



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
DIRECTIVE**

**DIRECTIVE NUMBER
603
DISTRIBUTION DATE
February 3, 2006**

1. **SUBJECT: RESPONSE TO THIRD-PARTY SUBPOENAS**
2. **PURPOSE:** To set forth procedures for responding to subpoenas served on the Department of Fair Employment and Housing (DFEH) by third parties involved in litigation to which the Department is not a party.
3. **BACKGROUND:** A subpoena is the legal procedure for requiring the attendance of a witness and/or production of documents at a particular time and place. In most instances, subpoenas are issued during the course of litigation conducted in federal court, state court or an administrative forum. The Department as an agency of the State of California is required to comply with a properly served subpoena, subject to the rights of privilege and confidentiality expressed in the California Constitution and by statute.
4. **PROCEDURES:**
 - A. **Processing a Subpoena Issued for Appearance of a Department Employee for Testimony at a Deposition or at a Trial before a State Court or Administrative Forum**
 - 1) Departmental employees may be subpoenaed to testify concerning the performance of their duties on behalf of the Department. This may be accomplished either by service of the subpoena directly upon the employee or by service of two (2) subpoenas upon the immediate supervisor of the particular employee or the designated agent for that supervisor. (Gov. Code, § 68097.1, subd. (a).)
 - 2) Upon receipt of a subpoena, the employee will:
 - a) Verify that the subpoena has been executed either by a clerk or judge of the court, an officer of the administrative forum or by an attorney at law.
 - b) Verify that a check in the amount of one hundred and fifty dollars (\$150.00) made out to the Department of Fair Employment and Housing has been provided with the subpoena.

If the subpoena is not properly executed and/or no check has been provided, the recipient will contact the issuer of the subpoena and inform him or her that the subpoena is invalid. (Code Civ. Proc., § 1985, subd. (c); Gov. Code, § 68097.2, subd. (b).)

- 3) Upon being served a valid subpoena:
 - a) The employee will calendar the date for appearance and
 - b) The employee will inform his or her supervisor of the required appearance.
 - c) In the event the proposed date is in conflict with the employee's calendar:
 - (1) The employee will inform his or her immediate supervisor of the conflict.
 - (2) With approval from the supervisor, the employee will contact the issuer of the subpoena to arrange alternative dates.
 - (3) If the conflict cannot be resolved, the matter will be referred to the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is unavailable.
- 4) The employee will consult with his or her supervisor regarding the need for legal representation at the appearance.
 - a) The supervisor and employee should consider such issues as:
 - (1) The complexity of the case;
 - (2) Problems peculiar to the case;
 - (3) Concerns peculiar to the case; and
 - (4) The experience of the employee.
 - b) If, in the opinion of the supervisor, legal representation appears necessary, the supervisor will contact the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is unavailable for consultation.

- 5) In making the appearance, the employee under subpoena will accurately log:
 - a) The time for travel to and from the appearance;
 - b) The amount of time he/she was required to remain for the appearance; and
 - c) The actual mileage required for travel from the employee's assigned work location to and from the location of the appearance;

- 6) At the completion of the appearance required by the subpoena, the employee will forward to the Accounting Office at Headquarters the following for processing:
 - a) A copy of the subpoena;
 - b) The issuer's check in the amount of one hundred and fifty dollars (\$150.00); and
 - c) A log of the total time spent for travel and appearance and the total mileage required to travel.

- 7) The Accounting Office will:
 - a) Obtain from Personnel the hourly rate of the employee's salary.
 - b) Calculate the amount of salary necessary to cover the subpoenaed employee's travel time and appearance time.
 - c) Calculate the total mileage at a rate of twenty cents (\$0.20) per mile.
 - d) Add the amount calculated for salary to the amount calculated for mileage.
 - e) If the resulting total is more than one hundred and fifty dollars (\$150.00), the Accounting Office will bill the issuer of the subpoena for the difference.
 - f) If the resulting total is less than one hundred and fifty dollars (\$150.00), the Accounting Office will issue a check to the issuer of the subpoena for the excess amount paid to the Department.

- g) The issuer's check for one hundred and fifty dollars (\$150.00) will be processed by the Accounting Office. (Gov. Code, §§ 68093 and 68097.2.)

B. Processing a Subpoena Issued for Production of Documents before a State Court or Administrative Forum (Subpoena Duces Tecum)

- 1) Documents maintained by the Department are routinely sought through the service of a subpoena duces tecum or a deposition subpoena on one of the Department's district offices. The subpoena often identifies the Custodian of Records as the individual who must provide the requested documents.
- 2) Upon receipt of a subpoena requesting documents:
 - a) The Custodian of Records will verify that the subpoena has been executed either by a clerk or judge of the court, an officer of the administrative forum or by an attorney at law.
 - b) If the subpoena is not properly executed, the Custodian of Records will contact the issuer of the subpoena and inform him or her that the subpoena is invalid. (Code Civ. Proc., § 1985.)
- 3) Upon verifying the validity of the subpoena, the Custodian of Records will calendar the date for production of the documents. The production of the documents will not occur prior to the date stated on the subpoena duces tecum. (Code Civ. Proc., § 1985 *et seq.*)
- 4) The Custodian of Records will search the district office for documents responsive to the subpoena. If at any time, the Custodian of Records determines the date and time stated on the subpoena for production cannot be met, the Custodian of Records will consult with his or her supervisor. With the approval of the supervisor, the Custodian of Records will contact the issuer of the subpoena to arrange alternative dates for production. If an agreement cannot be reached as to an alternate date, the matter will be referred to the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is unavailable.
- 5) If the Custodian of Records receives a Motion to Quash the subpoena prior to the date scheduled for production, the Department will not produce any records. The Custodian of Records will so inform the District Administrator. The District Administrator will contact the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is unavailable for further direction. (Code Civ. Proc., § 1985 *et seq.*)

- 6) If a Motion to Quash is not pending, the Custodian of Records will produce or make available only records responsive to the subpoena. However, documents prepared by the Department's Legal Division are normally privileged. The Custodian of Records must confer with the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is not available before producing these documents.
 - a) In the event the subpoena requests a Department investigative file, only the following will be produced:
 - (1) Complaint of Discrimination
 - (2) Response to Complaint of Discrimination
 - (3) Investigative notes
 - (4) Interview notes
 - (5) Departmental memoranda or correspondence, with the following exclusions:
 - (a) Any memorandum directed to or from Department counsel.
 - (b) Any notes or memoranda generated during the Department's efforts to settle or resolve the complaint.
 - (6) Employment records, medical records, bank records, financial records and other similar records obtained in the course of the Department's investigation. However, these documents can only be produced when:
 - (a) The Department has received a proof of service evidencing that a Notice to Consumer/Employee was served on the person(s) whose records are contained in our file AND
 - (b) There has been no objection communicated by this person(s) to the Department.
 - (7) Rental applications, credit checks, mortgage applications and similar records obtained in the

course of the Department's investigation. However, these documents can only be produced when:

- (a) The Department has received a proof of service evidencing that a Notice to Consumer/Employee was served on the person(s) whose records are contained in our file AND
 - (b) There has been no objection communicated by this person(s) to the Department.
- b) Other examples of documents which are considered records of a consumer/employee (requiring a Notice to Consumer/Employee and no objection) include W-2 statements, tax returns, paycheck stubs, personal checks, EDD statements, other IRS or state taxing agency forms, government identification, etc. (Cal. Const., art. 1, § 1; Code Civ. Proc., § 1985 *et seq*; Civ. Code § 56 *et seq*.)
- 7) In the event a person whose records are being sought contacts the district office and objects to the production of their records, the Custodian of Records will take the following steps:
- a) The Custodian of Records will notify the attorney who issued the pertinent subpoena of the objection. Any questions raised by the attorney who issued the subpoena will be referred for handling to the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is unavailable
 - b) The Custodian of Records will separate from the production of documents those records relating to the objection.
 - c) The Custodian of Records will contact the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is not available and inform the Department counsel about the documents being sought and the objection that was made.
 - d) The records to which there has been an objection will not be produced until the Department's attorney has authorized said production. All other documents will then be produced. (Code Civ. Proc., § 1985 *et seq*.)
 - e) Any further efforts made by the attorney issuer of the subpoena to obtain production of those documents which

were not produced because of objection, will be referred to the Department attorney who was informed of the matter.

- 8) After the Custodian of Records has completed the search for documents responsive to the subpoena, the Custodian of Records will execute the Custodian's Certification In Response To Subpoena (DFEH-400-13).
 - a) The Custodian of Records will check the appropriate box as to the existence or non-existence of records responsive to the subpoena and sign and date the document.
 - b) In no event, is the Custodian of Records permitted to execute any other declaration or certification without the permission of his or her supervisor.
- 9) If the subpoena directs the Custodian of Records to make the records available for copying by a copy service or a deposition officer at the district office, the Department will collect a fee of fifteen dollars (\$15.00). A check in this amount will be made payable to the Department of Fair Employment and Housing and submitted to the Custodian of Records at the time the documents are copied. (Evid. Code, § 1563, subd. (b)(6).)
- 10) When the subpoena directs the Custodian of Records to copy and produce the documents to the issuer of the subpoena either at the issuer's place of business or at the court, the Department is entitled to reasonable costs which have been incurred.
 - a) Reasonable costs are calculated at ten cents (\$0.10) per page and six dollars (\$6.00) per quarter hour of clerical time spent locating and copying the documents plus any postal charges.
 - b) The Custodian of Records will prepare an itemized bill on Department letterhead reflecting the number of hours spent to the nearest quarter hour, the total of pages copied and postal charges, if any.
 - c) The itemized bill will be presented to the issuer of the subpoena for payment at the time the documents are ready for delivery. The Department will require payment to be made prior to the actual delivery of the documents. (Evid. Code, § 1563, subd. (b)(1).)
- 11) In addition to reasonable costs identified above, should the subpoena require the appearance of the Custodian of Records to provide testimony, the Department is entitled to:

- a) Witness fees of thirty-five dollars (\$35.00) and
 - b) Mileage at the rate of twenty cents (\$0.20) per mile traveled to and from the custodian of record's assigned work location to the location for the appearance.
 - c) A check in this amount payable to the Department of Fair Employment and Housing and provided to the Custodian of Records at the time of the appearance. (Evid. Code, § 1563, subd. (c); Gov. Code, § 68093.)
- 12) All charges collected by Department staff in connection with any subpoena directed to the Department shall be forwarded to the Accounting Office in Headquarters along with a copy of the subpoena and the itemized bill for reasonable costs.

C. Processing a Subpoena Issued for Appearance of a Department Employee and/or Production of Documents before a Federal Court or Administrative Forum

- 1) Any staff member receiving a subpoena or subpoena duces tecum issued under the authority of a federal court or federal administrative forum will immediately notify his or her immediate supervisor.
- 2) The supervisor will contact the attorney assigned to the district office or the Chief Counsel, if the assigned attorney is unavailable.
- 3) Arrangements to deliver to the Department attorney copies of the subpoena and accompanying documentation will be made as soon as practicable.
- 4) The supervisor will coordinate with the Department attorney those steps necessary to comply with the federal subpoena.

5. APPROVAL:

Suzanne M. Ambrose, Director

Date