

## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 18-01

October 19, 2017

**TO:** All Regional Directors, Officers-in-Charge, Resident Officers,  
Division and Office Heads, and Branch Chiefs

**FROM:** Richard F. Griffin, Jr., General Counsel /s/

**SUBJECT:** Delegation of Section 102.118 Authorization to the Division of Legal  
Counsel

Section 102.118 of the Board's Rules and Regulations, as amended, requires that any party seeking to obtain the contents of files under the General Counsel's control in Washington or in the Regional Offices, or the testimony of any Board agent or attorney there employed, must secure the authorization of the General Counsel. In order to speed consideration of these requests and eliminate layers of review, several classes of Section 102.118 requests have been granted blanket General Counsel authorizations, or the General Counsel has delegated the authority to the Regional Directors or the Associate General Counsel for Enforcement Litigation to decide whether to approve certain requests.<sup>1</sup> As a result of Agency Headquarters restructuring, I am modifying the prior delegations made to the Associate General Counsel for Enforcement Litigation, to now be made to the Associate General Counsel for the Division of Legal Counsel.

By memorandum dated May 22, 1998 (GC 98-7), the Associate General Counsel for Enforcement Litigation was granted final authority to authorize disclosures under Section 102.118 in certain circumstances involving ongoing litigation in the Special Litigation, Contempt, and Appellate Court Branches. Those branches regularly engage in litigation in courts where affidavits from, and testimony by, Board agents or attorneys, or production of agency records is necessary and/or beneficial. In other instances, it is beneficial to share information with other government agencies, U.S. Trustees in bankruptcy, trustees in

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<sup>1</sup> See General Counsel memoranda dated February 2, 1972 (authorization for compliance officers to testify in compliance proceedings), March 21, 1974 (GC 74-17) (policy to permit inspection of regional files by agents of other federal agencies), March 20, 1992 (GC 92-2) (authorization to provide *Vaughn* indices in FOIA litigation), November 2, 1994 (GC 94-14) (delegation to Regional Directors to permit disclosure in four specified circumstances), May 22, 1998 (GC 98-7) (delegation to the Associate General Counsel for Enforcement Litigation in matters involving litigation handled in that Division), and July 13, 1998 (GC 98-9) (delegation to the Associate General Counsel for the Division of Operations-Management to determine 102.118 requests in matters not specified in prior memos).

bankruptcy, or other creditors of a debtor. Accordingly, authority to grant Section 102.118 authorization was delegated because time is frequently of the essence in meeting court-imposed deadlines, and the litigating branches tend to be in the best position to evaluate the need, in each case, for Section 102.118 authorization and to weigh the advantages and disadvantages of disclosure against the costs of litigation concomitant with nondisclosure. Such delegation further promotes internal agency efficiency. Additionally, by memorandum dated November 2, 1994 (GC Memo 94-14), the Regions were directed to contact the Special Litigation Branch when subpoenas (other than NLRB subpoenas) were served upon them, seeking documents or testimony in third-party litigation.

In July 2013, the Agency restructured Headquarters offices, including creating the Division of Legal Counsel, merging the Special Litigation and Contempt Litigation and Compliance Branches, and moving that merged branch (Contempt, Compliance, and Special Litigation Branch (CCSLB)) into the new Division. *See* 78 Fed. Reg. 44981 (July 25, 2013). As a result of this restructuring, the large majority, if not all, (non-Agency) litigation involving a need to disclose information arises out of the Contempt, Compliance, and Special Litigation Branch, within the Division of Legal Counsel. Additionally, with respect to third-party subpoenas directed to the Special Litigation Branch, that branch is now part of CCSLB, within the Division of Legal Counsel. Accordingly, the same reasons that supported delegating authority to the Associate General Counsel for Enforcement Litigation now support delegation to the Associate General Counsel for the Division of Legal Counsel instead. Additionally, as Legal Counsel also contains the Agency's FOIA Branch, that Division is better positioned to determine consistent Agency policy regarding disclosures.

There is an additional category of requests that should be directed to the Division of Legal Counsel for response. GC Memo 74-17 authorizes Regional Directors to permit the inspection of files by employees of federal agencies, and this authorization was extended to state and local agencies in GC Memo 94-14 (at 2 n.3). However, now that the Agency's files are accessible to headquarters electronically, consistency in Agency responses would be better served by having those requests answered by the Division of Legal Counsel, rather than by Regional Directors. When appropriate, such as when information from open cases has been requested, the Division of Legal Counsel should consult with the region. Providing the Division of Legal Counsel authority to respond to outside agency requests is particularly appropriate when federal or state criminal prosecutors seek access to informal Board records in aid of a *criminal investigation*. This is because if a criminal case goes to trial, the prosecution is obligated to release to the defendant much of the information collected in the course of the investigation. The Division of Legal Counsel is best suited to determine which such material should be released by the General Counsel, endeavoring to protect Agency privileges to the extent possible.

Accordingly, I hereby delegate to the Associate General Counsel for the Division of Legal Counsel final authority to grant authorization under Section 102.118 of the Board's Rules and Regulations for any member of the staff of the General Counsel, whether in headquarters or in the field, to write affidavits, to testify, or to provide other evidence in ongoing litigation, or otherwise to disclose information where the matter is being handled by or with the assistance of one of the litigating branches of the Division of Legal Counsel and where:

1. Affidavits from, and testimony by, Board agents or attorneys, or production of agency records would be necessary and/or beneficial;
2. The agency finds it beneficial to share information with other government agencies, U.S. Trustees in bankruptcy, trustees in bankruptcy, or other creditors of a debtor; or
3. The agency is responding to a third party subpoena.

Additionally, I further delegate to the Associate General Counsel for the Division of Legal Counsel the authority to produce agency records in response to requests from state or federal agencies. As stated in GC 74-17 and GC 94-14, the Agency's policy is to cooperate with such agencies, subject to certain precautions. As stated in GC 94-14, the federal or state agency officials should be reminded that our non-public file information was gathered for law enforcement purposes. In addition, "the officials should be requested to assert any available privileges and resist disclosure if a request for disclosure of the information is made. In this regard a federal agency would have the FOIA exemptions available to resist inappropriate disclosure. Many states also have statutes similar to FOIA providing access to their files while exempting disclosure of certain documents. In addition, the official should be informed that it is expected that before disclosing the information supplied from our files to any source, the [Agency] will be informed." GC 94-14 at 2 n.3.

Any questions concerning this matter should be addressed to the Associate General Counsel for the Division of Legal Counsel.

/s/

R. F.G.