.2.8. Directs the efforts of attorneys assigned to assist with preparing or responding to the case.

4.5.2.9. Thoroughly reviews, analyzes and produces, for potential use in litigation, the information collected through the Litigation Hold/Preservation Notice process.

4.5.2.10. Requests counsel for another federal agency issue a Litigation Hold/Preservation Notice when it is believed the agency has information potentially relevant to the Air Force case.

4.5.2.11. Ensures appropriate formal written discovery responses and information necessary to substantiate them are provided to DoJ, including verifications signed by individuals with personal knowledge.

4.5.2.12. Oversees the work of assigned paralegals, who, with appropriate supervision, may perform many of the functions associated with civil discovery and a Litigation Hold/Preservation Notice.

4.5.2.13. Informs the AFRO and any direct recipients of a Litigation Hold/Preservation Notice when the need to preserve the information no longer exists.

4.5.3. MAJCOM/DRU/FOA SJAs:

4.5.3.1. Provide legal support to the MAJCOM/DRU/FOA-level Air Force personnel and units that have possession, custody, or control of potentially relevant information and material.

4.5.3.2. If requested by the responsible Litigation Division, coordinate additional legal support or staffing, as resources allow.

4.5.4. Base-Level/Servicing SJAs:

4.5.4.1. Provide legal support to the installation-level Air Force personnel and units that have possession, custody, or control of potentially relevant information and material.

4.5.4.2. If requested by the responsible Litigation Division, coordinate additional legal support or staffing, as resources allow.

4.6. SAF/CIO A6 Roles and Responsibilities. The Air Force Chief Information Officer (SAF/CIO) has overall responsibility for the Air Force Records Management program and has primary responsibility for policy and guidance in all areas of information management. These responsibilities include the Air Force civil discovery and Litigation Hold/Preservation Notice activities. This responsibility extends to all information regardless of format or media type, physical location, or business value, whether temporary or permanent. In addition, SAF/CIO is responsible for providing a witness to testify on behalf of the Air Force, when needed, to explain how the Air Force preserves electronic records including emails, and handles searches of electronic records in response to discovery requests.

4.6.1. SAF/CIO (A6XA):

4.6.1.1. Participates in a standing working group with AF/JA representatives. The working group will periodically review Air Force Litigation Hold/Preservation Notice practices for consistency with legal and technological developments and recommend changes when necessary.

4.6.1.2. Develops and implements procedures to search for and identify potentially relevant information and material.

4.6.1.3. In conjunction with commanders, develops and executes procedures to preserve potentially relevant information, including ESI native file formats and associated metadata.

4.6.1.4. In conjunction with commanders, develops and executes procedures to collect potentially relevant information, including ESI native file formats and associated metadata, and delivers it to the Managing Attorney.

4.6.1.5. In conjunction with commanders, develops and executes procedures to document the audit trail for data mapping the ESI located as a result of the Litigation Hold/Preservation Notice processes.

4.6.1.6. Develops and provides training to all records professionals, commanders, and users involved in conducting, reporting, preserving, and producing information in response to a Litigation Hold/Preservation Notice.

4.6.1.7. Ensures records professionals follow Litigation Hold/Preservation Notice procedures and requirements.

4.6.2. The Air Force Records Officer (AFRO) Roles and Responsibilities. SAF/CIO A6 has designated AFRO as the office of primary responsibility for the management and oversight of the search, preserve and collect functions of the discovery/litigation hold process. AFRO shall ensure that the proper commanders and functional area experts are tasked to execute discovery/litigation holds pursuant to this Instruction, and AFMAN 33-363, *Management of Records* and other guidance provided by the Managing Attorney.

4.6.2.1. The AFRO uses the Air Force Records Information Management System (AFRIMS) to distribute a Litigation Hold/Preservation Notice to subordinate level records professionals, submits search findings, tracks results, and generates reports of responses.

4.6.2.2. AFRO forwards requests for IT administrator-initiated ESI searches to Defense Information Systems Agency (DISA), Cyberspace Support Squadron (CYSS), or other appropriate action offices and ensures the search is complete.

4.6.2.3. The Base Records Manager (BRM), or its equivalent, serves as the local point of contact and tasking authority for the search, preservation, and collection of potentially relevant information.

4.6.2.3.1. The BRM forwards the Litigation Hold/Preservation Notice to the commander or commander-appointed action officer for execution and provides guidance and support to the commander to ensure completion of search.

4.6.2.3.2. The BRM should ensure that the commander or commander-appointed action officer reports search results in AFRIMS and certifies that he/she fully complies with search and preservation instructions and requirements through his/her responses in AFRIMS.

4.7. Commander Roles and Responsibilities. Commanders and civilian directors shall work with the BRM and SJA or other legal counsel to develop and document a records management plan for their organizations that describes the process for conducting searches pursuant to a Litigation Hold/Preservation Notice. (T-0)

4.7.1. The command shall ensure that searches pursuant to a Litigation Hold/Preservation Notice are conducted and completed in accordance with AFI 33-322, *Records Management Program*, and AFMAN 33-363. (T-1)

4.7.2. The commander shall certify that he/she complied with the search and preservation instructions and requirements and report results of search to the BRM in accordance with AFMAN 33-363. (T-1)

4.8. Air Force Personnel Roles and Responsibilities. Individual Air Force personnel shall support Air Force civil discovery and Litigation Hold/Preservation Notice obligations, by:

4.8.1. Promptly providing the Managing Attorneys with all information needed to answer or draft written discovery requests and to determine the proper scope a Litigation Hold/Preservation Notice. (T-1)

4.8.2. Promptly taking all actions as directed by their commander or commander-appointed action officer; servicing BRM, other records professionals, or the Managing Attorney, as well as those actions required by a Litigation Hold/Preservation Notice, which may include conducting searches for potentially relevant information, documents, tangible things, and ESI in their custody, possession, or control. (T-1)

4.8.3. Seeking advice and assistance, as necessary, from the action officer, servicing BRM or other records professionals on proper search and preservation processes for ESI. (T-3)

4.8.4. Completing and returning all verifications, acknowledgements of receipt, litigation hold worksheets, search declarations, and any other requested information or documentation necessary to substantiate the Air Force's civil discovery and Litigation Hold/Preservation Notice processes. (T-3)

4.8.5. Immediately notifying the action officer, servicing BRM or other records professionals and the Managing Attorney of any technological problems, resource constraints, or other issues that impact the ability to comply and elevating issues that cannot be resolved through appropriate command channels. (T-3)

4.8.6. Notifying their servicing designated action officer; servicing BRM or other records professionals; and the Managing Attorney as soon as possible if they are deploying, subject to PCS or PCA orders, or otherwise leaving their position or the Air Force, and providing contact information concerning their replacement. (T-3)

4.9. When to Initiate the Discovery/Litigation Hold Process. The obligation to ensure documents, tangible things, and ESI are preserved arises when litigation commences and when a party "reasonably anticipates litigation." The Air Force reasonably anticipates litigation when it is on notice it may become involved in federal court civil litigation. The mere possibility of litigation will not trigger the duty to preserve documents, tangible things, and ESI; litigation must be likely to occur, based on credible facts and circumstances. If the Managing Attorney is in consultation with the Department of Justice about litigation, he/she should consider discussing whether and when to initiate the discovery/litigation hold process.

4.9.1. Air Force as Plaintiff. Initiating the discovery/litigation hold process should not wait until the lawsuit is filed, if litigation is reasonably expected.

4.9.2. Air Force as Defendant. The discovery/litigation hold process should be initiated when the Air Force first learns another party is preparing a lawsuit against it. Air Force knowledge of a lawsuit includes, but is not limited to, obtaining credible information that it is the target of legal action; receiving a letter from opposing counsel indicating an intent to file suit; receiving a written request to preserve information in advance of litigation to be filed; or any other circumstance that leads the agency to reasonably anticipate the filing of a lawsuit.

4.9.3. Air Force as Non-Party. Air Force personnel must immediately contact their base-level/servicing legal office if Air Force personnel learn (from receiving a subpoena, court

order, or other request for information) that they may have information (documents, tangible things, or ESI) that is needed in a lawsuit that doesn't directly involve the Air Force but is related to their official duties or is part of a request for release of Official Information. The servicing legal office will contact the HAF-level office responsible for the litigation. (T-0)

4.9.3.1. AFLOA/JAC or AFLOA/JAQ will assign a Managing Attorney to coordinate with the applicable release authority and to contact the Department of Justice to discuss whether to seek a protective order under Fed. R. Civ. P. 26(c), file a motion to quash or modify the subpoena under Rule 45(d)(3), or to comply.

4.9.3.2. If it is determined that the Air Force should comply with the subpoena or order, the Managing Attorney will initiate the discovery/litigation hold process.

4.9.4. Administrative claims. Normally, the receipt of an administrative claim alone will not mean the Air Force should reasonably anticipate litigation. The vast majority of administrative claims that the Air Force acts upon do not result in court-filed litigation. However, attorneys handling administrative claims should monitor individual claims and initiate the discovery/litigation hold process if the facts and circumstances warrant. Factors to be considered include the administrative agency's rules and guidance; whether claimant or claimant's attorney makes a demand for preservation; claimant's history of filing claims; significant media or Congressional interest; substantial monetary risk; whether the relevant information has already been compiled in an administrative record or claims file; and whether the appellate avenue for the administrative claim involves more than filing a new petition in federal district court.

4.9.5. State Court. The extent of the duty to preserve information relevant in state court litigation varies by state and locality. Managing attorneys should use the Fed. R. Civ. P. and this Instruction as a guide but also consult state and local rules.

4.10. Proportionality. The duty to preserve potentially relevant information does not extend to every shred of paper or piece of data maintained by the Air Force. Rather, search and preservation obligations are governed by standards of what is reasonable and appropriate for a given case, considering things like the importance of the issues, the ability to access the information, and whether the burden or expense in getting the information outweighs the likely benefit. For more information, consult the Managing Attorney for the matter.

4.11. Early Involvement and Consultation. Early in the case, Managing Attorneys should ensure they, and/or assigned Department of Justice counsel, are prepared to discuss issues about the disclosure or discovery of ESI, including locations to be searched, search terms, and the form of production, with opposing counsel. *See* Fed. R. Civ. P. 26(f) (3) (C) (discussing what parties must include in a discovery plan to the court.) *See also* Fed. R. Civ. P. 16(b) (2), and 26(f) (1) (discussing the timing of scheduling conferences and discovery plan due dates).

4.12. General Guidance for Drafting and Issuing a Search Request & Litigation Hold Notice. Managing Attorneys should carefully consider the nature and scope of any Notice and specifically tailor distribution to meet Air Force discovery obligations, which include providing litigation opponents with the identity of Air Force personnel with relevant knowledge of the matters in dispute and tangible Air Force information as described in Fed. R. Civ. P. 26. When possible, the Managing Attorney should avoid imposing undue or unforeseen burdens on Air Force personnel.

4.12.1. Managing Attorneys should draft the Search Request & Litigation Hold Notice to include information on: details of the matter at issue, search instructions, search terms to be used, preservation efforts, response requirements, legal authorities, suggested distribution, suspense dates, and contact information.

4.12.2. Managing Attorneys are strongly encouraged to send the servicing legal office a courtesy copy of the Notice or speak with them directly before distributing a Search Request & Litigation Hold Notice and to provide them with courtesy copies to facilitate understanding and compliance.

4.12.3. The distribution of the Notice will usually fall into one of three categories:

4.12.3.1. Air Force-wide data calls/holds. An Air Force-wide data call/hold requires hundreds of thousands of Air Force personnel to conduct searches for information even though there may be only a slight possibility the individual, unit, or organization will have it. Managing Attorneys seeking to implement an Air Force-wide data call shall first consult with the Litigation Support Center and then seek approval from the Managing Attorney's division chief. (T-1)

4.12.3.2. Particular units or organizations known or suspected to have possession, custody, or control of potentially relevant information. Distribution to particular units or organizations is appropriate when the Managing Attorney, through initial investigation, has narrowed the sources of potentially relevant information but specific individuals are still unknown or too numerous to target.

4.12.3.3. Individuals known or suspected to have the possession, custody, or control of potentially relevant information. Distribution to specific individuals is appropriate for narrowly focused disputes and/or disputes involving confidential issues.

4.13. Search Request & Litigation Hold Notice Distribution. Managing Attorneys initiate the discovery/litigation hold process by sending a Notice to AFRO, individual custodians or units, or both. The purpose of a Search Request & Litigation Hold Notice is to formally notify those with possession, custody, or control of potentially relevant documents, tangible things, and ESI of the requirement to search for, identify, and preserve information. The Notice also serves as potential evidence that Air Force acted reasonably and in good faith by implementing its discovery/litigation hold process.

4.13.1. **Distribution through AFRO.** The Managing Attorney may initiate the discovery/litigation hold process by sending a Notice to AFRO for further tasking to record professionals, commander-appointed action officers and individual custodians using the AFRIMS system. The AFRO organizational email box is usaf.pentagon.saf-cio-a6.mbx.af-records@mail.mil. All correspondence classification of Secret or above must be sent via SIPRnet. (Note: if the search itself is classified secret or above, send the request to usaf.pentagon.saf-cio-a6.mbx.af-records@mail.mil, and send a courtesy e-mail to the AFRO NIPRnet organizational email box to check for e-mail sent to SIPRnet.) To promote consistency and process efficiency, Managing Attorneys should use the format found at Figure 5.1 found at the back of this Chapter. (T-1)

4.13.2. **Distribution directly to individuals.** The Managing Attorney may initiate the discovery/litigation hold process by sending a Notice directly to individuals who have, or are likely to have, discoverable information about the matters in dispute. To promote consistency

and process efficiency, Managing Attorneys should use the format found at Figure 4.2 found at the back of this Chapter. (T-1) Because of the non-routine nature of the obligations imposed in the discovery/litigation hold process on most Air Force personnel, Managing Attorneys are also strongly encouraged to make telephone contact with individuals receiving a directly-distributed Notice and with their servicing legal office.

4.13.3. It is within the Managing Attorney's discretion to implement the discovery/litigation hold process. Not every matter will require a Search Request & Litigation Hold Notice to be distributed through the AFRO. If, after initial investigation, the Managing Attorney knows the specific individuals or units who have potentially relevant information, the Managing Attorney may distribute a Search Request & Litigation Hold Memo directly to those individuals or units. The Managing Attorney should also consider individual distribution if the issues raised in the dispute are sensitive or raise privacy concerns.

4.13.4. It is recommended that Notices also be sent to the Litigation Support Center for tracking.

4.14. Administrator ESI Searches. The Air Force information systems on which ESI is stored are decentralized. No single information technology component has control over or access to all ESI. With proper guidance and oversight, the record professionals and individual custodians known or reasonably suspected to have potentially relevant information are in the best position to identify and access their information systems, and therefore the ESI, in their possession, custody or control. The Managing Attorney should request IT administrator searches for ESI when individuals are unavailable, upon court order, or when relying solely on self-collection would create an appearance of improper action or otherwise hamper the Air Force from showing that it met its discovery obligations. Requests shall be made through AFRO or directly to the 624th Operations Center at 624OC.SDO@us.af.mil or other appropriate action offices. (T-1)

4.15. Search Methodologies. To meet its discovery obligations, the Air Force must be able to prove to opposing parties or the court that it took reasonable steps to preserve Official Information. (T-0) This can be achieved by demonstrating Air Force personnel followed established policies and procedures. Air Force personnel must follow the preservation guidance in AFMAN 33-363 and other guidance provided by AFRO or the Managing Attorney in order to ensure compliance with discovery obligations (T-1)

4.16. Disaster Recovery/Backup Tapes and Servers. Fed. R. Civ. P., Rule 26(b) (2) (B) places specific limitations on the discovery of ESI. In particular, "A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost." As a general rule, disaster recovery/backup tapes and servers will be deemed inaccessible and not subject to the requirements of a litigation hold, provided they are typically maintained for the purpose of disaster recovery and not used for active ESI storage and retrieval, and they are not the sole source of likely discoverable ESI contained on them.

4.17. Compliance. Air Force personnel have an ongoing duty to locate and preserve potentially relevant documents, tangible things, and ESI in matters in litigation, or in anticipation of litigation. (T-0)

4.17.1. If the Managing Attorney discovers a deficiency in searching for or preserving potentially relevant information, the Managing Attorney must immediately take steps to correct the process. (T-0) Also, if applicable, report the loss or destruction of information to

the Department of Justice attorney handling the matter since he or she may need to inform the court and opposing counsel. (T-0).

4.18. Processing, Reviewing, Analyzing and Producing Documents. Once the potentially relevant documents, tangible things, and ESI are delivered to the Managing Attorney, the Managing Attorney is responsible for performing or coordinating the processing, review, analysis, and production of the information to the opposing counsel or through the Department of Justice to opposing counsel.

4.18.1. Managing Attorneys are responsible for reviewing all information to be produced in discovery for exemptions and privileges, and for preparing a privilege log for any information to which any exemption or privilege is asserted.

4.19. Lifting the Litigation Hold. The Air Force has implemented retention and destruction policies for its documents and ESI in accordance with the Federal Records Act and the e-Government Act. Implementing a litigation hold necessarily disrupts that process and requires records professionals and others to take actions that are contrary to ordinary business practices. To avoid unnecessary costs and disruption, litigation holds will be released as soon as practicable but no later than 15 business days of a determination that there is no further legal requirement to preserve information. (T-1)

4.20. Cost of Compliance. In most cases, costs to comply with the discovery/litigation hold process will be the responsibility of the information owner. Units or organizations that would suffer extreme financial hardship to comply will immediately notify the Managing Attorney and at the same time elevate the matter through the chain-of-command. (T-1). Units or organizations claiming financial hardship should not assume that a financial burden will excuse the Air Force's obligation to comply with its discovery/litigation hold obligation.

4.20.1. Upon request, original documents provided in the discovery/litigation hold process will be returned to the original owners. Copies of documents provided to the AFRO or Managing Attorney will not be returned.

4.20.2. The Managing Attorney or Litigation Support Center may be able to provide an external hard drive onto which the Record Professionals may copy and provide potentially relevant ESI. If not, the responding unit will be responsible for providing its ESI on an external hard drive that will be returned, or on CDs and DVDs, which may be returned upon request.

4.20.3. Information not returned to the sender will become part of the Managing Attorney's litigation case file and will be assigned the appropriate disposition codes for such case files in accordance with the Air Force Records Disposition Schedule (RDS) located in the Air Force Records Information Management System (AFRIMS), in accordance with AFMAN 33-363.

4.20.4. Potentially relevant material loaded into any electronic information management database by the Litigation Support Center will be downloaded onto an external hard drive provided by the Managing Attorney and removed from that database at the conclusion of the case. This information will become part of the Managing Attorney's litigation case file and will be assigned the appropriate disposition codes for such case files in accordance with the Air Force Records Disposition schedule located in AFRIMS, as mentioned directly above in 4.20.3.

Figure 4.1. Format for AFRO Litigation Hold Memorandum.

[Date]
MEMORANDUM FOR SAF/CIO A6XA ATTN: AIR FORCE RECORDS OFFICE
FROM: [Sending Litigation Office]
SUBJECT: Search Request & Litigation Hold Memo for Documents and Information— [Case Name and Docket No.]
<p>1. <u>Detail</u>. The Air Force has a legal obligation to locate and preserve information including paper documents, electronically stored information (ESI), and tangible things related to [Brief description of matter (e.g. "John Doe wrongful termination claim," "XYZ bid protest.")]. Failure to preserve potentially relevant information can result in sanctions against the Air Force.</p> <p>Under the authority of AFI 51-301, <i>Civil Litigation</i>, and AFMAN 33-363, <i>Management of Records</i>, [Sending Litigation Office] directs the Air Force Records Officer (AFRO) to implement a litigation hold as described below.</p> <p>2. <u>General Terms</u>. Record Professionals (including Commander-designated action officers) and individuals who may possess relevant information (Record Holders) shall search all locations within their possession, custody or control where potentially relevant information is likely be stored including, but not limited to, file cabinets; e-mail accounts; .pst files; computer local and shared drives; portable storage devices; mobile devices; voicemail systems; collaboration sites (e.g. SharePoint); workflows (e.g. Task Management Tool); Air Force websites and social media; and staging areas (e.g. Federal Records Centers). This may include personally-owned computers or devices.</p> <p>Record Professionals and Record Holders shall preserve all potentially relevant information regardless of format including, but not limited to, both official records and personal working files; e-mails and attachments; instant and text messages; voicemails; handwritten notes; drafts; spreadsheets; and calendar and address book entries.</p> <p>3. <u>Scope</u>. The relevant time period is [Date Range]. The following categories of information are potentially relevant and should be preserved:</p>

Record Professionals and Record Holders should construe the above categories broadly. If you believe a document may be relevant but are unsure whether it fits within one of the categories above, err on the side of caution and preserve it.

If necessary to aid searching, the following search terms should be applied:

- a. [e.g. "Doe"]

4. Distribution. AFRO shall distribute this Memorandum to the units and organizations identified below. Identified Record Professionals shall search for potentially relevant information and ensure that individual Record Holders within their units and organizations who may possess potentially relevant information also conduct searches.

- a. [e.g. "AFLOA/JAC"]

Contact the Managing Attorney if you believe other units, organizations or individuals may have relevant information.

5. IT Administrator Search. [Sending Litigation Office] requests an additional administrator search of the e-mails [and network drives] for the individuals identified below:

Name	E-mail Address	Unit/Organization	Location
John D. Doe	john.d.doe.civ@mail.mil	AFLOA/JACL	JB Andrews

Apply the same date range and search terms identified in Paragraph 3 above.

6. Preservation. Record Professionals and Record Holders shall not alter or delete potentially relevant information. You shall preserve this information in its native format and transfer to clearly labeled folders or containers in a secure location until further notice. You shall suspend and override all destruction/disposition procedures for this information until further notice. Each Record Professional and each Record Holder shall acknowledge receipt of this litigation hold demand, conduct the required search, and document actions taken using the Litigation Hold Worksheet. Record Professionals and Record Holders shall notify the Managing Attorney of any potentially relevant information that has been destroyed or is otherwise inaccessible.

7. Suspenses. The AFRO shall distribute this litigation hold ***within 5 business days*** of AFRO's receipt of this Memorandum. All searches should be completed ***within 14 business days*** thereafter. The AFRO shall provide a progress report to the undersigned Managing Attorney ***no later than 20 business days*** after distribution.

8. Confidentiality. This Memorandum shall only be distributed to those Record Professionals and

Record Holders involved in the litigation hold process and who are believed to possess relevant information. AFRO, Record Professionals and Record Holders shall only discuss this Memorandum to the extent it is necessary to discharge their search and preservation duties.

If you have any questions or require additional information, please contact the undersigned at [telephone number] or [e-mail address].

//SIGNED//

[Signature block of Managing Attorney]
[Title]

cc:

[Servicing Legal Offices for Distributees]
[Litigation Support Center]

Figure 4.2. Format for Individual Litigation Hold Memorandum.

[Date]

MEMORANDUM FOR SAF/CIO A6XA
ATTN: AIR FORCE RECORDS OFFICE

FROM: [Sending Litigation
Office]

SUBJECT: Search Request & Litigation Hold Memo for Documents and Information—
[Case Name and Docket No.]

1. Detail. The Air Force has a legal obligation to locate and preserve information including paper documents, electronically stored information (ESI), and tangible things related to [Brief description of matter (e.g. “John Doe wrongful termination claim,” “XYZ bid protest.”)].

You have been identified as an individual who may have possession, custody, or control of potentially relevant information. Under the authority of AFI 51-301, *Civil Litigation*, and AFMAN 33-363, *Management of Records*, [Sending Litigation Office] directs you to take certain steps described below to search and preserve information.

2. General Terms. You shall search all locations within your possession, custody or control where potentially relevant information is likely be stored including, but not limited to, file cabinets; organizational and personal e-mail accounts; .pst files; computer local and shared drives; portable storage devices; mobile devices; collaboration sites (e.g. SharePoint); workflows (e.g. Task Management Tool); Air Force websites and social media; and staging areas (e.g. Federal Records Centers). This may include personally-owned computers or devices.

You shall preserve all potentially relevant information regardless of format including, but not limited to, both official records and personal working files; e-mails and attachments; instant and text messages; voicemails; handwritten notes; drafts; spreadsheets; and calendar and address book entries.

3. Scope. The relevant time period is [**Date Range**]. The following categories of information are potentially relevant and should be preserved:

a. [e.g. “**All contracts involving ABC Enterprises**”]

You should construe the above categories broadly. If you believe a document may be relevant but are unsure whether it fits within one of the categories above, err on the side of caution and preserve it.

If necessary to aid searching, the following search terms should be applied:

a. [e.g. “**Doe**”]

4. Additional Distribution. Contact the undersigned Managing Attorney if you believe other units, organizations or individuals may have relevant information. Do not forward this Memorandum to other Record Holders.

5. Preservation. You shall not alter or delete potentially relevant information. You shall preserve this information in its native format and transfer to clearly labeled folders or containers in a secure location until further notice. Contact your Record Professional or Commander-designated action officer if you require assistance with searching or preserving ESI. You shall suspend and override all destruction/disposition procedures for this information until further notice.

6. Suspenses. Immediately sign and return the attached Acknowledgment of Receipt. Conduct the required search, and complete and return the attached Litigation Hold Worksheet within 10 business days. If you need more time, please contact me for assistance.

7. Confidentiality. This Memorandum shall only be distributed to those Record Professionals and Record Holders involved in the litigation hold process and who are believed to possess relevant information. You shall only discuss this Memorandum to the extent it is necessary to discharge your search and preservation duties.

If you have any questions or require additional information, please contact the undersigned at [**telephone number**] or [**e-mail address**].

//SIGNED//

[**Signature block of Managing**

Attorney] [Title]

2 Attachments:

1. Litigation Hold Acknowledgement
2. Certified Litigation Hold Worksheet

cc:

**[Servicing Legal Offices for Distributees]
[Litigation Support Center]**

Chapter 5

FOREIGN CIVIL PROCEEDINGS AFFECTING U.S. INTERESTS

5.1. Notice of Proceedings. When an SJA of an Air Force component command for a U.S. geographic combatant command receives notice of legal, judicial, or quasi-judicial proceedings in a host State naming, as a defendant, respondent, or other party, the United States Government (USG), a USG agency, a USG employee in an official capacity, or any other interest or entity of the USG, that SJA is responsible for immediately notifying the Department of Justice (DoJ) Office of Foreign Litigation (OFL). (T-0) Immediate notification to the DoJ OFL should occur whether service of process appears proper or improper. (T-0) Requests for conciliation or arbitration hearings must be reported because, in some countries, they are the first step toward litigation. (T-0)

5.1.1. For proceedings in the United States European Command Area of Responsibility (USEUCOM AOR), notice must be provided to the DoJ OFL European Field Office. Both United States Air Forces in the Europe Command Staff Judge Advocate Office (USAFE/JA) and the United States Air Forces in Europe Command - United Kingdom Staff Judge Advocate Office (USAFE-UK/JA) will maintain current contact information for the field office. (T-0)

5.1.1.1. Notice will also be immediately provided to the legal section of the Office of Defense Cooperation (ODC) located in the country where the proceeding originates. (T-0)

5.1.2. For proceedings in the other AORs, notice is provided to the DoJ OFL Headquarters Office in Washington, D.C. (T-0). SJAs of the Air Force component commands serving in these AORs shall maintain current contact information for the headquarters office. (T-0)

5.2. Air Force Legal Offices. Immediately upon receipt, shall notify the relevant geographic combatant command Air Force component command SJA of any writ summons, notice of legal proceedings, or other foreign civil process delivered to an Air Force officer, employee, or activity. (T-0)

5.3. Non-Legal Air Force Offices. Immediately on receipt, send to the servicing SJA any writ, summons, notice of legal proceedings, or other foreign civil process delivered to an Air Force officer, employee, or activity. (T-0)

5.4. Avoid Representation of Accepting Service on behalf of the United States. Notice of foreign proceedings naming the USG, its agencies, or an employee as a party might come from the Ministry of Foreign Affairs, an attorney for the plaintiff, or even directly from the local court, labor tribunal, or other judicial or quasi-judicial entity. Such notices may be received from the Foreign Ministry under cover of a Diplomatic Note, be sent through the local mail, or be hand-delivered by a process server, the plaintiff, or other individual. On occasion, notice of a proceeding may be by publication or posting in a public location. While the foregoing methods of notification do not all amount to proper service on the United States, Air Force offices should not refuse to accept or turn away an individual attempting to deliver notice of a judicial or quasi-judicial proceeding or fail to report the receipt of any such notice (regardless of whether the service is proper under applicable law). (T-0) However, anyone from the Air Force receiving such a notice should refrain from making any oral or written representation that by receiving the notice, they are accepting service on behalf of the United States. (T-0)

5.5. Report to the DoJ OFL. Air Force component command legal offices shall make an immediate written report to the DoJ OFL (T-0). This report should be unclassified and always identify all the concerned parties by proper name, position, agency, and special status (to the extent known). (T-0) The report should contain the following information:

5.5.1. The date notice was received by the USG. (If notice first was received by a non-Air Force USG office and then passed to an Air Force office, both dates of receipt should be reported.)

5.5.2. How notice was transmitted or received (i.e., through the mail, by hand delivery, through the Foreign Ministry, etc.)

5.5.3. The hearing date, the date by which a response is required/requested, or the amount of time provided in which to respond.

5.5.4. A description of the documents received and whether the documents and all attachments are in English. (Promptly provide a full and complete copy of all of the documents, as well as an informal English translation of the court documents, statement of claim, and covering Diplomatic Note to the DoJ OFL. If English translations are not immediately available and cannot be quickly obtained, provide copies of the documents received and consult with the DoJ OFL about how best to address translation-related concerns.)

5.5.5. The name and location of the court or tribunal.

5.5.6. The name(s) of the plaintiff(s).

5.5.7. The identities of the U.S. parties named as defendant(s).

5.5.8. The case number.

5.5.9. As complete a report as possible of the facts of the case.

5.5.10. The name, telephone number, and e-mail address for a contact person knowledgeable about the facts relating to the attempted service and the facts of the case.

5.5.11. The name, telephone number, and e-mail address of the Air Force counsel point of contact.

(NOTE) Ensure a copy of the report is sent to the JACC Org box (T-1) at usaf.pentagon.af-ja.mbx.afloa-jacc-workflow@mail.mil

5.6. Protection of Reports. Reports to the DoJ OFL, as well as to other Air Force legal offices having an interest in the case, should be identified as attorney work product. (T-1)

5.7. Judge Advocate General Unified Automated Reporting System (JAGUARS) Reporting Requirement. The legal office with responsibility for supporting DoJ OFL in a specific foreign civil proceeding will ensure that the case is timely reported (T-1) and, as it progresses, updated in the JAGUARS Foreign Civil Litigation Reporting System accessible via the U.S. Air Force Judge Advocate General's Corps website (under "Reports") (T-1). At the end of the case, it must also be clear from the report when the case closed and whether the case was closed by payment of a settlement or judgment, or was dismissed or withdrawn. (T-1) The basis for the outcome must likewise be clear (unless the case was withdrawn without reasons provided by opposing counsel). (T-3)

5.8. Responsibility for Proceedings. The following offices have responsibility for supporting DoJ OFL in its efforts to protect Air Force interests in foreign civil proceedings involving the Air Force, its instrumentalities, and its officials:

5.8.1. Except as listed below, if the proceeding occurs in the USEUCOM or United States Africa Command (USAFRICOM) AOR, the USAFE SJA designates what attorney will serve as agency counsel to the DoJ OFL, in consultation with the relevant Air Staff office having subject matter expertise.

5.8.2. Except as listed below, if the proceeding occurs in the Pacific Command (PACOM) AOR, the PACAF SJA designates what attorney will serve as agency counsel to the DoJ OFL, in consultation with the relevant Air Staff office having subject matter expertise.

5.8.3. Except as listed below, if the proceeding occurs in the United States Central Command (USCENTCOM) AOR, the AFCENT SJA designates what attorney will serve as agency counsel to the DoJ OFL, in consultation with the relevant Air Staff office having subject matter expertise.

5.8.4. Except as listed below, if the proceeding occurs in the (United States Northern Command) USNORTHCOM AOR, the AFNORTH SJA designates what attorney will serve as agency counsel to the DoJ OFL, in consultation with the relevant Air Staff office having subject matter expertise.

5.8.5. Except as listed below, if the proceeding occurs in the United States Southern Command (USSOUTHCOM) AOR, the AFSOUTH SJA designates what attorney will serve as agency counsel to the DoJ OFL, in consultation with the relevant Air Staff office having subject matter expertise.

5.8.6. If, on a given matter, a component command SJA listed above determines that the Air Staff office having subject matter expertise should designate an attorney to serve as agency counsel, the component command SJA may request the relevant Air Staff office do so. The request should be made in writing to the Air Staff office's organizational e-mail box and that office's chief within 72 hours of being served or otherwise being made officially aware of the litigation.

5.8.7. In accordance with AFI 51-501, *Tort Claims*, or all non-contractual tort cases for amounts greater than \$50,000, AFLOA/JACC or, in the case of environmental tort cases, AFLOA/JACE designates what attorney will serve as agency counsel to the DoJ OFL, in consultation with the relevant Air Force component command SJA.

5.9. Support to Host Nation for Proceeding. If, under an applicable international agreement, a host nation is responsible for the legal, judicial, or quasi-judicial foreign proceeding affecting Air Force interests, the SJA of the Air Force component command of the relevant U.S. geographic combatant command will provide the requisite host nation support. (T-1)

5.10. Federal or State Domestic Suits against Individuals in Their Individual Capacity While Located in Foreign Jurisdictions.

5.10.1. Personnel or their counsel who are seeking to serve process on an individual serving, employed, or residing on Air Force facilities in a foreign location should contact the local installation Security Forces or base-level/servicing SJA office to coordinate access to base when process needs to be served on individuals working or living on the installation.

Additionally personnel or their counsel may consult the Department of State website at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/Service-of-Process.html> for information concerning proper methods of service in the foreign location as methods vary by country.

5.11. Service of Process for Matters Brought Against the United States in Foreign Jurisdictions. Generally, acceptable service of process is service, transmitted through a host nation's Foreign Ministry, that provides for at least 60 days (after such service) before any court appearance or written response is expected. Proper service must include sufficient information about the case, usually in the form of a complaint, statement of claim, or similar document, to enable the United States to determine what the case is about, whether it is a proper party, whether there are potential international law issues, and what steps, if any, it should take to defend the case. (T-0)

5.11.1. Alternatively, service may be made pursuant to the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 20 United States Treaties (UST) 361, if both countries are parties. Under this Convention, service must be effected on the U.S. Central Authority which is the U.S. Department of Justice, Office of International Judicial Assistance, Washington, D.C.

5.11.2. If service was not properly made, the DoJ OFL and the U.S. Department of State (DOS) usually coordinate with the affected U.S. agency to have the suit papers returned, through the host nation's Foreign Ministry, to the host nation court having jurisdiction over the matter. In such cases, the DOS provides language for the U.S. Diplomatic Note.

5.11.3. Since any communication directly with the foreign court, either by letter or calling court officials on the telephone, may be regarded by the court as an admission of jurisdiction Air Force personnel should avoid direct communications with a foreign court. (T-0).

5.12. Refrain from Actions Before Coordinating with the DoJ OFL. Designated agency counsel for the Air Force shall not take action in relation to foreign legal, judicial, or quasi-judicial proceedings (including responding to demands or requests for testimony or documents) until the DoJ OFL has been apprised of the case and provided guidance. (T-0) Once the DoJ OFL receives notice of a foreign proceeding, the DoJ OFL generally considers: first, if the USG has been properly served; second, if served properly, what local attorney should represent the U.S. in the proceeding; and then, after hiring the selected local attorney, how should the case be defended.

5.13. Litigation Report. Upon determination that proper service has occurred, designated agency counsel should send DoJ OFL a litigation report in time for effective case coordination. (T-0) The litigation report should incorporate pertinent information initially reported and include any additional facts, law, or other relevant information gathered in response to the case.

5.13.1. Designated agency counsel may, for the litigation report, use the format shown in Figure 2.1 found in Chapter 2 of this Instruction.

5.14. Conveying Agency Positions. Designated agency counsel will consider the issues raised by any foreign proceeding in light of HAF Mission Directive (MD) 1-14. Paragraph A3.2.4. of HAF MD 1-14 provides that "AF/JAO is responsible for operations and international law consistent with the provisions of this mission directive and attachments." Paragraph 3.1.2. of HAF MD 1-14 also states that "AF/JA and SAF/GC will provide one another with timely notice of the initiation or pendency of significant or potentially significant litigation and will provide updates

and an opportunity to comment quarterly and whenever a major event in that civil litigation matter occurs (e.g., a dispositive ruling by a judge).”

5.14.1. Designated agency counsel shall consult with AF/JAO, in coordination with the component command SJA and the legal section of the ODC (if there is an ODC at the location) for cases involving operational and international law issues to establish Air Force positions. (T-1) Such issues include, but are not limited to, weapons and capabilities, interpretation of international agreements, law of war, rules of engagement, status of forces, application of foreign laws/regulations, overflight, etc.

5.14.2. To permit coordination with higher offices when establishing Air Force positions, designated agency counsel will also report to AF/JAO and AFLOA/JACC any case involving senior Air Force or Department of Defense officials or any case meeting one of the criteria in DoDI 5030.7 at Paragraph 5.2.4. (T-0) The criteria in DoDI 5030.7 that agency counsel must consider are as follows:

5.14.2.1. Will the results of the action affect materially the operation and administration of the Department of Defense?

5.14.2.2. Will the results of the action affect materially the rights or benefits of personnel of more than one DoD Component?

5.14.2.3. Does the litigation affect materially the ownership of federal property under the jurisdiction of more than one DoD Component?

5.14.2.4. Is a statute, a treaty, or an Executive Order with a significant impact on more than one DoD Component being interpreted?

5.14.2.5. Is a new or significant principle of law involved?

5.15. Assertions of Immunity from Foreign Jurisdiction. It is the policy of DoJ and DOS that whenever the United States (including its agencies and instrumentalities) is made a party to a foreign legal proceeding and is properly served, the United States will generally retain legal counsel and enter an appearance in court, see Department of State Cable 15 State 82596, 11 July 2015, para 24. Without prior approval from TJAG and DoJ, Air Force attorneys acting as designated agency counsel may not assert or waive sovereign immunity through diplomatic channels, instruct local counsel to file a plea of sovereign immunity, or otherwise submit or authorize the submission of any written communication with the host Government or a judicial entity regarding sovereign immunity. (T-0)

5.16. DoJ OFL Hiring of Local Counsel. If the Air Force, through designated agency counsel, and the DoJ OFL decide to accept service, the DoJ OFL will assume responsibility for representing the USG interest in the specific litigation. The litigation may be against the U.S. or its agencies and instrumentalities in a foreign forum or it may be against officers/employees of the U.S. when it appears suit is based on actions performed in the scope of their USG employment. (In the latter case, representation must be requested from and approved by DoJ. See Paragraph 5.18, below). The DoJ OFL's responsibility for litigation against the USG includes the retention and instruction of local counsel. Once hired by the DoJ OFL, designated agency counsel should work with the local attorney and provide any necessary information and documents, in addition to those already provided in the litigation report, to assist the attorney and DoJ in preparing the USG's case.

5.16.1. The DoJ OFL, not the designated agency attorney, will instruct local counsel on steps to be taken in the litigation. (T-0)

5.16.2. Designated agency counsel should also refrain from consulting with local counsel on problems of an administrative or legal nature collateral to the civil litigation. When a local SJA cannot resolve the problems, elevate them to the next higher command.

5.17. Need for Ongoing Support to DoJ OFL. Even after the DoJ OFL has begun to handle the litigation, the designated agency counsel should immediately inform DoJ OFL of any contact from the host nation's Ministry of Foreign Affairs, the court, the parties, or others. Designated agency counsel should not assume that the DoJ OFL is already aware of that contact.

5.18. Legal Representation for Air Force Military Members and Civilian Employees Sued in Their Official Capacity for Actions Performed in the Scope of Employment. DoJ has the statutory responsibility to represent the Air Force and Air Force officials who are being sued in their official capacities (28 U.S.C. Sections 516-519). This responsibility extends to litigation in foreign courts. Provision of counsel and payment of expenses in foreign civil trial and appellate proceedings may also occur under specific authority articulated in AFJI 51-706, *Status of Forces Policies, Procedures, and Information*. Funds under this authority, however, are primarily available for foreign criminal proceedings, and in foreign civil proceedings, funds are unavailable where the United States is, in legal effect, the defendant unless prior approval has been obtained from the Secretary of the Air Force or the Secretary's designee. (T-1)

5.19. Legal Representation for Air Force Military Members and Civilian Employees Sued in Their Personal Capacity for Actions Performed in the Scope of Their Employment. Past or present Air Force personnel or employees who are named as individual defendants for personal liability in civil or criminal proceedings for acts or omissions arising from the performance of their official Air Force duties should work with their base-level/servicing SJA to request representation by DoJ (28 C.F.R. Secs. 50.15-50.16). NOTE: Because personnel sued in their personal capacity may have as little as twenty (20) days to respond to a complaint, time is of the essence in processing these requests. (Under certain circumstances, Air Force contractors sued by third parties may also request government representation.). For requests by Air Force personnel for legal representation by DoJ or by private counsel at government expense, see Chapter 2, Paragraph 2.6.

5.19.1. All documentation by Air Force personnel requesting such representation shall be forwarded to the Air Force legal office responsible for designating agency counsel in the case. (T-2)

5.20. Requests for Indemnification. The Air Force usually cannot indemnify Air Force personnel for any verdict, judgment, settlement, or other monetary award entered against them in their personal capacities. For processing of indemnification requests, see Chapter 2, Paragraph 2.7. For an indemnification request stemming from a foreign proceeding, the servicing SJA will address the request and make a recommendation. (T-1) The SJA will then send the request and recommendation through SJA channels for recommendations at each level of command to AFLOA/JACL, which will consult with AF/JAO, before the package is staffed to the appropriate Secretarial designee for a decision.

5.21. Requests for Testimony. A demand or request for testimony, including written or informal statements, may raise questions of immunity. Sometimes, through an Exchange of Diplomatic Notes, a host nation grants U.S. DOD personnel present in its territory the status protections

equivalent to the status protections afforded embassy administrative and technical staff under the 1961 Vienna Convention on Diplomatic Relations. In most cases, DOD personnel abroad have no special protections or, under an applicable Status of Forces Agreement (SOFA), they have a limited level of protection from the civil jurisdiction of a host nation for official acts. In proceedings abroad, the Air Force has a strong interest in preserving its protections.

5.21.1. The designated agency counsel shall ensure the DoJ OFL is informed, in writing, of any receipt of a subpoena or other demand or request for testimony, including written or informal statements. (T-0) Both the Air Force and the DoJ OFL need:

- 5.21.1.1. A description of the request, including when and how the request was received.
- 5.21.1.2. The date of the hearing or other proceeding, if any.
- 5.21.1.3. What information the requester seeks to obtain.
- 5.21.1.4. Factual information about the incident/matter for which the testimony is requested.
- 5.21.1.5. The full name and job position of the individual being called to testify.
- 5.21.1.6. Status protections applicable to the individual, if any.
- 5.21.1.7. The employing agency of the individual.
- 5.21.1.8. The individual's connection to/involvement in the matter and what information the individual likely will provide.
- 5.21.1.9. A recommendation from agency counsel whether the individual should testify (taking into consideration consequences under host nation law, if any, if the individual does not appear in court).
- 5.21.1.10. A conclusion from agency counsel (if applicable) that the testimony will not in any way be contrary to the USG interest.

5.21.2. When testimony is necessary to defend USG interests in foreign proceedings, the designated agency counsel should speak to the DoJ OFL about offering the testimony through the least expensive means possible (e.g., videoconference or depositions) where appropriate.

5.22. Requests for Documents. The Air Force does not authorize the release of original documents as a general matter but may make exceptions in certain circumstances, such as when original documents are needed to verify the authenticity of documents in a court proceeding. Copies of any originals released under this Paragraph should be made and maintained by the office to which the original belonged. Authentication should normally occur by the simplest procedure permissible. Preference should be given to authenticating official Air Force documents for civil litigation rather than requiring the custodian to personally appear and testify.

5.22.1. The designated agency counsel shall ensure the DoJ OFL and the respective Air Force component command SJA are informed of any requests for documents when the United States, its agencies, or its employees are or could be a party to litigation. (T-0) Both the Air Force and the DoJ OFL need:

- 5.22.1.1. A description of the documents requested.
- 5.22.1.2. How, when, and from whom the request was received.

5.22.1.3. The reason the requesting individual/entity requires the documents.

5.22.1.4. The date by which to respond.

5.22.1.5. A recommendation from agency counsel whether the documents should be provided.

5.22.1.6. A conclusion from designated agency counsel (if applicable) that releasing the requested document will not in any way be contrary to the USG interest.

5.23. Release Authorities for Official Information: Testimony and Documents. Official Information generally should be made reasonably available for use in federal, state, and foreign civil courts and other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure. Guidance on release and release authorities is provided for the Air Force in Chapter 3. With respect to Paragraph 3.3.6.7, base-level/servicing SJAs serve as release authorities for all other matters unless the relevant Air Force component command SJA (USAFE-AFAFRICA SJA, PACAF SJA, AFCENT SJA, AFNORTH SJA, AFSOUTH SJA) determines that a different release authority falling under his or her authority would be more appropriate.

5.24. Witness Travel Funding. Release authorities must first consider making available a witness who doesn't require temporary duty (TDY) before making available a witness that does require TDY. If DoJ doesn't authorize travel funds but DoJ OFL and designated agency counsel determine TDY is required for a necessary witness, the organization to which the witness is assigned will fund the TDY. (T-2)

5.25. Garnishment and Attachment Proceedings in Foreign Jurisdictions. Air Force personnel or offices receiving a writ, order, or petition for garnishment or money attachment shall refer such document to the base-level/servicing SJA of the organization to which the officer, employee, or office belongs. (T-2) As a general rule, the United States and its agencies and instrumentalities are not subject to garnishment orders or money attachment proceedings in foreign countries aimed at wages or other funds due and payable by the United States to alleged or adjudicated debtors of the parties on whose behalf garnishment or attachment is attempted. An exception to this rule exists in the Federal Republic of Germany. Under Article 34(3) of the German Supplementary Agreement to the NATO Status of Forces Agreement, the United States honors writs of garnishment issued by German courts against members of US forces or civilian component stationed in the Federal Republic of Germany for child support or alimony obligations. In all other cases, the United States cannot honor garnishment orders or money attachments. If the United States cannot honor the garnishment or money attachment request, notify the DoJ OFL of the request (see "Report to the DoJ OFL" above). The DoJ OFL will determine with the DOS whether Diplomatic Note will be used to communicate to the issuing authority the limits of military authority action under the circumstances. (Absent any objection from the DoJ OFL, the Air Force may furnish the foreign court or agency with the date, time and place of payments to be made to the debtor so that the creditor may pursue remedies under local law directly against the debtor.) For U.S. citizens and resident aliens, any release of information must be authorized under the Privacy Act (*see* AFI 33-332, *Air Force Privacy and Civil Liberties Program*). (T-0) For local national employees working for the U.S., any release of information requires consideration of Host Nation Privacy Law to the extent applicable.

5.26. Lawsuits in Foreign Courts: Suits or Criminal Complaints Initiated by the U. S. DoJ is responsible for the approval, initiation, and conduct of all lawsuits on behalf of the USG, including its agencies. DoJ must approve both the submission of foreign criminal complaints and the initiation of foreign civil suits. In some jurisdictions, submitting a criminal complaint to a local police authority or prosecutor's office or submitting a civil complaint is all that is required to initiate legal action. If a situation arises in which an Air Force component command legal office believes it is desirable for the USG to initiate a lawsuit in a foreign court, the SJA of that legal office shall forward its request to AF/JAO and include an explanation of the case and explain why legal action is recommended. AF/JAO will discuss the matter with ALFOA/JAJ or AFLOA/JAC based on the type of case. If the suit will involve a monetary claim, the Air Force component command SJA should advise as to the likelihood the USG will be able to collect from the defendant if a judgment in the USG's favor is rendered. (Situations where the USG initiates suits overseas are rare and require a strong showing of exceptional circumstances and compelling need to justify taking that step).

5.27. Wear of the Uniform. Air Force component command SJAs will provide guidance concerning wear of the Air Force uniform for Air Force members participating in foreign proceedings. These SJAs will take into consideration Paragraph 1.4.8 of AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, which prohibits Air Force members from wearing their Air Force uniform while participating in any civilian court proceeding when a conviction would bring discredit to the Air Force. These SJAs will also consider Chapter 3, Paragraph 3.11, of this Instruction, and force protection or other relevant concerns. Air Force component command SJAs will provide guidance concerning wear of the Air Force uniform.

5.28. Supplementation Authorized. To promote effective coordination with DoJ OFL and to protect USG interests, in general, and Air Force interests, in particular, within differing AORs, this Chapter may be supplemented in a manner consistent with U.S. law and DOD policy.

JEFFERY A. ROCKWELL
Lieutenant General, USAF
The Judge Advocate General

Attachment 1**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

5 U. S. C. Sec. 552(a), *Privacy Act of 1974*

5 U.S.C. Sec. 5520(a), *Garnishment of Pay*

10 U.S.C. Secs. 801-946(a), *Uniform Code of Military Justice*

10 U.S.C. Sec. 982, *Members: Service on State and Local Juries*

10 U.S.C. Sec. 1408, *Payment of Retired or Retainer Pay in Compliance with Court Orders*

10 U.S.C. Sec. 4001, *Residence for Tax Purposes*

12 U. S. C. Secs. 3401–3422, *Right to Financial Privacy Act*

22 U.S.C. Sec. 2751, et seq., *Arms Export Control Act*

28 U.S.C. Sec. 515, *Authority for Legal Proceedings; Commission, Oath, and Salary for Special Attorneys*

28 U.S.C. Sec 516, *Conduct of Litigation Reserved to Department of Justice*

28 U.S.C. Sec. 517, *Interest of the United States in Pending Suits*

28 U.S.C. Sec 518, *Conduct and Argument of Cases*

28 U.S.C. Sec 519, *Supervision of Litigation*

28 U.S.C. Secs, 2671- 2680, *Tort Claims Procedure*

42 U.S.C. Sec. 659, *Consent by United States to Income Withholding, Garnishment, and Similar Proceedings for Enforcement of Child Support and Alimony Obligations*

50 U.S.C. Secs 4601-4623, *Export Administration*

Public Law 93-595, Federal Rules of Evidence, January 2, 1975

Public Law 73-415, Rules Enabling Act (Federal Rules of Civil Procedure), June 19, 1934

28 C.F.R. Part 50.15 -50.16, *Representation of Federal Officials and Employees By Department of Justice Attorneys or Private Counsel Furnished by the Department of Justice*

32 Code of Federal Regulations (C.F.R.) Sec 257.5(d), *Responsibilities*

DoDD 5220.6, *Defense Industrial Personnel Security Clearance Review Program, 2 January 1992*

DoDD 5405.2, *Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses, 23 July 1985*

DoDI 5030.7, *Coordination of Significant Litigation and Other Matters Involving the Department of Justice, 22 August 1988*

DoDI 5500.07-R, *Joint Ethics Regulation, 1 August 1993*

DoDI 5525.08, *Service by Members of the Armed Forces on State and Local Juries*, 3 January 2007

DoD 7000.14-R, *DoD Financial Management Regulation*, updated monthly

DODM 5200.02, *Procedures for the DoD Personnel Security Program*, 3 April 2017

HAF Mission Directive 1-14, *General Counsel and the Judge Advocate General*, 29 December 2016

AFPD 13-5 *Air Force Nuclear Mission*, 17 July 2018

AFPD 51-3, *Civil Litigation*, 21 May 1993

AFPD 61-2, *Management of Scientific and Technical Information*, 28 March 2014

AFI 16-1404, *Air Force Information Security Program*, 29 May 2015

AFI 17-130, *Air Force Cybersecurity Program Management*, 31 August 2015

AFI 33-322, *Records Management Program*, 4 June 2012

AFI 33-324, *The Air Force Information Collections and Reports Management Program; Controlling Internal, Public, and Interagency Air Force Information Collections*, 6 March 2013

AFI 33-332, *Air Force Privacy Act and Civil Liberties Program*, 12 January 2015

AFI 33-360, *Publications and Forms Management*, 01 Dec 2015

AFI 33-364, *Records Disposition-Procedures and Responsibilities*, 22 December 2006

AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel*, 18 July 2011

AFI 41-210, *Tricare Operations and Patient Administration Functions*, 06 June 2012

AFI 51-501, *Tort Claims*, 13 September 2016

AFI 51-1102, *Cooperation with the Office of Special Counsel*, 23 April 2015

AFI 91-204, *Safety Investigations and Reports*, 27 April 2018

AFJI 51-706, *Status of Forces Policies, Procedures, and Information*, 15 December 1989

AFMAN 33-302, *Freedom of Information Act Program*, 26 April 2018

AFMAN 33-363, *Management of Records*, 1 March 2008

Prescribed Forms

AF Form 44, *Certificate of Records*

Adopted Forms

AF Form 847, *Recommendation for Change of Publication*

AF Form 4394, *Air Force User Agreement Statement—Notice and Consent Provision*

Abbreviations and Acronyms

AAFES—Army and Air Force Exchange Service

AFI—Air Force Instruction
AFLOA—Air Force Legal Operations Agency
AFRO—Air Force Records Officer
AOR—Area of Responsibility
CFR—Code of Federal Regulations
DoD—Department of Defense
DoJ—Department of Justice
DRU—Direct Reporting Unit
EEO—Equal Employment Opportunity
EEOC—Equal Employment Opportunity Commission
ESI—Electronically Stored Information
FLRA—Federal Labor Relations Authority
FM—Financial Management Office or Officer
FOA—Field Operating Agency
FOIA—Freedom of Information Act
Fed. R. Civ. P.—Federal Rules of Civil Procedure
FRE—Federal Rules of Evidence
FSIP—Federal Services Impasses Panel
FTCA—Federal Tort Claims Act
GAO—General Accounting Office
GC—Office of the General Counsel
HIPAA—Health Insurance Portability and Accountability Act
HQ USAF/JAA—Headquarters Air Force, Administrative Law Directorate
JAC—Civil Law and Litigation Directorate
JACE—Environmental Law and Litigation Division
JACL—General Litigation Division
JAQ—Commercial Law and Litigation Directorate
JACC—Claims and Tort Litigation Division
LLFSC—Labor Law Field Support Center
LSC—Litigation Support Center
MAJCOM—Major Command
MAJCOM/JA—Major Command Legal Office

MLC—Medical Law Consultant
MSPB—Merit Systems Protection Board
NAF—Numbered Air Force
NOE—Network Operations Element
PA—The Privacy Act
PI—Preliminary Injunction
RFPA—Right to Financial Privacy Act
SAF—Secretary of the Air Force
SJA—Staff Judge Advocate
TJAG—The Judge Advocate General
TRO—Temporary Restraining Order
ULFSC—Utilities Law Field Support Center
USAO—United States Attorney’s Office
VTC—Video Teleconference

Terms

Air Force Records Officer (AFRO)—The individual appointed by the Air Force Chief Information Officer (CIO) to direct the Air Force Records Management Program and all associated activities.

Air Force Personnel—Active component members of the military, Air Force Reserve members in duty or training status, Air National Guard members in federal service or on Title 10 orders, and civilian employees. NOTE: Contractors and contractor personnel are not “Air Force personnel”; however, their information and assistance are often critical to perform the functions listed in this instruction.

Covered Personnel—Air Force personnel as defined above, Air Force Academy cadets, retired, and former Air Force personnel (where a matter involves events occurring during a time when the individual was employed by the Air Force), including Non-appropriated fund activity employees and direct hire and indirect hire non-U.S. nationals who perform services in foreign locations for the United States. Under some circumstances, contractor personnel may be included in this definition.

Custodian—A person in charge of an office in which official Air Force records are filed by law, regulation, or custom; or a person whom proper authority so designates; and, for certain purposes, a person who has possession, custody, or control of official Air Force information for use in official duties.

Data—Symbols or representations of facts or ideas that can be communicated, interpreted, or processed by manual or automated means. Often associated with electronic data or with statistics or measurements.

Database—A set of data, consisting of at least one data file, that is sufficient for a specific purpose. In electronic recordkeeping, a set of data, consisting of at least one file or a group of integrated files, usually stored in one location and made available to several users at the same time for various applications.

Data Map—A listing of information about an organization’s electronic data, which may include, but is not limited to: the storage locations; the type, amount, and description of data that lies in the storage locations; the name and type of operating systems, computers, servers, networks, and databases on which the data resides; the name of individuals with access to the information; and the data security and disposition policies in effect for the storage location.

Demand—An attorney or court-issued subpoena, order, or other command of a court of competent jurisdiction, or other specific authority, for testimony of Covered Personnel or for the production, disclosure, or release of Official Information.

Direct Reporting Unit (DRU)—Has a specialized and restricted mission, and is directly subordinate to the Chief of Staff, United States Air Force or to Chief of Staff’s representative on the Air Staff.

Discovery—The process by which one party in litigation obtains information and data from other parties. The Fed. R. Civ. P. governs several formalized methods of conducting discovery, including: interrogatories, requests for production of documents, requests for admissions, and depositions. Before formal discovery begins, parties have an obligation to search for and preserve information that may be relevant to the issues in the case. This is accomplished through the issuance of a Litigation Hold/Preservation Notice. Parties must also affirmatively identify all facts, documents, and witnesses that support their respective claims or defenses. Discovery is not limited only to information that may be admissible in evidence, but extends to information that is reasonably calculated to lead to the discovery of admissible evidence.

Document—Applies to writings, printed words, drawings, graphs, charts, lithographs, photographs, images, sound recordings, maps or plans, and any other form of printed material, stored in any medium from which information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably usable form. It is generally understood that the term also now includes electronically stored information, such that a party need not differentiate between the two when making a discovery request.

Electronically Stored Information (ESI)—A generally accepted definition of ESI is: information that is stored in an electronic medium and is retrievable in perceivable form. ESI is generally understood to encompass: e-mails and attachments; webpages and databases; electronic word processing files, spreadsheets and presentations; digital sound files, images and graphics, stored in the memory or computers, magnetic disks (such as computer hard drives and floppy disks, optical disks (CDs and DVDs), and flash memory (such as “thumb” drives or “flash” drives). It also encompasses information stored on servers, networks, desk tops, lap tops, home computers, backup tapes and servers, and other portable storage media devices such as Personal Digital Assistants (PDAs), mobile phones, and “smart” phones now available. It is data or data compilations stored in any electronic medium from which information can be obtained.

Federal Rules of Civil Procedure (Fed. R. Civ. P.)—The formal rules that govern the conduct of the parties in civil litigation.

Field Operating Agency (FOA)—A subdivision that carries out activities under the operational control of a headquarters Air Force functional manager.

In Camera—A court proceeding before the judge in his/her chambers out of view of spectators.

Litigation—The legal process by which cases, controversies, or disputes are resolved and includes pretrial (such as discovery requests or depositions) and post-trial actions (such as appeals). Litigation involves matters conducted before local, state, federal or foreign courts, as well as commissions, boards, and administrative tribunals, and is governed by established rules applicable to the particular forum. For purposes of this instruction, litigation also includes matters not yet in a formal proceeding, but for which litigation is reasonably expected.

Litigation Division—The offices, Field Support Centers, and Divisions within the Air Force Legal Operations Agency (AFLOA) Civil Law and Litigation Directorate (JAC) and Commercial Law and Litigation Directorate (JAQ) authorized to act on behalf of TJAG to perform the functions as noted in this Instruction.

Litigation Hold/Preservation Notice—A detailed statement of an individual's, unit's, or organization's responsibilities: (1) in the discovery phase of litigation, to search for, identify, preserve, index, and report paper documents and ESI that are potentially relevant to the facts and issues in a case or in a matter where there is a reasonable anticipation of litigation; or (2) to locate and preserve information for which there is a current or expected future need, whether or not litigation is anticipated.

Managing Attorney—The attorney assigned by the responsible Litigation Division to serve as agency counsel on a matter and to perform the functions as noted in this Instruction, including handling discovery matters on an active case, or matter that is anticipated to result in litigation. The term also includes military and civilian paralegals, who may perform the duties and functions, if under the supervision of the Managing Attorney.

Metadata—Data imbedded within an electronic document which gives information about the document's data. In a Word document, for example, metadata can come in several categories, which include: (1) substantive metadata, such as textual modifications and editorial comments; (2) systemic metadata, such as the document's author, file name, publication date, last date of alteration, file type, etc.; and (3) embedded metadata, such as a hyperlink or macro.

Non-Official Information—All information that does not meet the criteria of Official Information. Non-Official Information includes information or facts that Covered Personnel obtained, possess, or have control of, that is not related to their Air Force duties.

Official Information—Information of any kind, however stored, that is in the possession, custody, or control of covered personnel; that relates to information in the possession, custody, or control of covered personnel; and that was acquired by covered personnel as part of their official duties or because of their official status while on active duty, employed, or under contract. Information that is the property of the Air Force but is in the possession, custody, or control of another federal agency is also included in this definition.

Records Professionals—All Air Force personnel with responsibility for any and all areas of information access, assurance, and security in order to ensure compliance with, among other things, discovery requirements relating to litigation. Records professionals include the Air Force Records Officer, Air Force Records Office personnel, Command and Agency Records Managers,

Base Records Managers, Commander-designated records points of contact, Knowledge Operators, and Network Operations Element personnel, Command and Agency Records Managers, Base Records Managers, unit level record managers, Knowledge Operators, and Network Operations Element personnel performing functions related to the discovery/civil litigation hold process.

Release Authority—The Air Force official with the delegated authority to determine what Official Information may be released in response to a Demand or Request

Testimony, Testifying, or Testimonial—Live witness verbal statements at a deposition, trial, or hearing. The method of testimony can include in-person, telephonic, Video Teleconference (VTC), or similar method. The term also includes declarations and affidavits. For purposes of this Instruction, it also includes witness interviews.