

WAR DEPARTMENT
ARMY SERVICE FORCES
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON

9 July 1943.

MEMORANDUM for the Assistant Secretary of War.

Subject: Proposed modification of AR 410-5, 8 February 1943,
with respect to classified information.

1. In a telephone conversation on 5 June 1943 Captain John M. Hall of your office stated to a representative of this office that the Secretary of War desired that consideration be given to a possible amendment to AR 410-5, 8 February 1943, with respect to the procedure now being followed in the handling of requests for the disclosure of classified information in connection with litigation. It is understood that the change discussed would, if adopted, delegate certain functions pertaining to the disclosure of classified information involved in litigation from this office to various field installations such as service commands, defense commands and armies.
2. It is understood that the reason suggested for the consideration of a possible change is that under present procedure delays might occur in referring to this office requests for authority for such disclosures. It was suggested that prompt action is often necessary in legal proceedings and that time frequently may not permit the obtaining of the necessary authority from this office for such disclosures. It also has been suggested that delays may occur on the theory that concurrence is required both from the Military Intelligence Division, War Department General Staff, and this office.
3. A very careful survey has been made and no case has been found in which any delay has occurred. Under paragraph 5c, AR 410-5, requests for the disclosure of classified information "other than that relating to pending and prospective litigation" are referred to G-2. Requests for the disclosure of information in connection with litigation, however, come within the language of the first subparagraph of paragraph 5 and are passed upon wholly by this office after consultation with the chief of branch concerned and, in certain cases, with the Office of the Secretary or Under Secretary of War. It is never necessary to obtain authorization for such a disclosure from both G-2 and this office.
4. Most requests for the production of classified records come from the Department of Justice. Since the creation of the Litigation Division of this



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office, a highly cooperative and effective procedure has been established with the various divisions in the Department of Justice. Under the established procedure, when any United States Attorney desires to use a classified document of the War Department in connection with litigation he informs the Attorney General of that fact who requests the necessary authority from this office as well as advice concerning any safeguards that should be taken in connection with its production. It is the daily practice of this office to secure for the Department of Justice authenticated copies of classified documents for use in the courts of the District of Columbia, the Court of Claims and other courts and administrative tribunals.

5. Under the present procedure, when a request for the production of classified records is received, this office immediately consults the chief of the branch of the War Department having custody of the records. If the disclosure of the information requested would be adverse to the interests of the Government, this office, after receiving the recommendations of the chief of the branch concerned, takes appropriate steps to prevent an improper disclosure. In many cases, it is necessary for this office to advise quickly a supervising attorney of the Department of Justice concerning the handling of a case and to suggest appropriate steps to safeguard various types of information. The Department of Justice depends upon the advice of this office as to the use it makes of documentary evidence in cases in which all or part of the evidence is secret, confidential or restricted. In many cases, such evidence is received under the rule of secrecy and, in other cases, the information is merely made available to the court and is not spread upon the record.

6. Most War Department litigation arises out of contracts originating in branches or services of the War Department which are not under the control of service commands, defense commands or armies, such as the Corps of Engineers, the Quartermaster Corps and the Army Air Forces. Service commanders, defense commanders and commanders of armies in the field rarely deal with such litigation and are not familiar with it. Consequently, they are not sufficiently informed to determine whether requests for classified records for use in litigation should be granted. In those few instances in which classified records under the control of service or defense commanders are requested, this office follows a policy of informally consulting such commanders with respect thereto. To place authority for the disclosure of classified information in such commanders would inevitably result in the formulation of varied and inconsistent policies and would cause confusion and delay. It is not believed that they desire to have such responsibilities placed upon them.

7. Copies of most contracts and of other types of documents that are usually requested are on file in Washington and, under the established procedure, such records are delivered to representatives of the Attorney General when they are desired as evidence in the courts of the District of Columbia.

In other cases, they are mailed directly to the United States Attorney making the request, together with any advice deemed necessary as to how the documents should be used and the methods to be employed to avoid unwarranted disclosure of their contents.

8. As nearly all litigation of concern to the War Department arises from the activities of field installations which are not under service commands, defense commands or armies, the effect of delegating such matters to them would be to interpose unnecessarily other War Department agencies which are not properly qualified to discharge the function. The Attorney General would still continue to consult the War Department direct in most cases.

9. The United States Attorneys and the litigation officers already have authority under the provisions of AR 410-5, 8 February 1943, to request unclassified documents for use in litigation. This procedure is not followed in most cases as most of the necessary documents are furnished the Department of Justice by this office, or in appropriate cases, the records desired are furnished directly to the United States Attorneys by this office or by the commanding officer of the installation primarily interested in the litigation. Close collaboration on the part of service or defense commanders with the Department of Justice in such matters is impracticable, if not impossible.

10. Under present regulations, and the uniform procedure now followed, most requests relating to pending or prospective litigation are referred directly to this office. If the changes suggested were made, it would be necessary in many cases for this office, before acting on such a request, to communicate with a service or defense command in order to ascertain whether action had already been taken. Under such a system, necessary coordination would be impossible. In all matters affecting their respective services or branches, the chiefs thereof are entitled to be consulted. To interpose other layers of authority, such as service or defense commands would, in many cases, accomplish nothing except confusion and delay.

11. The need for close and direct coordination between the War Department and the Department of Justice cannot be overemphasized. Any change of the character proposed would result in local commanders dealing directly with United States Attorneys in the field and would disrupt the integrated system for the handling of litigation now in effect between the War Department and the Department of Justice. Under such an arrangement, coordination could not be maintained either from the standpoint of the War Department or of the Department of Justice.

12. It is necessary that this office be at all times conversant with the status of War Department litigation, and such a delegation of authority with respect to the disclosure of classified information to field installations would seriously disrupt the control over the conduct of civil litigation which is pres-

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ently exercised by this office under the general supervision of the Under Secretary of War. Under the established system, this office conducts all legal liaison with respect to War Fraud cases through Mr. Julius H. Amberg, the assistant to the Secretary of War. Cases before the Interstate Commerce Commission relating to the abandonment or retention of railroad lines or services are handled by this office under the supervision of Brigadier General Edward S. Greenbaum, Office of the Under Secretary of War. Matters relating to War Department transportation are handled with Colonel James H. Graham of the Office of the Under Secretary of War. Litigation involving contractors with the War Department is cleared with Colonel Marion Rushton, Administrative officer for the Under Secretary of War, and other types of cases are handled under the immediate supervision of various individuals or division heads in the offices of the Secretary or Under Secretary of War. It is believed that such a delegation of authority with respect to the disclosure of classified information would result in field installations taking action which would be contrary to long established policies of the War Department and the Department of Justice and would render the making of reports as well as the conduct of proper liaison with the Department of Justice and the supervisory offices of the War Department extremely difficult.

13. The present procedure with respect to the disclosure of classified information permits the handling of all requests therefor, if necessary, within a few hours. The heads of the various divisions of the Department of Justice have been consulted regarding this proposal as well as some of the branches and services within the War Department. All of those consulted have expressed satisfaction with the present procedure and are of the opinion that delays and confusion would result from such a change.

14. It is my recommendation that no change be made with respect to the present procedure for the disclosure of classified information desired as evidence in litigation. I will be pleased to furnish any additional information you may desire or will be glad to have a representative of this office supplement these views at a conference with you or your representatives in the event a conference is deemed desirable.

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Myron C. Cramer

Myron C. Cramer,
Major General,
The Judge Advocate General.