

**Department of the Interior**  
**Departmental Manual**  
Freedom of Information Act Handbook  
(383 DM 15)

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**Effective Date:** 4/22/04

**Chapter 5:** FOIA Exemptions

**Originating Office:** Office of the Chief Information Officer

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5.1 General. Under the FOIA there are nine exemptions and three law enforcement exclusions that serve as a basis for withholding information from the public. The nine exemptions are listed below and discussed at length in this chapter.

Exemption 1 - Matters of National Defense or Foreign Policy

Exemption 2 - Internal Personnel Rules and Practices

Exemption 3 - Information Exempted by Other Statutes

Exemption 4 - Trade Secrets, Commercial or Financial Information  
(Confidential Business Information)

Exemption 5 - Privileged Interagency or Intra-agency Memoranda  
or Letters

Exemption 6 - Personal Information Affecting an Individual's Privacy

Exemption 7 - Records Compiled for Law Enforcement Purposes

Exemption 8 - Records of Financial Institutions

Exemption 9 - Geological and Geophysical Information  
Concerning Wells

5.2 Decisions to Withhold Information.

A. Bureaus will withhold information responsive to a FOIA request only if it is protected from release by one of the nine statutory exemptions (see paragraph 5.1 of this Chapter) or if one of the law enforcement exclusions discussed in paragraph 1.3B of Chapter 1 is applicable. DOI rarely uses the two law enforcement exclusions available to it. Before withholding information based on one of the exemptions or a law enforcement exclusion, the bureau must consult with the Office of the Solicitor (SOL).

B. The exemptions may apply singly or in combination to a given request. If information does not fall under any of the exemptions, there is no basis for withholding. Any reasonably segregable non-exempt portions of a document must be released after deletion of the exempt portions (see paragraph 5.7B (1) (c) of this Chapter).

C. Examples of information withheld under each exemption are discussed below. They are not intended to be all inclusive or to apply in every situation. All records must be reviewed on a case-by-case basis.

D. Depending on how current the information is, whether an action is pending or has been completed, and other related circumstances, release may be appropriate on a discretionary basis even if it is otherwise protected by an exemption.

E. If it is unclear as to whether specific documents fall under any of the exemptions, consult the FOIA Officer or the designated FOIA attorney for the bureau/office, or the Departmental FOIA Officer for guidance. In accordance with 43 CFR 2.21(f), any decision to withhold a record will be made only after consultation with the bureau's designated FOIA attorney.

5.3 Exemption 1 - Matters of National Defense or Foreign Policy. This exemption allows an agency to withhold information concerning the national defense or foreign policy providing that it has been properly classified under Executive Order 12,958, Classified National Security Information (dated October 14, 1995), or superseding Executive order.

5.4 Exemption 2 - Internal Personnel Rules and Practices. Exemption 2 protects from public disclosure records that are related to the internal personnel rules and practices of an agency. It includes two distinct categories of records:

A. Those dealing with internal matters of a relatively trivial nature for which there is no legitimate public interest or benefit (referred to as "low 2."). Exemption "low 2" is applicable when it would impose an administrative burden on the agency to process and release the requested records. Examples of records protected under "low 2" include information relating to the use of parking facilities, lunch hours, sick and annual leave rules, etc.

B. Those of a more substantive nature, the disclosure of which would allow circumvention of a statute or agency regulation, or impede the effectiveness of the agency's activities (referred to as "high 2"). The premise under "high 2" is that disclosure should not benefit those attempting to violate the law and avoid detection. Examples of records protected under "high 2" include:

(1) Agency procedures, manuals and instructions concerning investigatory or security matters, e.g., records that reveal how investigations or audits are conducted, security techniques, etc.);

(2) Sensitive information related to America's Homeland security, including

critical infrastructure information (e.g., inundation maps, vulnerability assessments, plans, blueprints, and architectural drawings of Federal buildings, National monuments, etc.);

(3) Agency records which, if released, would give someone an unfair advantage in the job selection process and may require the office to create replacement documents (e.g., examination questions and answers; crediting plans used in determining the qualifications of a candidate for employment, advancement or promotion; and criteria for interviewing prospective employees, etc.)--these records can be withheld only if a bureau intends to use the documents in the future;

(4) Government charge card numbers (the details of purchases more than likely have to be released); and

(5) Information related to computer security the release of which could result in the alteration, loss, damage, or destruction of data contained in computer systems, e.g., computer security plans, passwords, IP addresses, and URL addresses of restricted web sites.

#### 5.5 Exemption 3 - Information Exempted by Other Statutes.

A. This exemption allows an agency to withhold records that are specifically exempt from disclosure by other Federal statutes. Information may be withheld only if the statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

B. Exemption 3 statutes applicable to DOI include (see DOI's FOIA home page for an updated listing):

(1) Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. 1350 through 1352;

(2) Federal Coal Leasing Act Amendments of 1976, including the provisions of the Mineral Leasing Act, 30 U.S.C. 201(b)(3) and 208-1(b) through (e);

(3) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1257, 1258, and 1262;

(4) Archaeological Resources Protection Act of 1979, 16 U.S.C. 470hh (a);

(5) National Materials and Minerals Policy, Research and Development Act of 1980, 30 U.S.C. 1604(f);

(6) National Historic Preservation Act Amendments of 1992,

16 U.S.C. 470w-3;

- (7) Indian Mineral Development Act of 1982, 25 U.S.C. 2103(c);
- (8) Federal Cave Resources Protection Act of 1988, 16 U.S.C. 4301;
- (9) Indian Gaming Regulatory Act, 25 U.S.C. 2701;
- (10) Rule 6(e), Federal Rules of Criminal Procedure (Grand Jury), 18 U.S.C. Appendix;
- (11) Juvenile Justice Delinquency and Prevention Act of 1974, as amended, 18 U.S.C. 5038;
- (12) Inspector General Act of 1978, as amended, 5 U.S.C. Appendix 3;
- (13) Federal Property and Administrative Services Act, 41 U.S.C. 253b, as amended by the National Defense Authorization Act for FY 1997, Pub. L. 104-201; and
- (14) National Parks Omnibus Management Act of 1998, 16 U.S.C. 5937, Section 207.

C. Examples of information protected by some of the above exemption 3 statutes include:

- (1) Material collected by investigators and submitted to a grand jury (Federal Rules of Criminal Procedure);
- (2) Certain witness interviews (Inspector General Act of 1978);
- (3) The identity of employee whistleblowers (Inspector General Act of 1978);
- (4) Certain information related to archaeological and/or historic resources (Archaeological Resources Protection Act of 1979).
- (5) The location of caves and artifacts found (Federal Cave Resources Protection Act of 1988);
- (6) Names and contract proposals of unsuccessful bidders (vendors) (Federal Property and Administrative Services Act, 41 U.S.C. 253b, as amended by the National Defense Authorization Act for FY 1997);
- (7) In certain circumstances, information concerning the specific location of a National Park System resource, e.g., a threatened or endangered species within a unit of the National Park System (National Parks Omnibus Management Act of 1998, section 207); and

(8) Information regarding the location of a historic property included in or eligible for inclusion on the National Register (National Historic Preservation Act Amendments of 1980).

D. The Privacy Act and the Trade Secrets Act are not exemption 3 statutes.

(1) Privacy-protected information should be considered under exemptions 6 and 7(C).

(2) Information involving commercial/financial interests should be considered under exemption 4.

5.6 Exemption 4 - Trade Secrets, Commercial or Financial Information (Confidential Business Information). Exemption 4 protects trade secrets and commercial or financial information that is obtained from a person and is privileged or confidential.

A. This exemption is intended to protect both the interests of commercial entities that submit proprietary information to the Government and the interests of the Government in receiving continued access to such data.

B. Exemption 4 is not applicable if the information is generally available to the public, e.g., if it is published in the company's annual report or available through the Securities and Exchange Commission, or would be made available if requested from the submitter.

C. The following criteria will be used to determine whether exemption 4 is applicable:

(1) Trade Secrets. The records must contain information regarding a trade secret. A trade secret is defined as a secret, commercially valuable plan, formula, process, or device used to make, prepare, or process a commodity. Because this is a rarely used aspect of exemption 4, any bureau considering using it should consult the bureau's designated FOIA attorney.

(2) Commercial or Financial Information.

(a) The records must contain commercial or financial information. Information is commercial if a person has a commercial interest in it (see paragraph 1.5G of Chapter 1).

(b) The information must be obtained from a person. A person may be a corporation, association, a state or local government, or any public or private organization, including an Indian tribe. An agency of the Federal Government would not be a person for the purposes of this provision (see paragraph 5.7B (4) of this Chapter regarding the protection of Government commercial information).

(c) The information must be privileged or confidential. The

test for whether commercial or financial information is confidential depends in part on whether the information was voluntarily or involuntarily submitted to the Government.

(i) Where a submitter voluntarily provides information to the Government, the information will be considered confidential for the purposes of exemption 4 if “it is of a kind that would not customarily be released to the public by the person from whom it was obtained.” The agency has the burden of proving that the submitter does not customarily release the information to the public.

(ii) Where the Government requires the submitter to provide information, commercial or financial information is “confidential” for purposes of exemption 4 if disclosure is likely to have either of the following effects:

(A) Impair the Government's ability to obtain necessary information in the future. The agency must be able to demonstrate that the submitter would not have provided the information if he/she believed it would be subject to disclosure or that the reliability or quality of the information it receives from the submitter in the future would be diminished.

(B) Cause substantial competitive harm to the person/business from whom the information was obtained. If no competition exists (i.e., the company is the sole producer of a given product), then the information cannot be withheld under the premise that release would cause competitive harm; or

(C) Harm an identifiable private or governmental interest, e.g., impair the effectiveness of a Government program or agency compliance.

D. A submitter's voluntary participation in an activity--such as seeking a Government contract or applying for a grant or loan, does not govern whether any submissions made in connection with that activity are likewise voluntary. Bureaus should focus on whether the Government required those who chose to participate in a given activity or process to submit the information at issue. Information is considered required if any legal authority compels submission as a condition of doing business with the Government.

E. Government documents may be protected under exemption 4 to the extent that they contain summaries or reformulations of information supplied by an outside source.

F. In accordance with Executive Order 12,600, Predisclosure Notification Procedures for Confidential Commercial Information, June 23, 1987, or superseding Executive order, and 43 CFR 2.23, bureaus will notify submitters when their data is requested under the FOIA to determine if the material is confidential and exempt from disclosure (see paragraph 3.23 of Chapter 3). That notice must give submitters a reasonable amount of time to comment on the proposed release before the bureau releases the information.

G. The bureau must maintain adequate records to support its decision to disclose

commercial or financial information in case a lawsuit is filed by the submitter (commonly called a “reverse FOIA.”)

H. Examples of information the courts have found to be properly withheld under exemption 4 include:

(1) Commercial or financial information received in confidence in connection with bids, contracts, or proposals, including:

- (a) Assets, income, profits, losses, and expenditures;
- (b) Names of consultants, subcontractors, and suppliers; performance, cost, and equipment information;
- (c) Labor costs, profit margins, and competitive vulnerability;
- (d) Business sales statistics, research data, and technical designs;
- (e) Financial statements and balance sheets;
- (f) Price negotiation memos;
- (g) Names of customers and amounts and discounts offered to them;
- (h) Resumes and other employee-related information such as what the company pays its employees;
- (i) A company's internal organization chart;
- (j) Letters of reference from private sector clients;
- (k) Approach and methodology for accomplishing work set forth in the solicitation; and
- (l) Plant facility reports.

(2) Scientific and manufacturing processes or developments containing technical or scientific data submitted with an application or report while research is in progress.

(3) Solid mineral information, including production data and royalty statistics.

(4) Geophysical information--location of oil and gas wells, drilling plans, exploration data, geologic reports, maps, etc.

(5) Financial information maintained on Indian tribes.

5.7 Exemption 5 - Privileged Interagency or Intra-agency Memoranda or Letters.

A. Exemption 5 is designed to protect those interagency and intra-agency memoranda or letters, which would not be available, by law to a party in litigation with the agency (i.e., those records which normally would not be made available through the discovery process--the means by which the parties involved in a lawsuit exchange information prior to a hearing or trial).

(1) This exemption applies to inter- or intra-agency records--records that are transmitted within or among DOI components, or between or among Federal agencies.

(2) In some circumstances, it may also apply to documents generated outside of an agency. Documents prepared by outside consultants at the request of the agency and recommendations or advice from Congress or the States can be protected if those documents played a role in the agency's deliberative process and the outside parties are not advocating their own interests in seeking a Government benefit at the expense of others. This may include Indian tribes under limited circumstances. However, the bureau should conclude that documents generated outside of the Federal Government meet the "intra- or inter-agency" threshold requirement only after consulting with its designated FOIA attorney.

(a) Communications to or from an outside party will meet the threshold test (i.e., the communications would qualify as inter- or intra-agency records) where the outside party does not represent his/her own interest, or an interest of another client, when it gives advice to the agency.

(b) Communications to or from outside parties who, though characterized as consultants by an agency, communicate with the agency in order to advance their own self-interest at the expense of others seeking benefits, would not meet the exemption 5 threshold.

(c) On the other hand, communications from an outside party who represents its own self interest, but not at the expense of others seeking benefits, may meet the exemption 5 threshold requirement. Examples might include tribal communications with a bureau regarding an asset entirely its own (i.e., tribal timber, mineral, oil or gas deposits) the use of which would not deprive others of their use.

(d) If the documents meet the threshold and contain information covered by an exemption 5 privilege, it qualifies for protection under exemption 5.

(e) The courts have made it clear that exemption 5 does not protect, on the basis of the trust relationship alone, communications between the Indian tribes and the Department, and bureaus cannot withhold communications with the tribes solely on that basis.

B. Four of the privileges most commonly invoked under exemption 5 are discussed below:

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(1) Deliberative-Process Privilege.

(a) This privilege is designed to protect the quality of the agency's decisionmaking process, i.e.:

(i) To encourage candid and frank discussions among agency officials;

(ii) To protect against premature disclosure of proposed policies before they are finally adopted; and

(iii) To avoid public confusion that might be caused by disclosing reasons and rationales that were not ultimately the basis for an agency's action.

(b) In order to fall within this privilege, the material must be both predecisional and deliberative (i.e., part of the decisionmaking process in that it includes opinions, recommendations, or deliberations on legal or policy matters). Generally, protected information is analytical and subjective rather than factual. In determining whether a document is predecisional and deliberative, the following should be considered:

(i) The document's language and its place in the decisionmaking process. Predecisional, deliberative documents are written prior to the agency's final decision and usually contain recommendations or opinions, or represent the agency's tentative position on an issue. They typically discuss the pros and cons of the adoption of one viewpoint over another.

(ii) The decisionmaking authority of the person issuing the document, i.e., whether the person who issues the document has the authority to speak finally and officially for the agency. If the author lacks the authority to make the final decision for the agency, the document is more likely to be predecisional.

(iii) The direction in which the document flows in the decisionmaking chain. Documents written by a subordinate and transmitted to a superior are more likely to be predecisional than those written by a person who is in a position to make the final decision for the agency.

(c) The deliberative process privilege generally may not be used to withhold purely factual material or the factual portions of deliberative documents. The factual portions must be released where they can be segregated from the deliberative portions of the document. However, if the manner of selecting or presenting those facts would reveal the deliberative process or if the facts are inextricably intertwined with the decisionmaking process, the facts may be withheld. Agencies also may withhold factual material where the facts are such a negligible part of the document that releasing them would be meaningless.

(d) Drafts of documents are exempt under the deliberative process

privilege. They must be part of the decisionmaking chain and prepared prior to the adoption of a final agency position. Drafts are reflective of the give and take of the review process that leads to a decision--agency officials need to be able to talk and discuss issues freely. However, labeling a document "Draft" does not in itself protect the material.

(e) The deliberative process privilege may be used to protect a draft regardless of whether it differs from the final version providing the agency is able to show that it is part of the decisionmaking process and describes the role that the document plays in that process. An exception to withholding a draft document is when an agency cites it as binding precedent, adopts it as working agency law, or incorporates it by reference in a final agency decision. If several recommendations are presented in a draft and only one is adopted, the unadopted recommendations may be withheld under the deliberative process privilege of exemption 5.

(f) Final documents (documents that represent the final agency action on an issue) and generally post-decisional documents which discuss, analyze, or explain established policies and decisions may not be withheld under this privilege. Under certain circumstances, a post-decisional document may be withheld if it contains predecisional information, e.g., guidance for decisions of similar cases arising in the future or information that reflects the agency's decisionmaking process or the author's own recommendations.

(2) Attorney-Work-Product Privilege. This privilege protects documents and other memoranda prepared by an agency attorney during or in anticipation of litigation, including administrative proceedings. It covers litigation-related documents prepared by an attorney or under his/her direction that reveal the attorney's mental impressions, theories of the case, legal strategies, such as reports prepared by a consultant or a program employee which were prepared under the direction of any attorney in anticipation of litigation. Litigation need not have started but it must be reasonably contemplated, i.e., a specific claim must exist that is likely to lead to litigation. The privilege still applies after a case has ended or even if it never was begun, as long as it was reasonably contemplated. Attorney-work-product documents may be withheld in their entirety because unlike the deliberative-process privilege, the attorney-work-product privilege protects facts.

(3) Attorney-Client Privilege. This privilege applies to confidential communications between an agency attorney and his/her client (here the client is the Department, which acts through its employees), relating to a legal matter for which the client has sought professional advice. The privilege is designed to protect the client so only the client can waive this privilege. Unlike the attorney-work-product privilege, the use of the attorney-client privilege is not limited to instances where litigation is expected. However, in order to withhold information under this privilege, the documents must meet 4 elements: 1) the non lawyer must have been or sought to be a client of the lawyer; 2) the lawyer must have acted in the capacity as a lawyer; 3) the document must relate to facts communicated confidentially to secure a legal opinion; and 4) the client must not have waived the privilege. If it is shared with persons outside the attorney-client relationship, exemption 5 may no longer be used to protect the information. Information circulated within the agency to employees involved in the matter for which advice is sought does not breach confidentiality. Special rules apply to communications between

attorneys and clients on individual Indian trust matters. The bureau should consult its designated FOIA attorney on these matters. Factual information may only be withheld under this privilege if it is part of the confidential communication. If the facts are not covered by the four elements of the attorney-client privilege, they must be segregated and released.

(4) Government Commercial Information Privilege. This privilege is available to the Government for information that it generates in the course of its business dealings, such as the process leading up to the award of a contract, or for some appraisal information associated with the acquisition of real property. The premise is that premature release of such information would put the Government at a competitive disadvantage or would endanger the consummation of a contract. However, once the contract has been awarded, property acquired, or the offer withdrawn, the privilege expires. The privilege applies to trade secrets or other confidential research, development, or commercial information generated by the Government. Factual information in the document, that would not compromise the Government's position, must be segregated and released.

C. Examples of materials covered by exemption 5 may include:

- (1) Advisory opinions, recommendations, and deliberations which are part of the decisionmaking process (deliberative process privilege);
- (2) Draft documents regardless of whether they differ from the final version (deliberative process privilege);
- (3) The nonfactual portions of predecisional staff papers, containing staff evaluations, advice, opinions, or suggestions (deliberative process privilege);
- (4) Recommendations contained in official reports of inspection, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one of DOI's components (deliberative process privilege);
- (5) Ratings given to job applicants by panel members (ratings may be released if they cannot be linked to the panel members who gave them) (deliberative process privilege);
- (6) In some circumstances, advisory material prepared on behalf of the agency by consultants (deliberative process privilege);
- (7) Information of a speculative, tentative, or evaluative nature on such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to a private entity in its dealings with the Government, or would impede the activities of the agency (deliberative process privilege/commercial information privilege);
- (8) Financial formulas used to determine the financial capability of a contractor (deliberative process privilege/commercial information privilege);

(9) Certain information in an appraisal generated by the Government or on its behalf (commercial information privilege);

(10) Cost estimates, technical ratings and evaluations, and recommendations for award prepared by the Government (deliberative process privilege/commercial information privilege);

(11) Facts divulged by a client to his/her attorney in confidence and opinions given by an attorney to his/her client based upon those facts (attorney-client privilege);

(12) Information gathered by agency investigators under the direction of agency attorneys (attorney work-product);

(13) Memoranda prepared by an agency attorney that advise an agency of the types of legal challenges it may face in light of a proposed program, potential defenses available to the agency and the likely outcome (attorney work-product); and

(14) Records prepared by an agency attorney concerning his/her legal strategy in a case that are exchanged among agency personnel or with other agencies in preparing for litigation or an administrative proceeding (attorney work-product).

5.8 Exemption 6 - Personal Information Affecting an Individual's Privacy.

A. This exemption permits the withholding of information about individuals in personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(1) To warrant protection under exemption 6, the information must fall within the category of personnel, medical, or similar files. The term "similar files" applies to any file or document that pertains to a specifically identifiable individual and contains information that can be identified as applying to that person. Examples of "similar files" may include:

(a) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be, or has been taken that are identified to a specific individual;

(b) Aircraft and personal injury report files;

(c) Files containing information related to permits, applications, and licenses; and

(d) Certain information in reports of investigation (see paragraph 5.9C).

(2) Records concerning a business or association generally may not be withheld under exemption 6 (e.g., business addresses and telephone numbers). In certain circumstances, where the business is owned and operated by an individual and the records of the

business are in essence the records of the individual, the exemption may apply. If a bureau believes this exceptional situation exists, it should consult its Designated FOIA Attorney.

B. The bureaus should consider the following in making decisions under exemptions 6 and 7(C) (see paragraph 5.9C of this Chapter pertaining to exemption 7(C)):

(1) Determine whether a privacy interest exists. There must be a privacy interest in the requested information for any further consideration of privacy-exemption protection to be considered.

(a) To qualify, the information must concern the privacy interest of an identifiable, living person (see paragraph 5.8B (7), below).

(b) A privacy interest exists if disclosure of the information to the public would violate the privacy of the subject individual, and/or could cause injury or embarrassment to the individual.

(c) If a personal privacy interest does not exist, then exemptions 6 and 7(C) do not apply.

(d) Exemption 6 material that is covered by the Privacy Act may be released with the prior written consent of the person who is the subject of the record (see paragraph 3.15D of Chapter 3). However, there is no requirement for prior written consent for exemption 6 information that is not covered by the Privacy Act. Whether this information should be released is determined by the balancing test.

(2) If there is a privacy interest, determine whether there also is a public interest.

(a) Would disclosure of the information shed light on the agency's performance of its statutory duties? Information that reveals little or nothing about the operations or activities of the Government does not meet the public interest standard and should be withheld.

(b) Consider how disclosure would benefit the general public in light of the content and context of the requested document.

(c) The requester's particular purpose, circumstances, and proposed use should not be taken into account, except to the extent that it may coincide with an identifiable public interest.

(3) Balance the personal privacy interest against the public interest. If the bureau determines that a public interest is present, then that interest should be balanced against the personal privacy interest. The benefit to the public must be weighed against the potential harm to an individual's personal privacy. If the privacy interest is greater, the information should be

withheld. If the public interest is greater, the material should be released.

(a) A privacy interest may still exist even though personal information has been made available to the general public at some place and point in time (this is referred to as the practical obscurity standard). In such situations, the bureau FOIA Officer and the designated FOIA attorney should be consulted.

(b) The fact that disclosure of certain information about a particular individual to the media might be interesting to the public does not in and of itself create a public interest that is recognized under the FOIA. Disclosure must reveal something about the operations or activities of the agency in order to be considered as a public interest in the balancing test.

(4) A requester's particular knowledge of, or relationship to, the information in question should not be considered in deciding FOIA requests. For example, an agency should not disclose information to the spouse or relative of the subject individual that they would withhold from any member of the general public.

(5) The identity of a FOIA requester cannot be taken into consideration in considering what should be released. An exception to this rule is that a bureau may not invoke exemption 6 or 7(C) where the only privacy interest to be protected is the requester's. For example, if a requester asks for a copy of a study or report--a record not covered by the Privacy Act--and it contains his/her home address, the bureau cannot withhold the requester's home address from him/her. Normally these exemptions cannot be used to withhold information from a requester that he/she would be entitled to under the Privacy Act (information about himself/herself).

(6) Exemptions 6 and 7(C) generally may be used only to protect the privacy of living individuals--not businesses or deceased persons. However, in some cases, they may be invoked to protect the family of the deceased. Particularly sensitive, often graphic, personal details about the circumstances surrounding an individual's death may be withheld when necessary to protect the privacy interests of surviving family members. For example, the audiotape of the Challenger astronauts recorded immediately before their deaths was withheld to protect the family members from the pain of hearing the final words of their loved ones. In another case involving the National Park Service, the autopsy and death photographs of an individual were withheld to protect the family members from the pain of seeing them. Also, privacy information about a deceased member of a tribe may be withheld in order to protect the privacy interests of a surviving relative.

(7) After the privacy-protected, personal identifying information has been deleted, all reasonably segregable, nonexempt portions of the requested records must be released.

(8) In accordance with 5 CFR 293.311, certain personnel-related information pertaining to present and former employees is generally releasable under the FOIA (see paragraph 3.29A of Chapter 3).

C. Examples of information withheld under exemption 6 may include:

(1) Personal identifying information such as name, social security number, military service number, home address, home telephone number except if the individual is operating a business out of his/her home, personal cell telephone number, fax number, and e-mail address, PIN, and beeper number is in and of itself protected by its nature;

(2) Information such as a particular individual's age, place and date of birth, marital status, party or union affiliation, education (not directly related to the position held, e.g., information about primary school, name of college attended, year of graduation (high school and college), etc.) and work experience (not directly related to the professional qualifications for the position held) of the employee or successful applicant, details of health and insurance benefits, allegations of misconduct or arrests, and information concerning or provided by relatives and references;

(3) Payroll information--number of deductions and the amounts, fringe benefit payments, number of withholding exemptions and net wages (the gross salary is releasable), hours worked, and rate of pay per hour (not valid for Wage Grade employees);

(4) Financial information such as an individual's credit rating and personal credit card numbers;

(5) Information pertaining to security and law enforcement officials, e.g., their names (including the name of the Secretary's security detail) (see paragraph 5.9F(4) of this Chapter) and pager and cell telephone numbers;

(6) The following types of personnel-related information:

- (a) Performance appraisals;
- (b) Supervisory evaluation of a candidate for a particular position;
- (c) Identities and qualifications of unsuccessful job applicants;
- (d) The knowledge, skills, abilities and personal characteristics of unsuccessful applicants;
- (e) Referral lists of qualified candidates and the roster of applicants for a particular position, except for the successful candidate;
- (f) Justifications for awards based on performance of the employee's duties;
- (g) Reasons for job termination;
- (h) Results of a complaint by an employee against his/her supervisor; and
- (i) Letters of reprimand and suspension notices.

(7) Mailing lists that contain names and home addresses where the release would not shed light on the operations or activities of the Government; and

(8) Records on an employee's medical condition, history, and health test results.

5.9 Exemption 7 - Records Compiled for Law Enforcement Purposes. Exemption 7 protects records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could cause one of the harms specified below. In order to invoke exemption 7, an agency must demonstrate that the requested records were compiled for a law enforcement purpose. The law to be enforced within the meaning of the term law enforcement purposes includes civil (e.g., EEO statutes) as well as statutes authorizing administrative and regulatory proceedings. The records do not have to be initially compiled for law enforcement purposes, so long as they are being used for that purpose at the time the response to the FOIA request is made. Exemption 7 allows withholding if the production of such law enforcement records or information:

A. Could reasonably be expected to interfere with enforcement proceedings (Exemption 7(A)).

(1) Law enforcement proceedings include civil and criminal proceedings. In order to qualify for exemption 7(A) protection, the agency must show that a law enforcement proceeding is pending or prospective and disclosure of the documents could reasonably be expected to cause harm, i.e., disrupt, impede, delay, or otherwise harm the enforcement proceeding (e.g., destroy or alter the evidence or intimidate a witness).

(2) Generally, an agency may invoke exemption 7(A) as long as the law enforcement proceeding remains pending or prospective. Once the proceeding is closed, the information can be withheld only if another exemption applies.

(3) Agencies may make categorical withholdings of documents under exemption 7(A) if they can show that release of particular kinds of documents would generally interfere with enforcement proceedings. If documents do not fall under one of the categories, then they must be released.

(4) Examples of categories of information that may be withheld under exemption 7(A) include: reports of investigation, witness statements, lab reports, evidence logs, affidavits, and audit reports where an investigation is involved.

B. Would deprive a person of a right to a fair or an impartial adjudication (Exemption 7(B)). This exemption is rarely used. Contact the bureau's designated FOIA attorney before using exemption 7(B) to withhold information.

C. Could reasonably be expected to constitute an unwarranted invasion of personal privacy (Exemption 7(C)).

(1) As with exemption 6, exemption 7(C) requires identifying and balancing the relevant privacy and public interests to determine whether disclosing certain law enforcement information could cause an unwarranted invasion of personal privacy (see paragraph 5.8B). Under exemption 7(C), agencies may determine that a certain type of information may be protected always (categorical withholding) regardless of the individual circumstances.

(2) Under exemption 7(C), the names and addresses of private individuals appearing in law enforcement files may be categorically withheld unless access is necessary to confirm or reject evidence that an agency is involved in an illegal activity.

(3) Individuals involved in a criminal investigation—including suspects, witnesses, interviewees, middle and low-ranking law enforcement officers, investigators, and other individuals named in investigatory files possess privacy interests under exemption 7(C), in not having their names revealed in connection with an investigation because disclosure may result in embarrassment or harassment. On the other hand, the names of supervisory law enforcement officers are normally released.

(4) An agency may continue to invoke exemption 7(C) even if the information is compiled into a non-law enforcement file at a later date if the non-law enforcement file essentially reproduces and is substantially the equivalent of all or part of an earlier record made for law enforcement purposes. Contact your designated FOIA attorney before making a determination on this issue.

(5) Examples of information that may be withheld under exemption 7(C) include the following: names of low to mid-level special agents and law enforcement personnel, informants, witnesses, interviewees, and suspects (this information also may be withheld under exemption 6 (see paragraph 5.8C (4))).

D. Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source (Exemption 7(D)).

(1) The identity of a source is protected whenever he/she has provided information under either an express promise of confidentiality or under circumstances where such an assurance could reasonably be implied. In considering whether to invoke exemption 7(D), consider whether the information was furnished by a confidential source during the course of a legitimate law enforcement investigation.

(2) Not all sources furnishing information in the course of criminal investigations are entitled to a “presumption of confidentiality.” Source confidentiality must be determined on a case-by-case basis. Two factors should be applied in deciding whether implied confidentiality exists: the nature of the crime and the source’s relation to it. A key consideration is the potential for retaliation, reprisal, or harassment against the source who provided the

information.

(3) Under exemption 7(D), there is no balancing--if the source was confidential, the exemption may be invoked regardless of the public interest in disclosure. The nature of the information is not considered. The question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the source spoke under an express or implied promise that the communication would remain confidential.

(4) Exemption 7(D) may be used regardless of the fact that an investigation has been closed--its protection cannot be lost through the passage of time or the death of the source.

(5) Examples of information withheld under exemption 7(D) include: any information that might identify a confidential source such as interviews, affidavits, or another witness' reference to the source.

E. Would disclose: 1) techniques and procedures for law enforcement investigations or prosecutions; or 2) guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law (Exemption 7 (E)).

(1) Under the first clause of exemption 7(E), an agency does not have to show that a particular harm would be caused by release of the information. Information may receive categorical protection.

(2) Under the second clause of exemption 7(E), an agency has to show that harm would be caused by release of the information. The agency can only withhold those portions that would cause harm.

(3) Techniques and procedures may be withheld even if they are known to the public if disclosure could lessen their effectiveness.

(4) Examples of material the courts have found to be properly withheld under exemption 7(E) include: certain portions of the Inspector General's manual, information on interviewing techniques, and conducting surveillances and investigations.

C. Could reasonably be expected to endanger the life or physical safety of any individual (Exemption 7(F)).

(1) To withhold the names of individuals mentioned in law enforcement files or other information under exemption 7(F), an agency must show that there is a concern for the safety of people, i.e., release of the information could result in physical attacks, threats, risks to physical safety, or harassment.

(2) Exemption 7(F) is applicable even after a law enforcement officer has retired or after an individual has testified at trial.

(3) Agencies are not required to balance the public's interest in disclosure against the individual's personal privacy interest as in exemptions 6 and 7(C).

(4) Examples of material covered under exemption 7(F) include: names and other identifying information pertaining to law enforcement personnel, including the Secretary's security detail (see paragraph 5.8C (4) and 5.9C (5)), and critical infrastructure/sensitive information related to America's Homeland security, e.g., inundation maps, if disclosure could reasonably be expected to jeopardize our national security or endanger the life or physical safety of our citizens.

*Note: Under certain circumstances, records concerning pending investigations and informants may be considered as outside the scope of the FOIA (5 U.S.C. 552(c) (1) and (2)). These exclusions (see paragraph 1.3B of Chapter 1) are discussed in the DOJ FOIA Guide. In such instances, the designated FOIA attorney should be consulted.*

5.10 Exemption 8 - Records of Financial Institutions. Exemption 8 covers matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions such as the Federal Reserve Board or the Office of the Comptroller of the Currency. It generally does not apply to records in DOI's possession. Examples of documents withheld are:

- A. Bank examination reports--those evaluating a bank's stability, and its financial condition and operations, and
- B. Reports examining a bank's compliance with consumer laws and regulations.

5.11 Exemption 9 - Geological and Geophysical Information Concerning Wells. This exemption pertains to geological and geophysical information and data (including maps) concerning wells. Exemption 9 has been invoked to withhold well logs and maps, seismic reports, and other exploratory findings of oil companies. The exemption applies to wells broadly, including oil wells, natural gas wells, and water wells.

5.12 Waiver of Exemption. Depending upon the circumstances of the release, an agency may lose the right to invoke an exemption even when it is otherwise warranted, if the information has been disclosed previously, i.e., shared with parties outside the Federal Government. The Department has not waived its right to invoke an exemption in the following circumstances:

- A. When records are circulated within an agency or between Federal agencies;
- B. When material is disclosed to Congress (see paragraph 1.10A (2) of Chapter 1);
- C. Depending on the facts, when an agency must release a document under limited and controlled conditions, e.g., release of documents under a protective order in an administrative proceeding;

- D. Where prior disclosure was unauthorized or unlawful, e.g., a leak; or
- E. Where disclosure is in furtherance of a legitimate Government purpose.

*Note: Close coordination with the bureau's designated FOIA attorney is necessary whenever the issue of possible waiver arises. The bureau will consult with its designated FOIA attorney if it is unclear as to whether it has waived its right to invoke an exemption.*

5.13 Special Rules Governing Certain Information Concerning Coal Obtained Under the Mineral Leasing Act or the Mineral Leasing Act for Acquired Lands. See DOI's FOIA regulations, 43 CFR Part 2, Appendix F.

5.14 Discretionary Release. A discretionary release of otherwise exempt information may be appropriate consistent with DOI's FOIA policy. DOI's policy is subject to the Department of Justice's policy, which traditionally the Attorney General issues for each Administration.

A. Disclosure of information that is protected under exemptions 1, 3, and 4, and 6 and 7(C) (to the extent that they are covered by the Privacy Act) will in most instances be restricted from discretionary release by a statute or Executive order. Such documents are not subject to discretionary release.

B. On the other hand, documents covered by exemptions "low 2", 5, and 9 may be considered for discretionary release under certain circumstances. Legally it is possible to consider documents covered by exemptions "high 2," 6 and 7(C) (to the extent the information is not covered by the Privacy Act), 7(A), 7(B), 7(D), 7(E), and 7(F) for discretionary release. However, as a matter of Departmental policy, only in extremely rare circumstances would such information be subject to discretionary disclosure.

C. The bureau/office must consult with its Designated FOIA Attorney and obtain his/her surname before making a discretionary release of information.

D. The bureau/office will document the FOIA case file to reflect the fact that it has considered the interests that could be implicated by disclosure and include the reasons why a discretionary release is appropriate.

E. The bureau/office should advise the requester in its response that the requested information is exempt from disclosure under the FOIA, but that the bureau office has decided to exercise its discretion to release the information.

F. Discretionary release of information does not mean that all information related to the subject must be disclosed.