U.S. Department of the Treasury

The Freedom of Information Act Handbook

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FOR A BOUND, HARD COPY OF THIS HANDBOOK,
CONTACT DISCLOSURE SERVICES
AT 202/622-0930 OR ROOM 633 METRO. SQUARE

Departmental Disclosure Office
January 2000

The Freedom of Information Act Handbook

U.S. Department of the Treasury

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1. INTRODUCTION

During the time of your Treasury employment, you may be asked to process a Freedom of Information Act (FOIA) request for records. Both the FOIA and Treasury regulations contain rules and procedures that must be followed. This handbook will guide you through the process, from receiving the requester's letter to the administrative appeal stage.

This edition of the *Freedom of Information Act Handbook* includes guidance pertaining to the Electronic Freedom of Information Act Amendments of 1996 (EFOIA). Information is also available on the DONet site and on the Treasury Internet web site at http://www.treas.gov/foia.

If you have any questions, contact your bureau's disclosure office (on the list at the end of this chapter) or the Departmental Disclosure Office at 202/622-0930.

Policy

The Department's policy is to implement the FOIA uniformly and consistently and to provide maximum allowable disclosure of records. Therefore, if a record is requested by a member of the public, and the requester follows the rules for making a FOIA request, that record will be disclosed unless it is appropriately protected from disclosure by one or more of nine exemptions or by one of the three law enforcement record exclusions. Under the FOIA, Treasury's "openness in government" principle is in the form of discretionary disclosures. This means that even if the information can be withheld under a FOIA exemption, the information should be disclosed unless a foreseeable harm to an interest protected by an exemption can be identified.

Treasury also provides assistance to requesters to help them understand and comply with procedures established by the Department's disclosure regulations.

You may want to read the President's October 4, 1993, Memorandum to Heads of Departments and Agencies, and the corresponding Memorandum from the Attorney General. Both pertain to the principle of openness in government, and you will find them at the end of this chapter.

Background

The Freedom of Information Act established a presumption that records of the Executive Branch of the United States Government are accessible to the people. This was not

always the policy regarding Federal information disclosure. Before the FOIA in 1966, the burden was on the individual to establish a right to examine Government records.

With the passage of the FOIA, the burden of proof shifted from the individual to the Government. Those seeking information are no longer required to show a need for information. Instead, the "need to know" standard has now been replaced by a "right to know" standard. The Government now has to justify its need for secrecy.

The FOIA sets standards for determining which records must be made available for public inspection and which records can be withheld from disclosure. The law also provides administrative and judicial remedies for those denied access to records. Above all, the statute requires Federal agencies to provide the fullest possible disclosure of information to the public.

Role of the Departmental Disclosure Office

The Departmental Disclosure Office manages the FOIA program mandated by Congress at the Departmental level; promotes Treasury's compliance with the law; has oversight and reporting responsibilities for the Department; provides guidance on procedural and policy matters to the Department; and provides FOIA-related training.

THE DEPARTMENT OF THE TREASURY
BUREAU FOIA/PA OFFICES

Departmental Offices
Disclosure Services
Ph: 202/622-0930
Fax: 202/622-3895
Address:
FOIA Request
Department of the Treasury
Washington, DC 20220

Bureau of Alcohol, Tobacco and Firearms
Ph: 202/927-8480
Fax: 202/927-8866
Address:
FOIA Office - Rm. 8430
650 Massachusetts Avenue, NW
Washington, DC 20226

Bureau of Engraving & Printing
Ph: 202/874-2582
Fax: 202/874-3529
Address:
FOIA Office
14th & C Street, SW
Washington, DC 20228

Comptroller of the Currency
Ph: 202/874-4700
Fax: 202/874-5274
Address:
Disclosure (FOIA) Office
Washington, DC 20219

United States Customs Service
Ph: 202/927-1251
Fax: 202/927-1873
Address:
Disclosure Branch, OR&R
Third Floor - Ronald Reagan Bldg.
1300 Pennsylvania Avenue, NW
Washington, DC 20229

Federal Law Enforcement Training Center (FLETC)
Ph: 912/261-4524
Fax: 912/267-3113
Address:
FOIA Office
Department of the Treasury
Building 94
Glynco, GA 31524

Financial Management Service
Ph: 202/874-6837
Fax: 202/874-7016
Address:
Disclosure Branch
401 14th Street, SW
Washington, DC 20227

(Cont.)

Internal Revenue Service
Ph: 202/622-6250
Fax: 202/622-5165
Address:
FOIA Request
P.O. Box 795 - Ben Franklin Station
Washington, DC 20044

United States Mint
Ph: 202/874-6010
Fax: 202/874-4083
Address:
FOIA Request
Judiciary Square Bldg., 7th Fl.
633 3rd Street, NW
Washington, DC 20220

Bureau of the Public Debt
Ph: 202/691-3516
Fax: 202/219-4163
Address:
FOIA Request
999 E Street, NW
Washington, DC 20239

United States Secret Service
Ph: 202/406-6370
Fax: 202/406-5154
Address:
FOIA Office
950 H Street, NW., Suite 3000
Washington, DC 20001

Office of Thrift Supervision
Ph: 202/906-5896
Fax: 202/906-7755
Address:
FOIA Branch
1700 G Street, NW
Washington, DC 20552

Treasury Inspector General for Tax Administration
Office of Chief Counsel (Disclosure Unit)
Address:
1401 Wilson Blvd. - Suite 800
Arlington, VA 22209
Ph: 703/812-1700
Fax: 703/812-1722

THE WHITE HOUSE

WASHINGTON
October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

I am writing to call your attention to a subject that is of great importance to the American public and to all Federal departments and agencies the administration of the Freedom of Information Act, as amended (the "Act"). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration.

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.

The Freedom of Information Act, moreover, has been one of the primary means by which members of the public inform themselves about their government. As Vice President Gore made clear in the National Performance Review, the American people are the Federal Government's customers. Federal departments and agencies should handle requests for information in a customer-friendly manner. The use of the Act by ordinary citizens is not complicated, nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation.

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

WILLIAM J. CLINTON

OFFICE OF ATTORNEY GENERAL
Washington, DC 20530

October 4, 1993

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: The Freedom of Information Act

President Clinton has asked each Federal department and agency to take steps to ensure it is in compliance with both the letter and the spirit of the Freedom of Information Act (FOIA), 5 U.S.C § 552. The Department of Justice is fully committed to this directive and stands ready to assist all agencies as we implement this new policy.

First and foremost, we must ensure that the principle of openness in government is applied in each and every disclosure and nondisclosure decision that is required under the Act. Therefore, I hereby rescind the Department of Justice's 1981 guidelines for the defense of agency action in Freedom of Information Act litigation. The Department will no longer defend an agency's withholding of information merely because there is a "substantial legal basis" for doing so. Rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure.

To be sure, the Act accommodates, through its exemption structure, the countervailing interests that can exist in both disclosure and nondisclosure of government information. Yet while the Act's exemptions are designed to guard against harm to governmental and private interests, I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure in each particular case.

In short, it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.

It is my belief that this change in policy serves the public interest by achieving the Act's primary objective -- maximum responsible disclosure of government information -- while preserving essential confidentiality. Accordingly, I strongly encourage your FOIA officers to make "discretionary disclosures" whenever possible under the Act. Such disclosures are possible under a number of FOIA exemptions, especially when only a governmental interest would be affected. The exemptions and opportunities for "discretionary disclosures" are discussed in the Discretionary Disclosure and Waiver section of the "Justice Department Guide to the Freedom of Information Act." As that discussion points out, agencies can make discretionary FOIA

disclosures as a matter of good public policy without concern for future "waiver consequences" for similar information. Such disclosures can also readily satisfy an agency's "reasonable segregation" obligation under the Act in connection with marginally exempt information, see 5 U.S.C. § 552(b), and can lessen an agency's administrative burden at all levels of the administrative process and in litigation. I note that this policy is not intended to create any substantive or procedural rights enforceable at law.

In connection with the repeal of the 1981 guidelines, I am requesting that the Assistant Attorneys General for the Department's Civil and Tax Divisions, as well as the United States Attorneys, undertake a review of the merits of all pending FOIA cases handled by them, according to the standards set forth above. The Department's litigating attorneys will strive to work closely with your general counsels and their litigation staffs to implement this new policy on a case-by-case basis. The Department's Office of Information and Privacy can also be called upon for assistance in this process, as well as for policy guidance to agency FOIA officers.

In addition, at the Department of Justice we are undertaking a complete review and revision of our regulations implementing the FOIA, all related regulations pertaining to the Privacy Act of 1974, 5 U.S.C. § 552a, as well as the Department's disclosure policies generally. We are also planning to conduct a Departmentwide "FOIA Form Review." Envisioned is a comprehensive review of all standard FOIA forms and correspondence utilized by the Justice Department's various components. These items will be reviewed for their correctness, completeness, consistency, and particularly for their use of clear language. As we conduct this review, we will be especially mindful that FOIA requesters are users of a government service, participants in an administrative process, and constituents of our democratic society. I encourage you to do likewise at your departments and agencies.

Finally, I would like to take this opportunity to raise with you the longstanding problem of administrative backlogs under the Freedom of Information Act. Many Federal departments and agencies are often unable to meet the Act's ten-day time limit for processing FOIA requests, and some agencies -- especially those dealing with high-volume demands for particularly sensitive records -- maintain large FOIA backlogs greatly exceeding the mandated time period. The reasons for this may vary, but principally it appears to be a problem of too few resources in the face of too heavy a workload. This is a serious problem -- one of growing concern and frustration to both FOIA requesters and Congress, and to agency FOIA officers as well.

It is my hope that we can work constructively together, with Congress and the FOIA - requester community, to reduce backlogs during the coming year. To ensure that we have a clear and current understanding of the situation, I am requesting that each of you send to the Department's

Office of Information and Privacy a copy of your agency's Annual FOIA Report to Congress for 1992. Please include with this report a letter describing the extent of any present FOIA backlog, FOIA staffing difficulties and any other observations in this regard that you believe would be helpful.

In closing, I want to reemphasize the importance of our cooperative efforts in this area. The American public's understanding of the workings of its government is a cornerstone of our democracy. The Department of Justice stands prepared to assist all Federal agencies as we make government throughout the executive branch more open, more responsive, and more accountable

Janet Reno

2. THE ELECTRONIC FREEDOM OF INFORMATION ACT AMENDMENTS OF 1996 (EFOIA)

After several years of legislative and administrative consideration of electronic record FOIA issues, Congress enacted the1996 amendments to the FOIA. For an excellent reference to the EFOIA amendments, see the Department of Justice (DOJ) Fall 1996 issue of *FOIA UPDATE*. Copies are available from the Departmental Disclosure Office and the DOJ has made the *UPDATES* accessible via the Internet at: http://www.usdoj.gov/oip/foi-upd.htm.

"Index of Selected Records" Procedures

The electronic access provisions of the FOIA are intended to enhance public access to agency records and information. Bureaus are responsible for establishing their own procedures for complying with the new (a)(2) requirements of the FOIA.

Internet Requirements

Bureaus must make available via Internet those records which have been created on or after November 1, 1996, and which contain, generally speaking, what the bureau has treated as authoritative indications of its position on legal or policy questions. This includes the following types of records (which are often referred to as "(a)(2)" material):

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in a bureau's adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by a bureau and are not published in the *Federal Register;*

(3) Administrative staff manuals and instructions to staff that affect a member of the public.

In addition, copies of all records released in response to a FOIA request which, because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests, must be placed on the Internet. This is intended to make material released in response to a FOIA request that is of interest to the public at large, or at least special interest groups, more easily accessible to the public and also reduce the number of individual FOIA requests.

The Department meets the above requirements by making such records available on appropriate bureau web sites. It should be noted that at some bureaus, information has traditionally been placed in reading rooms as a matter of convenience to the public. However,

not all of that material needs to be made available in the FOIA electronic reading room -- only the types of material specifically included in section (a)(2) of the FOIA that were created on or after November 1, 1996.

Other New Requirements

Other new requirements resulting from the EFOIA amendments that pertain to request processing are briefly mentioned here. More detail is available in the chapter that addresses a particular requirement.

(1) Records shall be provided in any form or format requested if they are readily reproducible in that form or format. (See Chapter 7.)

(2) Reasonable efforts must be made to search for records in electronic form or format. (See Chapter 7.)

(3) The time limit for an agency to provide an initial determination to a FOIA request was changed from 10 working days to 20 working days. (See Chapter 13.)

(4) Agencies are permitted to implement systems for multi-track processing. (See Chapter 13.)

(5) Agencies are required to Amake a reasonable effort to estimate the volume@ of records or information withheld and inform the requester. (See Chapter 14.)

(6) When a record is only partially disclosed, the part deleted is to be clearly indicated on the disclosed part of the record at the place of deletion. (See Chapter 14.)

(7) Expedited processing may be granted if the requester demonstrates a Acompelling need@ for a speedy response. (See Chapter 13.)

3. PERFECTING A REQUEST

Before a FOIA request can be processed, it must:

1. Be made in writing.

2. State that it is made pursuant to the FOIA or Treasury disclosure regulations.

3. Include information that will enable the processing office to determine the fee category of the user.

4. Be addressed to the bureau that maintains the record. In order for a request to be properly received by the Department, the request must be received in the appropriate bureau's disclosure office.

5. Reasonably describe the records.

6. Give the address where the determination letter is to be sent.

7. State whether or not the requester wishes to inspect the records or have a copy made without first inspecting them.

8. Include a firm agreement from the requester to pay fees for search, duplication or review, as appropriate. In the absence of a firm agreement to pay, the requester may submit a request for a waiver or reduction of fees, along with justification of how such a waiver request meets the criteria for a waiver or reduction of fees found in the statute at 5 U.S.C. 552(a)(4)(A)(iii). See Chapter 6 under the "Fee Waivers" section.

4. ASSIGNING THE REQUEST

Upon receipt of a FOIA request in the proper disclosure office, the request will be routed to the appropriate responsible official for processing. Requests for expedited processing will be considered according to Treasury=s disclosure regulations at 31 CFR '1.5(e) and your bureau=s implementing procedures. If a request for expedited processing has been granted, the responsible official should process the request as soon as practicable. Denials of expedited processing requests may be appealed. (See Chapter 13 regarding expedited processing.)

Departmental Offices

The Departmental Disclosure Office (DDO), also known as Disclosure Services, will assign requests to the appropriate Departmental Offices (DO) office or Treasury bureau having custody of the records.

Other Treasury Bureaus

Treasury bureaus will assign requests according to their respective procedures.

Misdirected Requests

If the DDO assigns a request to an incorrect DO office or Treasury bureau, the receiving office will notify the DDO immediately and return the request for reassignment to the correct office.

5. DETERMINING THE USER CATEGORY

Upon receipt of a FOIA request, the requester=s fee category must be determined so that appropriate fees can be charged. A fee category is determined based on the projected use of the records. Where there is reasonable cause to doubt the use to which a requester will put the records sought, or where the use is not clear from the request itself, bureaus should seek additional clarification before designating the request to a specific category. The request should indicate whether the requester is a commercial-use requester, an educational institution, non-commercial scientific institution, representative of the news media, or Aall other@ requester subject to the fee provisions described in 31 CFR l.7. These categories of requesters are defined as follows:

Commercial use request. This refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

Educational institution. This refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

Non-commercial scientific institution. This refers to an institution that is not operated on a "commercial" basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

Representative of the news media. This refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication though not actually employed by one. A publication contract would be the clearest proof, but bureaus may also look to the past publication record of a requester in making this determination. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services such as web sites), such alternative media would be included in this category.

All other requesters. Requesters not fitting into any of the above categories will belong to a group called “all other”requesters.

6. FEES AND FEE WAIVERS

Fees For Processing Requests

FOIA and Privacy Act requests from individuals for records about themselves will be processed under the fee provisions of the Privacy Act, which authorizes fees for duplication only, excluding charges for the first 100 pages.

Fees to be charged under the FOIA will vary, depending upon the fee category applied to the request. The search, duplication, and review services for which fees are charged are defined as follows:

Search. All time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searches may be done manually or by computer using existing programming. Reasonable efforts have to be made to search for records in electronic form or format. However, no search is required if such efforts would significantly interfere with the operation of an automated information system.

Duplication. Process of making a copy of a document in order to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audio-visual materials, or machine readable documentation [e.g., magnetic tape or disk], among others.

Review. Process of examining records located in response to a commercial use request to determine whether any portion of any record located is permitted to be withheld. It also includes processing any records for disclosure; e.g., doing all that is necessary to excise them and otherwise prepare them for release.

Fees are charged in the following instances:

1. To recover costs of copying records by photocopy at a fixed rate per page (up to 8-l/2" x 14"). (See 31 CFR 1.7(g)(1)(i) for rate to be charged.) Actual costs are charged for copying computer tapes, photographs, or other non-standard records.

2. Searches for other than electronic records. Search charges are calculated by using the salary rate of the employee(s) making the search (basic pay plus 16 percent). Transportation of personnel and records necessary to the search shall be charged at actual cost. (See 31 CFR 1.7(g)(2)(i).)

3. Searches for electronic records. Actual direct cost of the search, including computer search time, runs, and the operator's salary, will be charged. The fee for computer printouts will be actual costs. (See 31 CFR 1.7(g)(2)(ii).)

4. For review of records. Commercial use requesters are charged for review of records at the salary rate (basic pay plus 16 percent) of the employee(s) making the review.

5. For other services. Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at actual cost. This includes, but is not limited to:

-- Certifying that records are true copies;

-- Sending records by special methods such as express mail, etc.

Different fees apply to different categories of requesters. The following chart shows the services which are provided free of charge and the services which are chargeable for the different requester categories:

CATEGORY	**FREEBIES**	**CHARGEABLE FEES**
Commercial	NONE	Search, review, duplication
Educational Institution	***Search, review 100 pages***	***Duplication***
Non-commercial scientific institution	***Search, review 100 pages***	***Duplication***
News Media	***Search, review, 100 pages***	***Duplication***
All Other Requesters	2 hours search, review, 100 pages	Search, duplication

(The categories in italics are subject to identical fee treatment.)

Limitations on fees and special considerations:

1. Fees should not be charged if the cost of collecting the fee would exceed the amount collected. This limitation applies to all requests, even those for commercial use.

2. Inspection of documents. Fees for all services provided will be charged whenever a

bureau must make copies available to the requester for inspection. No fee will be charged for monitoring a requester's inspection of records.

3. Search time may be charged even if no records are located, or if located records are denied.

4. Each bureau sets its own threshold for minimum charges.

5. Aggregating requests. When it is believed that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the bureau may aggregate these requests and charge accordingly.

6. Bureaus may request prepayment of fees, even if less than $250, after a request has been processed and before documents are released.

Has the requester set an upper limit on what he/she is willing to pay? Requesters have the option of deciding how much they are willing to pay for requested information. The processing official will process the request up to the point the upper limit is reached.

Will pre-payment be necessary? If a request for access to records is anticipated to generate fees of $250 or more due to the need for extensive search or review time or extensive copying, payment of the estimated fees must be obtained prior to performing such work in the case of requesters with no history of payment.

The estimate of anticipated fees must be reliable and must be based upon a realistic and factual appraisal of costs. The basis for estimating fees is to be documented in the case history.

The requester should be informed:

1. Of the extent to which the estimate represents search costs, copying, or review costs;

2. That additional fees may become due if the actual search, review or number of copies exceed the estimate;

3. That a refund may be made if the actual search, review or number of copies is less than the estimate. However, search fees are not refundable if a search is performed but does not result in the location or release of records.

In cases where the requester has a history of prompt payment, the requester is advised of the likely cost, and satisfactory assurance of full payment is obtained.

Does the requester have a history of non-payment? If a requester has previously failed to pay a fee within 30 days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest before a new request is processed. In addition, payment of estimated costs, regardless of the amount involved, will be requested prior to performing any services beyond the minimal effort necessary to reasonably estimate costs.

Bureaus should maintain records adequate to permit them to recognize persons having a history of nonpayment. This may involve receiving a monthly or quarterly listing from the bureau's accounting office of all "over 30 days receivables." Or, records may consist of entries on correspondence controls, case logs or other records as may be considered practical and convenient. The reasons for requesting payment prior to performing services must be documented.

Whenever interest is charged, it should be assessed from the 31st day following the day on which billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717. In an effort to encourage payment, the provisions of the Debt Collection Act of 1982 should be applied. This includes using administrative offset pursuant to 31 CFR Part 5, disclosure to consumer reporting agencies, and the services of collection agencies. What measures are used will depend upon the amount owed and what threshold has been set for determining what amounts will be collected.

In cases involving anticipated fees that exceed $250 or subsequent requests from nonpaying requesters, the administrative time limits prescribed in (a)(6) of the FOIA will begin only after bureaus have received the fee payments described.

Form of payment shall be made by check or money order payable to the ATreasury of the United States" (or to the bureau which processed the request).

Who sends out the bill?

Billing for DO is done by the DDO based on information provided in Part IV of the FOIA Action Form. Bureaus bill according to their own procedures.

Fee Waivers.

If a requester desires a waiver of fees, this must be done in writing. Fee waivers are not automatically granted. Fees may be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to the public's understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Responsible offices assigned the request make the fee waiver decision.

Determinations about fees charged are separate and apart from determinations about the eligibility for fee waivers. For example, a news reporter will be charged for duplication fees after the first l00 pages, but may ask that these fees be waived. Duplication fees, therefore, are the only fees to be considered.

Before considering the fee waiver request, decide which fee category the request fits into.

When a request is received for disclosure of records that would be primarily in the commercial interest of the requester, you are not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest.

A requester is not eligible for a fee waiver solely because of indigence.

The decision whether to grant or deny a request for fee waiver or reduction has to be in writing to the requester. When making a determination to deny a fee waiver or reduction, the responsible official should prepare a memo to the file establishing the basis for the decision. Should the requester appeal the denial and/or file suit, it is especially important that documentation be available to support the determination made.

At the end of this chapter is the full text of a memo issued to all Federal agencies from the Department of Justice. The memo provides fee waiver guidance and gives a basis for evaluating a fee waiver request. The guidance will help you determine whether to grant or deny a request for fee waiver, or reduce fees.

Appeals From Denials of Requests For A Waiver Or Reduction Of Fees

Appeals will be decided by the official authorized to decide appeals from denials of access to records. The requester may also appeal when there has been an adverse determination of the requester's category. Appeals should be addressed in writing to the official listed in the appropriate Appendix to the disclosure regulations (31 CFR Part 1) within 35 days of the denial of the initial request for waiver or reduction of fees, or an adverse determination on the requester's category. The appeal will be decided promptly. The official who processed the initial request for a fee waiver should not be involved in the appeal process other than to provide the initial decision file to the appellate official.

U.S. Department of Justice *fee waiver guidance, page 1*
Office of Information and Privacy

Washington, D.C. 20530

NEW FEE WAIVER POLICY GUIDANCE

[The following is the full text of the Department of Justice fee waiver policy guidance memorandum issued to the heads of all federal agencies on April 2, 1987, by Stephen J. Markman, Assistant Attorney General, Office of Legal Policy.]

Under the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48 (1986), all federal agencies subject to the Freedom of Information Act ("FOIA") are required to promulgate revised regulations implementing the FOIA's amended fee and fee waiver provisions. The Office of Management and Budget has prepared Uniform Freedom of Information Act Fee Schedule and Guidelines ("OMB Fee Guidelines"), 52 Fed. Reg. 10011 (March 27, 1987), and the revised FOIA fee regulations issued by each agency must conform with the OMB Fee Guidelines.

One provision of the Freedom of Information Reform Act requires that individual agency regulations set forth "procedures and guidelines for determining when such fees should be waived or reduced." 5 U.S.C. § 552(a)(4)(A)(i) (effective April 25, 1987). The OMB Fee Guidelines address neither this requirement nor the new statutory standard governing the waiver of FOIA fees, 5 U.S.C. § 552(a)(4)(A)(iii).

To assist agencies in implementing this provision, and in accordance with the statutory responsibility of the Department of Justice to encourage agency compliance with the FOIA, see 5 U.S.C. § 552(e), I am providing the following advisory fee waiver policy guidance to all federal agencies on behalf of the Attorney General, see 28 C.F.R. § 0.23© (1986).

The Department of Justice stands committed to encouraging agencies to waive fees under the FOIA whenever the statutory fee waiver standard is met. By the same token, of course, agencies also are expected to respect the balance drawn in the statute, safeguarding federal funds by granting waivers or reductions only where it is determined that the statutory standard is satisfied.

This guidance advises agencies of the factors which should be considered in applying the new statutory fee waiver standard. As the Supreme Court has made clear in interpreting the FOIA, the Act is to be applied according to "[t]he plain language of the statute itself." Part I of this memorandum addresses the new statutory fee and fee waiver structure, Part II sets forth specific fee waiver factors recommended for each agency to include in its revised FOIA regulations, and Part III explains the derivation and application of those factors under the language of the new statutory fee waiver standard.

I. NEW STATUTORY FEE WAIVER STANDARD

Prior to its amendment in 1986, the FOIA provided for the charging of fees for document search and duplication, and further provided that such fees should be waived or reduced wherever that was found to be "in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. § 552(a)(4)(A) (1982).

As amended, effective April 25, 1987, the FOIA establishes three levels of fees that may be charged: Depending on the identity of the requester and his use of requested information, 5 U.S.C. § 552(a)(4)(A)(ii) provides for the charging of fees for document duplication alone for certain categories of requesters; fees for search time and duplication, and for review time as well, in the case of commercial requesters; and, for all other requesters, fees for search time and duplication. A separate provision of the amended FOIA provides for the waiver or reduction of applicable fees upon the satisfaction of a revised statutory fee waiver standard.

The FOIA's new fee waiver standard, found at 5 U.S.C. § 552(a)(4)(A)(iii), more specifically defines the term "public interest" and provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

This new statutory fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees properly assessable can be waived or reduced. First, it must be established that "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

government." Second, it must be established that "disclosure of the information . . . is not primarily in the commercial interest of the requester."

Where these two statutory requirements are satisfied, based upon information supplied by a requester or otherwise made known to an agency, the waiver or reduction of a FOIA fee is compelled by the statute and should be granted freely and promptly by the agency. Where one or both of these requirements is not satisfied, a fee waiver is not warranted under the statute.

II. SUMMARY OF FEE WAIVER GUIDANCE

The Department of Justice recommends that each federal agency employ the following six factors when, as required by the Freedom of Information Reform Act, it revises its regulations to set forth "guidelines for determining when [FOIA] fees should be waived or reduced." The remainder of this guidance memorandum elaborates upon the derivation and application of these factors. In summary, these factors are as follows:

A. Disclosure of the Information "is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government."

(1) **The subject of the request:** Whether the subject of the requested records concerns "the operations or activities of the government";

(2) **The informative value of the information to be disclosed:** Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to "public understanding"; and

(4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

B. Disclosure of the Information "is Not Primarily in the Commercial Interest of the Requester."

(1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

III. APPLICATION OF FEE WAIVER FACTORS

The six enumerated factors elaborated upon below are those which the new statutory standard, by its plain language, requires agencies to take into consideration in determining whether the two basic requirements for a fee waiver or reduction are met. They should be applied to fee waiver requests sequentially, on a case-by-case basis.

A. Disclosure of the Information "is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government."

This first part of the new statutory fee waiver standard sets forth a specific definition of the crucial term "public interest." As distinguished from the previous statutory language, which spoke only generally of a disclosure's benefit to the public, this language specifies the public benefit resulting from disclosure to be considered in making fee waiver determinations. In so doing, it establishes a more particular "public interest" standard to be met as a threshold matter, with the result that some disclosures that might have met the more general public interest standard under the previous standard will not satisfy the standard as revised.

The plain language of this first basic requirement encompasses four related considerations. A careful analysis of them, in sequence, is necessary to lead to a proper determination of whether a request satisfies the statute's specific "public interest" requirement.

(1) **The Subject of the Request:** Whether the Subject of the Requested Records Concerns "the Operations or Activities of the Government."

Initially, an agency should consider whether the subject of the requested records, in the context of the request, concerns the operations or activities of the government in the first place. A more general public interest in the subject of a record, which was the broader focus of the previous statutory standard, no longer is sufficient. Rather, the subject matter of the requested records must specifically concern identifiable operations or activities of the federal government—with a connection between them that is direct and clear, not remote or attenuated. As the D.C. Circuit Court of Appeals recently indicated in applying the predecessor fee waiver standard, "the links between furnishing the requested information and benefiting the general public" should not be "tangential," "less than obvious," or "at best tenuous." National Treasury Employees Union v. Griffin, 811 F.2d 644, 647-48 (D.C. Cir. 1987); see also American Federation of Government Employees v. Department of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (claims of public benefit under previous standard rejected as "too ephemeral").

While in most cases records possessed by a federal agency will likely meet this threshold, there are cases in which requested records do not directly concern government operations or activities and therefore would fail to meet it. A prime example can be records in an agency's possession that were generated by a non-government entity, records which often are sought for their intrinsic informational content alone. Where requesters manifestly seek records for

their intrinsic content apart from their informative value with respect to specific government operations or activities, they can hardly hold real prospect for contributing to public understanding of those operations or activities. In the case of such requests, whether for records submitted to an agency or generated by it, this threshold consideration is not satisfied.

(2) **The Informative Value of the Information to be Disclosed:** Whether the Disclosure is "Likely to Contribute" to an Understanding of Government Operations or Activities.

Next, an agency should determine whether the disclosure in question is likely to contribute to an understanding of government operations or activities. This requires an analysis of the substantive content of the disclosable portions of the records requested, in order to determine whether their disclosure will in fact be informative regarding the particular government activities or operations that are connected to the subject matter of the request. The agency to whose operations the records pertain ordinarily is in the best position to make this determination.

Although the subject matter of a FOIA request may directly concern certain government operations or activities, if the records (or record portions) which can be released in response to that request contain nothing that is meaningfully informative on such operations or activities, then the requested FOIA disclosure would not at all contribute to an understanding of them. Further, even where information is meaningful in and of itself, it does not necessarily hold great potential for contributing to increased public understanding. Thus, the foundation for a proper fee waiver analysis must be a close appraisal of the particular information that is to be disclosed, with careful attention to the potential that it holds for contributing to the public understanding of government operations or activities.

In this connection, an agency should also consider whether the requested information is already in the public domain, either in a duplicative or a substantially identical form. If it is, then disclosure of the information would not be likely to contribute to an understanding of government operations or activities, as nothing new would be added to the public record. This principle properly applied under the previous statutory fee waiver standard, see, e.g., Blakey v. Department of Justice, 549 F. Supp. 362, 364-65 (D.D.C. 1982), aff'd mem., 720 F.2d 215 (D.C. Cir. 1983), and should continue to be applicable.

(3) **The Contribution to an Understanding of the Subject by the Public Likely to Result from Disclosure:** Whether Disclosure of the Requested Information Will Contribute to "Public Understanding."

An agency next should consider whether disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. See Crooker v. Department of the Army, 577 F. Supp. 1220, 1223 (D.D.C. 1984) (rejecting fee waiver under previous standard for information of interest

to "a small segment of the scientific community," which would not "benefit the public at large"), appeal dismissed as frivolous, No. 84-5089 (D.C. Cir. June 22, 1984).

The proper focus thus must be on the contribution to public understanding, rather than personal benefit to be derived by the requester. See National Treasury Employees Union v. Griffin, 811 F.2d at 648 (rejecting "union's suggestion that its size insures that any benefit to it amounts to a public benefit"). Thus, a requester's indigency, for example, does not entitle him to a fee waiver; there must be a credible showing of a contribution to the public's understanding that would result from disclosure. Cf. Ely v. United States Postal Service, 753 F.2d 163, 165 (D.C. Cir.) (holding under previous fee waiver standard that indigency alone did not satisfy statutory requirement that disclosure must primarily benefit general public), cert. denied, 471 U.S. 1106 (1985). This is only appropriate, given that a fee waiver necessarily involves the "expenditure of public funds." Id.; see also Burriss v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981) ("[I]n simple terms, the public should not foot the bill unless it will be the primary beneficiary of the [disclosure].").

For purposes of this analysis, the identity of the requester should be considered, in order for an agency to determine whether the requester is in a position to contribute to public understanding through the requested disclosure. A requester's identity and qualifications—e.g., expertise in the subject area and ability and intention to disseminate the information to the general public—should be evaluated. Accord Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979) (articulating such approach under previous fee waiver standard). Specialized knowledge often is required to extract, synthesize and effectively convey information to the public and requesters vary in their ability to do so. Where not readily apparent to an agency, requesters should be asked to describe specifically their qualifications, the nature of their research, the purposes for which they intend to use the requested information, and their intended means of dissemination to the public.

Bare assertions by requesters that they are "researchers" or have "plans to author a book" are insufficient evidence that a contribution to understanding by the general public will ultimately result from a disclosure. See Burriss v. CIA, 524 F. Supp. at 449 (holding such assertions insufficient under prior law to establish that general public would be ultimate beneficiary of disclosure). It reasonably may be presumed, however, that those "representatives of the news media," as defined in the OMB Fee Guidelines, who have access to the means of public dissemination, readily will be able to satisfy this aspect of the statutory requirement. Accord FOIA Update, Fall 1983, at 14.

This consideration is not satisfied simply because a fee waiver request is made by a library or other record repository, or a requester who intends merely to disseminate information to such an institution. Such requests, like those of other requesters, should be analyzed to identify a particular person who will actually use the requested information in scholarly or other analytic work and then disseminate it to the general public; absent that, it cannot be determined that disclosure to the requester will contribute to the public's understanding of government operations or activities. Accord National Treasury Employees Union v. Griffin,

811 F.2d at 647 (observing under previous standard that public benefit should be "identified with reasonable specificity"). Thus, such requesters should make the same fee waiver showing that a person would have to make to obtain a fee waiver directly, including a representation by that person of intent to perform the work involved.

(4) **The Significance of the Contribution to Public Understanding:** Whether the Contribution to Public Understanding of Government Operations or Activities Will be "Significant."

Lastly, an agency is required by the statute to determine whether an identified contribution to public understanding of government operations or activities will be a "significant" one, i.e., such that the general public's understanding of the subject matter in question likely will be enhanced by the disclosure to a significant extent.

This final step in the "public interest" analysis requires an agency to focus as realistically as possible on the precise nature of the public contribution likely to result from a disclosure. It necessarily involves an assessment of the likely impact of the disclosure on the public's understanding of the subject in question, as compared to the level of public understanding of that subject existing prior to the disclosure. A differential analysis between the two should be undertaken in order to determine whether the contribution likely to result from the disclosure can be regarded as "significant."

The determination of "significance," which will require the exercise of especially careful judgment in many cases, is essentially an objective rather than a subjective determination. The agency's decision properly turns on whether the disclosure is likely to lead to a significant contribution to public understanding. This does not permit a separate value judgment by the agency as to whether the information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is "important" enough to be made public.

If the agency determines that the likely contribution to public understanding is significant—and each agency disclosing its own records under the FOIA is in the best position to evaluate the disclosable portions and reach such a judgment regarding their likely contribution to public understanding of government operations or activities—then the fee waiver standard's "public interest" requirement is fully satisfied.

B. Disclosure of the Information "is Not Primarily in the Commercial Interest of the Requester."

Once an agency is satisfied that the first requirement for a fee waiver has been met, the statutory standard then requires a determination of whether disclosure of the requested information is primarily in the commercial interest of the requester; if it is, then a waiver is not warranted. To apply this second basic requirement, an agency must determine the

magnitude of any commercial interest of the requester (or person upon whose behalf the requester may be acting) that would be furthered by disclosure, and then compare it to that of the public interest already identified.

(1) **The Existence and Magnitude of a Commercial Interest:** Whether the Requester has a Commercial Interest that Would be Furthered by the Requested Disclosure.

An agency must first determine as a threshold matter whether the request involves any commercial interest of the requester and, if so, assess the magnitude of that commercial interest. Only commercial interests that would be served by disclosure—as opposed to other personal, non-commercial interests—should be considered. A "commercial interest" is one that furthers a commercial, trade or profit interest as those terms are commonly understood. See OMB Fee Guidelines, sec. 6g. Accord, e.g., American Airlines, Inc. v. National Mediation Board, 588 F.2d 863, 870 (2d Cir. 1978) (defining "commercial" in Exemption 4 as meaning anything "pertaining or relating to or dealing with commerce"); see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 644 F. Supp. 344, 346 (D.D.C. 1986) (entity's "non-profit status is not by itself determinative") (appeal pending). Thus, not only profit-making corporations but individuals or other organizations may have a commercial interest to be served by disclosure, depending upon the circumstances involved.

If the requester's interest in the records sought is unclear, it is entirely proper for agencies to consider and draw reasonable inferences from the requester's identity and the circumstances surrounding the request in determining the existence of a commercial interest. Where an agency reasonably believes that such circumstances suggest the existence of a commercial interest in disclosure, the requester should be given an opportunity in the administrative process to provide further information rebutting such reasonable inferences or clarifying the circumstances of the request where necessary. Accord National Treasury Employees Union v. Griffin, 811 F.2d at 647; see also OMB Fee Guidelines, sec. 6g.

Where a commercial interest is found to exist, and it would be furthered through the disclosure sought, the magnitude of that commercial interest must then be assessed. In making such an assessment, an agency should reasonably consider the role that such FOIA-disclosed information plays with respect to the requester's commercial interests, as well as the extent to which FOIA disclosures serve those interests overall.

(2) **The Primary Interest in Disclosure:** Whether the Magnitude of the Identified Commercial Interest of the Requester is Sufficiently Large, in Comparison with the Public Interest in Disclosure, that Disclosure is "Primarily in the Commercial Interest of the Requester."

Once a requester's commercial interest has been found to exist, the statute requires that an agency then determine whether disclosure of the information would be "primarily" in that interest. This requires the balancing of the requester's commercial interest against the public interest in disclosure that has been identified. Fundamentally, this balancing process is the same as that required under the previous fee waiver standard—except that, once the more

specific “public interest” standard is satisfied, the balance is now only between the magnitude of the public interest and the magnitude of requester’s commercial interest, as those terms are used in the statute.

Where the “public interest” standard is satisfied as discussed above, and that public interest can fairly be regarded as greater in magnitude than the requester’s commercial interest in disclosure, a fee waiver or reduction must be granted. Conversely, even where sufficient public interest exists to meet that more particular standard, a fee waiver is not warranted under the statute if the requester’s commercial interest in disclosure is found to be greater than the public interest to be served, because disclosure would then be “primarily” in the requester’s commercial interest.

Such comparisons, of course, require careful attention. For example, although newsgathering organizations usually have a commercial interest in obtaining information, the traditional process of newsgathering and dissemination by established news media organizations, as a rule, should not be considered to be “primarily” in their commercial interest; because of their established role in providing information to the general public, it ordinarily can be presumed that, if a significant public interest has been identified, that will be the interest “primarily” served by disclosure to such organizations. On the other hand, the disclosure of agency records to data brokers or others who compile and market government information for direct economic return can more readily be considered as primarily in the commercial interests of the requester, depending on the nature of the records and the exact circumstances of the enterprise.

In the final analysis, each agency is best situated to make comparative assessments of the likely effects of disclosure of its own records; the statutory standard certainly affords agencies sufficient discretion with which to do so.

In making the subtle and sometimes difficult determinations required under the revised fee waiver standard, agencies should nevertheless strive to be as efficient as reasonably possible in expending agency resources on them. All fee waiver requesters, however, are entitled to full and careful consideration of the merits of their requests. Where agencies undertake a fee waiver analysis according to the logical sequence of factors outlined in this guidance memorandum, they can confidently discharge their statutory obligations.

In addition to the foregoing guidance on the substantive factors to be considered in making fee waiver decisions, agencies should continue to refer to the procedural guidance with respect to fee waiver questions published in the January 1983 issue of FOIA Update, which remains effective. That guidance advises, for example, that agencies may grant a fee waiver in a percentage commensurate to the proportion of disclosable records that satisfy the statutory fee waiver standard. See FOIA Update, Jan. 1983, at 4.

Should any executive agency's administrative or legal personnel have any question regarding the implementation or interpretation of the new statutory fee waiver standard, they may contact the Department of Justice's Office of Information and Privacy, at (FTS) 633-3642 (633-FOIA).

1. This guidance supersedes the previous fee waiver guidance issued by the Department of Justice in January 1983 and November 1986, and is effective with respect to fee waiver determinations made as of April 25, 1987. It interrelates in part with the OMB Fee Guidelines. Additionally, agencies considering fee waiver issues should note particularly the new specific fee limitation provisions to be found at 5 U.S.C. § 552(a)(4)(A)(ii), (iv), as amended, which are addressed in the OMB Fee Guidelines.

2. United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984) (FOIA decision applying statutory language on its face); see also CIA v. Sims, 471 U.S. 159, 167 (1985) (the "plain meaning" of such statutory terms should be applied). Decisions applying the language of the previous FOIA fee waiver standard are cited in this memorandum only where their holdings are consistent with the plain language of the revised standard.

Because of the accelerated procedures by which Congress enacted the Anti-Drug Abuse Act of 1986, of which the Freedom of Information Reform Act was a part, at the close of the 99th Congress, there exists no committee report or actual floor debate on the revised fee provisions of the FOIA, although several prepared statements were inserted into the Congressional Record by Senators Hatch and Leahy and Congressmen English and Kindness. As regards the new statutory fee waiver standard, its plain meaning may readily be determined from its language.

3. The 1986 amendments to the FOIA added a new clause (vi) providing that "Nothing in this subparagraph [containing the FOIA's fee provisions] shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." 5 U.S.C. § 552(a)(4)(A)(vi). Accordingly, this guidance does not apply to fee waivers sought in connection with requests for Defense Department technical data that are subject to the separate statutory fee and fee waiver scheme to be codified at 10 U.S.C. § 2328. It also does not apply to fees assessed or fee waivers sought in connection with requests for information provided by the National Technical Information Service, see 15 U.S.C. § 1153 (1982), or in connection with a request for records under any other statute providing for the separate charging of fees within the meaning of this provision. See OMB Fee Guidelines, sec. 6b. Fees and, if applicable, fee waivers for such records should be determined according to the standards provided in those statutes, not according to the FOIA.

4. By its terms, the revised fee waiver standard provides that the two statutory requirements it contains must be met before the requester is entitled to a waiver or reduction of fees. It does not, however, automatically require a complete waiver of all fees whenever those requirements are met; § 552(a)(4)(A)(iii) instead provides that "[d]ocuments shall be furnished without

any charge or at a charge reduced below the [otherwise applicable] fees" if both requirements of the fee waiver standard are met.

As a matter of course, the Department of Justice encourages agencies to provide a waiver of fees when both requirements of the statutory standard are met, just as they must deny a waiver of fees whenever one or both of those requirements are not met.

However, Congress in amending the FOIA specifically revised and retained the reduction language in the fee waiver standard, and that language should be read to have some effect. Accord United States v. Menasche, 348 U.S. 528, 538-39 (1955) (court has duty to give effect, if possible, to every clause and word of statute); see also Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). Therefore, in rare cases, perhaps involving exceptional burden or expenditure of public resources in the context of a request that minimally satisfies the "public interest" requirement, it may be possible to give effect to the language of the statute providing for "a charge reduced below the [otherwise applicable] fees" by granting a reduction rather than a complete waiver of fees.

5. The term "representative of the news media" appears in 5 U.S.C. § 552(a)(4)(A)(ii), which precludes the charging of search fees to certain categories of requesters. Though that term does not appear in the fee waiver standard of the Act, § 552(a)(4)(A)(iii), the fact that a request is from a "representative of the news media" for purposes of clause (ii) is clearly a relevant factor in evaluating a waiver or reduction of duplication charges under the fee waiver standard of clause (iii).

6. Decisions on fee waiver requests are matters committed to the exercise of sound agency discretion in the first instance. Once a fee waiver issue proceeds to court, however, a new judicial review provision included in the amended FOIA, 5 U.S.C. § 552(a)(4)(A)(vii), provides for review of agency fee waiver denials according to a de novo standard, as opposed to the more deferential "arbitrary or capricious" standard previously employed.

The scope of judicial review of fee waiver determinations, however, remains limited to the administrative record established before the agency. Id. As a general rule of administrative law, this record ordinarily cannot be supplemented in litigation either by the agency or by the requester. See, e.g., National Treasury Employees Union v. Griffin, 811 F.2d at 648. It therefore is imperative that an agency create a comprehensive administrative record of each fee waiver denial, specifying in as much detail as reasonably possible each of the grounds upon which it is based. See FOIA Update, Winter 1985, at 6.

It should be noted, however, that the de novo review standard of § 552(a)(4)(A)(vii) applies by its terms only to the "waiver of fees," i.e., to determinations made under clause (iii). Thus, agency determinations of fee assessments made under any other provision of § 552(a)(4)(A) should continue to be subject to judicial review according to the traditional "arbitrary or capricious" standard.

7. SEARCHING FOR RESPONSIVE RECORDS

Conduct an adequate search

You are required to make reasonable efforts to locate records responsive to a FOIA request, including page-by-page or line-by-line identification of material within records. How- ever, you are not required to reorganize a filing system to respond to a request nor to search every record in your office to locate responsive records.

Providing records in the format requested

You must provide the records in the format requested (i.e., paper, diskette, CD-ROM, etc.) if they are reproducible in that format. Agencies are to make reasonable efforts to maintain records in forms or formats that are reproducible for purposes of the FOIA.

Computer search for electronic records

Electronic records are subject to the FOIA. Information and data stored on your hard drive and on disks is subject to a FOIA request. So, also, are e-mail messages.

A search may involve retrieving data from a database using existing programming. You are not required to write a new program in order to respond to a request. However, a test of reasonableness should be applied. If extracting the requested information requires a modification of existing programming, and the effort spent in making the modification is minimal, you should do what you need to do to retrieve the responsive records. On the other hand, if retrieval of the information requested would cause a great deal of reprogramming or new programming, you are not required to do this.

Retrieve records from the Federal Records Center

Records that have been retired to the Federal Records Center must be retrieved if they are the subject of a FOIA request. Treasury records that have been accepted by the National Archives and Records Administration (NARA) for storage are generally considered the property of NARA.

When no responsive records are found

If no records are found after an adequate search, then the requester is advised of the right to appeal. Appeal rights are provided because a no-records response is considered an adverse determination (see *Oglesby v. Department of the Army* [920 F.2d 57 D.C. Cir 1990]). Even if no responsive records are found, a requester may be charged applicable search fees, depending upon the user category.

Consider "Glomar" application

To neither confirm nor deny the existence of records is called a "Glomar" response. This response can be used only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. It's most commonly used to protect the existence or non-existence of Exemption 1 and Exemption 7(C) material. (See Chapter 8 regarding exemptions.) However, only through consistent application of the "Glomar" response, regardless of whether responsive records do actually exist, can the privacy of individuals who are in fact mentioned in law enforcement records be protected. For further information regarding using a AGlomar@ response, see the Department of Justice A*FOIA UPDATE,*@ Vol. VII, No. 1, Winter 1986. (Articles from *FOIA UPDATE* are available from the Departmental Disclosure Office, or at the Department of Justice web site at www.usdoj.gov/oip/foi-upd.htm.)

Multiple-track processing

Offices may maintain different processing tracks (though not required) based upon the amount of work or time (or both) involved in processing requests. Requests for voluminous records may be in one processing track, for example, and simple requests (few records, similar request just processed) may be in a Afast@ track. You also may provide a requester with an opportunity to limit the scope of the request in order to qualify for processing under a Afast@ track.

8. APPLYING THE FOIA EXEMPTIONS

Treasury's policy is to provide maximum allowable disclosure of agency records upon request by any individual. A memo regarding the FOIA from the Attorney General to Heads of Departments and Agencies (October 1993) sets forth the "openness in government" principle in the form of discretionary disclosures. This means that even if the information can be withheld under a FOIA exemption, the information should be disclosed unless a foreseeable harm to an interest protected by an exemption can be identified. For further information regarding discretionary disclosures, please see www.usdoj.gov/oip/discretionary.htm.

The FOIA requires that virtually every record in the possession of a Federal agency be made available to the public if specifically requested in writing, unless it is exempted from disclosure. The nine exemptions of FOIA ordinarily provide the only basis for withholding information. Records that meet the exemption criteria may be withheld from public disclosure, and need not be published in the *Federal Register*, be made available in the reading room, or be provided in response to a FOIA request.

The following types of records may be withheld from disclosure in whole or in part unless otherwise prescribed by law: (For additional information about using exemptions, see www.usdoj.gov/oip/foi-act.htm.)

Exemption (b)(1) protects material A(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." This exemption applies to those records properly and currently classified in the interest of national security or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations.

An agency's classification judgment is generally upheld in the courts. However, when the same information has been leaked to the press or otherwise made available to members of the public, it may be difficult to protect. It has been held that information is not considered in the public domain unless it has been the subject of an official disclosure [See *Simmons v. Dept. of Justice*, Civil No. H-84-1381 (D. Md. Aug. 21, 1985), aff'd, 796 F. 2d 709 (4th Cir 1986)].

The provisions of Executive Order 12958 must be applied in making determinations on classifications and declassifications.

Classified information will not be released under the FOIA even to a requester of "unquestioned loyalty." In a case decided in 1990, a Government employee with a current Top Secret security clearance was denied access to classified records pertaining to himself because exemption 1 protects information from disclosure based on the nature of the material, not on the nature of the requester.

The requirement of the Act to release information that is reasonably segregable applies in cases involving classified information as well as cases involving non-classified information. For example, just because a document is classified doesn't qualify it for automatic withholding. A non-classified portion must be disclosed unless it is otherwise exempt from disclosure.

In camera affidavits have sometimes been submitted in the courts when disclosure in a public affidavit would in itself confirm or deny the existence of the records, thereby posing a threat to national security. To neither confirm nor deny the existence of records in a response has come to be known as a "Glomar" denial [See *Phillippi vs. CIA*, Civil No. 75-1265 (D.D.C. Dec. 1, 1975), rev'd, 546 F. 2nd 1009 (D.C. Cir. 1976) on remand (D.D.C. June 9, 1980), aff'd, 655 F. 2d 1325 (D.C. Cir. 1981)]. The "Glomar" denial has also been incorporated in E.O. 12958.

Exemption (b)(2) of the FOIA exempts from mandatory disclosure records "related solely to the internal personnel rules and practices of an agency." This exemption has been interpreted to encompass two distinct categories of information:

1. Internal matters of a trivial nature ("low 2"), and

2. More substantial matters that would hinder the effective performance of a significant function of the Department or allow circumvention of a statute or agency regulation ("high 2").

For a long time, confusion existed concerning the intended coverage of exemption 2. The D.C. Circuit Court in 1983 came up with the following test for exemption 2 coverage:
First, the material withheld should fall within the terms of the statutory language as a personnel rule or internal practice of the agency. Then, if the material relates to trivial administrative matters **of no genuine public interest**, exemption would be automatic under the statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.

As a result of *Schwaner v. Department of the Air Force,* 898 F.2d 793 (D.C. Cir. 1990), agencies may no longer, as a practical matter, apply exemption (b)(2) at the administrative level to withhold lists of Government employees and their office addresses.

Examples of "high 2" relate to those operating rules, guidelines, and manuals for Department personnel involved in investigations, inspections, auditing, or examining areas that remain privileged in order for the bureau to fulfill a legal requirement.

Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, advancement, or promotion, are also examples of "high 2." "Crediting plans," records used to evaluate the credentials of Federal job applicants may also be withheld under exemption (b)(2).

Disclosure of the plans would compromise the selection process since future unscrupulous applicants would have an unfair competitive advantage. Also considered "high 2" are vulnerability assessments like the computer security plans that Federal agencies are required to prepare.

Law enforcement materials heretofore protected under exemption (b)(2) may also be protected under exemption (b)(7)(E), which was revised in the FOI Reform Act of 1986.

Exemption (b)(3) of the FOIA exempts records concerning matters that are Aspecifically exempted from disclosure by statute [other than FOIA], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.@ Examples of these statutes are: Disclosure of tax returns and tax return information, 26 U.S.C. 6103; and Federal Rules of Criminal Procedure, Rule 6(e).

A Federal statute falls within the exemption's coverage if it satisfies either one of the requirements. Generally, exemption (b)(3) is triggered by the actual words in the statute. Therefore, Federal rules of procedure, Executive Orders, or regulations are not considered (b)(3) statutes. However, when a Federal rule of procedure is modified and thereby specifically enacted into law by Congress, it may qualify under the exemption. This applies to Rule 32 of the Federal Rules of Criminal Procedure which relates to the disclosure of presentence reports and to Rule 6(e) of the Federal Rules of Criminal Procedure relating to Grand Jury information.

Some statutes meet both parts of exemption (b)(3) subparts, such as 8 U.S.C. 1202(f) which pertains to the issuance or refusal of visas and permits to enter the U.S., while others fail to meet either part, such as 18 U.S.C. 1905, the Trade Secrets Act, and 17 U.S.C. 101-810, concerning copyrights.

The Supreme Court has held that Section 6103 of the Internal Revenue Code satisfies subpart (B) of exemption 3. Courts of appeals have further reasoned that 6103 is a subpart (A) statute to the extent that a person is not entitled to access tax returns or return information of other taxpayers. Pursuant to 6103(b)(2), individuals are not entitled to obtain tax return information even regarding themselves if it is determined that release would impair enforcement by the IRS. Section 6103 applies only to tax return information obtained by Treasury, and not to such information maintained by other agencies which was obtained by means other than through the provisions of the Internal Revenue Code.

While the issue of whether a treaty can qualify as a statute under exemption (b)(3) has not yet been ruled on in any FOIA case, there is a sound policy basis for concluding that a treaty can be protected under (b)(3).

The National Defense Authorization Act for FY 97, 41 U.S.C. 253(b), provides blanket protection for proposals of unsuccessful bidders that are submitted in response to a solicitation for a

compeitive proposal. The proposal is also protected from disclosure if it is not set forth or incorporated by reference in the final contract.

The Privacy Act of 1974, 5 U.S.C. 552a, is not a (b)(3) statute. The Privacy Act was amended to specifically address this issue (Public Law 98-477, effective 10/15/84).

Exemption (b)(4) of the FOIA protects Atrade secrets and commercial or financial information obtained from a person that is privileged or confidential.@

This exemption is intended to protect the interests of both Government and submitters of information. It encourages submitters to voluntarily furnish useful commercial or financial information to the Government, and it provides the Government with an assurance that such information will be reliable. It also safeguards submitters of business information from the competitive disadvantages that could result from disclosure.

The exemption covers two broad categories of information:

(1) trade secrets; and
(2) information which is commercial or financial, and obtained from a person, and privileged or confidential.

The overwhelming bulk of exemption (b)(4) cases focuses on whether the withheld information falls within the second category (commercial or financial, obtained from a person, and privileged or confidential).

AObtained from a person@ refers to a wide range of entities, including corporations, state governments, and foreign governments, but does not apply to information obtained from the Federal Government. (Federal Government information that needs to be protected can possibly be withheld under exemption (b)(5).)

Examples of records protected by exemption (b)(4) are:

Commercial or financial information received in connection with loans, bids, contracts or proposals, as well as trade secrets, inventions, discoveries, sales statistics, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information regarding financial condition. Personal financial information is also included.

Commercial or financial matter is "confidential" if it meets any one of a three-part test:

1. Impairs the Government's ability to obtain necessary information in the future; or

2. Causes substantial harm to the competitive position of the person from whom the information was obtained. Actual competition need not be demonstrated. Only evidence of competition and the likelihood of substantial competitive injury is all that needs to be shown; or

3. Whether disclosure of the information will harm an "identifiable" private or governmental interest which the Congress sought to protect by enacting exemption (b)(4).

The "intrinsic commercial value" of business-related records or information obtained by the Government may be protected under exemption (b)(4) of FOIA.

Formulae, designs, drawings, research data or other such information can be significant, not as records in general, but as items of valuable property. Written work can be sold like any other commodity in the marketplace, bringing to its private owner the economic benefit of his/her proprietary interest. Given the nature of the information, some businesses, rather than keeping the information secret, prefer to sell or license the information to others for large sums of money.

Exemption (b)(4) is designed to preserve private proprietary interests by ensuring that, through the FOIA process, the normal operations of the marketplace are not disrupted. The exemption is intended to protect information that would not customarily be released to the public by the person from whom it was obtained. The person that owns marketable records does not customarily release them to the public without receiving payment of their market value. The release of such information under FOIA would diminish the value of marketable records, since it is often cheaper to pay the cost associated with a FOIA request than the cost of obtaining the information through the market place.

If the Department can show that the loss of market value of "intrinsically valuable" information is likely to be substantial in nature, the material should be withheld under (b)(4). However, if the Department can determine that no substantial market value loss is threatened, there is no justification for nondisclosure.

The "mosaic" approach is the concept of protecting information the disclosure of which would not in and of itself cause harm, but which would be harmful when combined with information already available to the requester.

Numerous types of competitive injury have been identified by the courts as properly causing harm by disclosure, such as disclosure of: Assets, profits, losses, market shares; data describing a company's workforce which would reveal labor costs, profit margins, competitive vulnerability; a company's selling prices, purchase activity and freight charges; technical and commercial data,

names of consultants and subcontractors, performance, cost and equipment information; currently unannounced and future products, proprietary technical information, pricing strategy and subcontractor information.

Mundane information about submitter's operations, general description of a manufacturing process with no details, or disclosures that would cause "customer or employee disgruntlement@ have been determined not to qualify as causing substantial harm.

Exemption (b)(5) encompasses "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This includes internal advice, recommendations, and subjective evaluations, as opposed to factual matters contained in records that pertain to the decision-making process of an agency, whether within or among agencies (as “agency” is defined in 5 U.S.C. 552(e)) or within the Department.

The three primary privileges incorporated in exemption (b)(5) are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

Three purposes constitute the basis for the **deliberative process privilege**: (1) to encourage open, frank discussions between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. Examples include:

1. The nonfactual portions of staff papers, including after-action reports and situation reports that contain staff evaluations, advice, opinions, or suggestions;

2. Advice, suggestions, or evaluations prepared on behalf of the Department by individual consultants or boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations;

3. The nonfactual portions of evaluations by a bureau or by personnel of contractors;

4. Information of a speculative nature, tentative, or evaluative nature, or such matters as proposed plans to purchase, lease, or otherwise acquire and dispose of facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate Government functions;

5. Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

If any intra- or inter-agency record or reasonably segregable portion of a record would be made available routinely through the "discovery process" in the course of litigation with the agency, then it should not be withheld from the general public even though discovery had not been sought in actual litigation. "Discovery" is the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing. The record or document need not be made available under this section if the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of the litigant, and balanced against the interests of the agency in maintaining its confidentiality.

Intra- or inter-agency memoranda or letters that are factual, or reasonably segregable portions that are factual, are routinely made available through "discovery" and shall be made available to a requester, unless the factual material is:

1. Otherwise exempt from release; or

2. Inextricably intertwined with the exempt information; or

3. So fragmented as to be uninformative.

A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

Also incorporated into exemption (b)(5) is the **attorney work-product privilege**, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. Its purpose is to protect the adversary trial process by insulating the attorney's preparation from scrutiny. Litigation need never have actually commenced, so long as specific claims have been identified which make litigation probable. Rule 26(b)(3) of the Federal Rules of Civil Procedure allows the privilege to be used to protect documents prepared "by or for another party or by or for that other party's representative." The work-product privilege has been held to persist where the information has been shared with a party holding a common interest with the agency, even where it has become the basis for a final agency decision.

Attorney client privilege concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. vs. Department of Air Force*, 566 F. 2d at 242 (D.C.Cir. 1977). It is

not limited to litigation and includes protection for facts provided by the client as well as the attorney's opinions.

Exemption (b)(5) also applies to trade secret or confidential research, development or commercial information generated by the Government itself in the process leading up to the awarding of a contract. It expires once the contract is awarded or after an offer has been withdrawn. Early release of this information could put the government at a competitive disadvantage in the contract process. Other examples of this type of material would include: realty appraisal for property to be sold by the Government; background documents used to calculate its bid in a contracting out procedure; inter-agency cost estimates used in evaluating construction proposals; reports prepared by expert witnesses.

If a prior release of information ordinarily protectable under exemption (b)(5) has been made by an agency such as disclosure to the subject of the record, under a protective order in an administrative proceeding, or in the course of criminal discovery, the agency's authority to later withhold the document is not diminished.

Exemption (b)(6) exempts Apersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.@ Examples of files containing personal information similar to that contained in personnel and medical files are:

1. Those compiled to evaluate or determine the suitability of candidates for employment and the eligibility of individuals for security clearances, or for access to particularly sensitive classified information;

2. Files containing reports, records, and other materials pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

The information must be identifiable to a specific individual and not merely pertain to an individual.

In determining whether the release of information would result in a "clearly unwarranted invasion of personal privacy," consideration should be given to the Supreme Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press,* 199 S.Ct. 1468 (1989). (See the Department of Justice's *FOIA UPDATE,* Spring 1989.)

Corporate and business information can't be protected under exemption (b)(6), unless the information pertains to a small business where the individual and his/her business is identical. Then, depending on the information, exemption (b)(6) may be applicable.

Generally, privacy rights do not extend to a deceased person. But sensitive or graphic personal details about the circumstances of a person's death may be withheld to protect the privacy interests of surviving family members.

Public figures do not lose all rights of privacy, but they are diminished. Disclosure of sensitive personal information has been found to be appropriate only where exceptional interests mitigate in favor of disclosure. Examples: Federal employees found guilty of accepting bribes, misuse of government vehicles, and misconduct of government employees.

The Supreme Court has limited the concept of public interest under the FOIA to the Acore purpose@ for which Congress enacted the FOIA: ATo shed light on an agency=s performance of its statutory duties.@ Information that does not directly reveal the operations or activities of the Federal government falls outside the ambit of the public interest that the FOIA was enacted to serve. This public interest standard must be weighed against the threat to
privacy. Put another way, it must be determined which is the greater result of disclosure: the harm to personal privacy or the benefit to the public.

Intimate details about an individual's life are usually protected, such as marital status, legitimacy of children, medical condition, welfare payments, family fights, and reputation.

Generally, civilian Federal employees' names, present and past position titles, grades, salaries, and duty stations, as well as position descriptions are releasable. Military personnel are given greater privacy protection overseas because of threats of terrorism. Even favorable information, such as details of an employee=s outstanding performance evaluation, can be protected on the basis that it may embarrass an individual or cause jealousy among co-workers. Also, release of such information reveals by omission the identities of those who did not receive high ratings, creating an invasion of <u>their</u> privacy.

When the request is from a third party concerning another individual and the records are of a particularly sensitive nature (such as information from the Employee Assistance Program files), it may be necessary to use the AGlomar@ response; you would neither confirm nor deny the existence or nonexistence of records because to do so would in itself be an invasion of privacy. To be successful, the Glomar response would have to be used for all requests about individuals, whether or not information pertaining to them existed.

In some instances, deletion of identifying information may not provide enough privacy protection when the requester may already know some information about the principals involved. This may happen when there is a small group of co-workers, or when information that has been previously publicized combined with other facts and circumstances could identify individuals. In these instances, the material would not be disclosed.

Exemption (b)(7) of the FOIA exempts from disclosure Arecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(A) could reasonably be expected to interfere with enforcement proceedings;

(B) would deprive a person of a right to a fair trial or an impartial adjudication;

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(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;

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(F) could reasonably be expected to endanger the life or physical safety of any individual.@

An item of information originally compiled by an agency for a law enforcement purpose does not lose exemption (7) protection merely because it is maintained in or recompiled into a non-law enforcement record. Conversely, any information may qualify for exemption (7) protection if it is later used for a valid law enforcement purpose. Therefore, what is contained in the record and the reason information is compiled will determine whether exemption (7) applies, rather than the overall character of the record in which the information appears.

Exemption (b) (7)(A) protects records or information compiled for law enforcement purposes, but only to the extent that release of such records or information could reasonably be expected to interfere with enforcement proceedings. (Note: This protection applies only to a *specific* law enforcement proceeding which could be harmed by disclosure.)

Not only does the law enforcement proceeding have to be pending or anticipated, but release of the information could be expected to cause some specific harm. Exemption (7)(A) can be invoked when release could hinder an agency=s ability to control or shape investigations; would enable targets of investigations to avoid detection or suppress or fabricate evidence; or would prematurely reveal evidence or strategy in the Government=s case.

AInterference with enforcement proceedings@ does not have to be shown on a document-by-document basis. AGeneric@ categories of records can be used in withholding of law enforcement records as long as you can explain how the release of each category could interfere with enforcement proceedings. *But*, you still need to review each document to determine in which category, if any, it belongs.

Exemption (7)(A) protection is not usually granted when the person being investigated already has the information in question. Related to exemption (7)(A) is a separate provision in the FOIA called the A(c)(1) exclusion.@ See Chapter 11 for information about exclusions.

Exemption (b)(7)(B) is aimed at preventing prejudicial pre-trial publicity that could impair a court proceeding and is rarely used, mainly because the use of exemption (7)(A) protects the interests of the defendants to the prosecution as well.

Exemption (b)(7)(C) provides protection for personal information in law enforcement records similar to exemption (6). However, there is a lower burden of proof required to justify withholding, and the protection has been strengthened by a change in the risk of harm standard from "would" to "could" reasonably be expected to constitute an unwarranted invasion of personal privacy.

The omission of the word Aclearly@ in (7)(C) recognizes that law enforcement records are by nature more invasive of privacy than Apersonnel and medical files and similar files.@ When the balancing test is applied (privacy interest vs. public interest), considerably more weight is given to the privacy interest in a law enforcement record since the mere mention of a person=s name in the context of a law enforcement investigation carries a negative connotation.

The identities of law enforcement personnel are generally withheld under (7)(C), since identification of such personnel could subject them to harassment and annoyance in carrying out their duties.

Names of witnesses, their home and business addresses and telephone numbers can be protected under (7)(C).

Most agencies with criminal law enforcement responsibilities respond to FOIA requests for records about other individuals by refusing to confirm or deny the existence of such records (AGlomar@) to protect the privacy of those being investigated or mentioned in investigatory files

Exemption (b)(7)(D) provides protection for information compiled for law enforcement purposes which could reasonably be expected to disclose the *identity* of a confidential source, and, in the case of a record or information compiled by a criminal law enforcement agency

conducting a lawful national security intelligence investigation, exemption (7)(D) protects *information* furnished by a confidential source. A confidential source can be a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis. Note that the first clause of this exemption focuses on the identity of the confidential source,

and not on the information provided. However, this exemption protects both the identity of the informer and information which might reasonably be found to lead to disclosure of such identity.

ASource@ includes a wide variety of individuals and institutions, such as crime victims, citizens providing unsolicited allegations of misconduct, citizens responding to inquiries from law enforcement agencies, employees providing information about their employers, prisoners, mental healthcare facilities, medical personnel, commercial or financial institutions, state and local law enforcement agencies, and foreign law enforcement agencies. However, neither Federal law enforcement agencies nor Federal employees when acting in their official capacities should receive Aconfidential source@ protection.

Not all information received from sources in the course of criminal investigations is automatically entitled to confidentiality. Source confidentiality must be determined on a case-by-case basis. AConfidentiality@ means that the information was provided in confidence or in trust, with the assurance that it would not be disclosed to others.

Informants' identities are protected whenever they have provided information under either an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred. When using the exemption for Aimplied confidentiality,@ two factors must be applied: The nature of the crime and the source=s relation to it.

Exemption (7)(D)=s protection for sources and the information they have provided is in no way diminished when the case is closed. Additionally, unlike (7)(C), the safeguards of (7)(D) remain undiminished by the death of the source.

See also Chapter 11 for information about the (c)(2) exclusion.

Exemption (b)(7)(E) protects law enforcement information which would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. It protects techniques or procedures that may not already be well known. In some cases, however, law enforcement techniques that are commonly known can be protected when combined with other aspects of the investigation. In some cases it is possible to mention the technique without disclosing the details, such as references to audit criteria, IRS's discriminant function scores which have been used to select returns for audit, computer programs used to detect anti-dumping law violations, and methods and techniques used to relocate

protected witnesses. In these situations, the general nature of the technique is released, while protecting the details.

Law enforcement manuals meet the requirements for withholding under (7)(E) to the extent that they consist of or reflect law enforcement techniques and procedures that are confidential.

Any "law enforcement guideline" is also protected in exemption (7)(E), as long as it "could reasonably be expected to risk circumvention of the law."

Note that since exemption (7)(E) protects only a governmental interest, it is well suited for discretionary disclosure when disclosure can be made without Aforeseeable harm.@

Exemption (b)(7)(F) permits the withholding of law enforcement information that, if disclosed, could reasonably be expected to endanger the life or physical safety of any individual. This exemption is broader than exemption (7)(C) because there's no balancing for withholding required. This should be applied by law enforcement agencies when there is any reasonable likelihood that disclosure could cause any physical harm to anyone.

Exemption (7)(F) protects names and identifying information of Federal employees and third persons who may be unknown to the requester in connection with particular law enforcement

matters. This withholding may be necessary to protect such persons from possible harm by a requester who has threatened them in the past. The protection remains applicable even after a law enforcement officer has retired.

Exemption (b)(8) relates to those records contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for regulation or supervision of financial institutions.

The purpose of exemption (b)(8) is to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability. For this reason, bank examination reports prepared by Federal bank examiners have been withheld in their entirety. In addition, material that relates to these reports, examination findings, any follow-ups, etc., have also been determined exempt from release. In *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980), the court decided that exemption (b)(8) provided "absolute protection" for examina-tion-related documents.

State bank examination reports are also exempt from disclosure under Exemption (b)(8). Records pertaining to insolvent banks are also protected.

An entire examination report is protectable and need not be segregated to provide portions unrelated to the financial state of the institution.

Exemption (b)(9) relates to records containing geological and geophysical information and data concerning wells (including maps). This exemption applies only to "well information of a technical or scientific nature."

Additional Guidance

For additional guidance on the appropriate application of FOIA exemptions, refer to the Freedom of Information Act Guide and Privacy Act Overview, and the Freedom of Information Case List. Both publications are prepared by the Department of Justice's Office of Information and Privacy. Also, any questions relating to the disclosure of documents should be discussed with your legal counsel.

9. REVIEWING THE RECORDS FOR DISCLOSURE

Before you analyze records for disclosure determinations, make yourself a work copy -- do not use originals. Also, do not re-key documents to exclude information. You may want to do a two-step review. First, read through the records (copies of originals), and perhaps bracket with pencil or red pen the information you think is nonreleasable, and note the exemption(s) to be cited. Then, go back and actually delete the information. It is recommended that the information to be deleted be cut out, rather than "blacked out" or "whited out." Then make a copy of the records. The copy is sent to the requester.

Reasonably segregable portions

Although portions of some records may be denied, the remaining portions must be released to the requester when the meaning is not distorted by deletion of the denied portions and when it can be reasonably assumed that a skillful and knowledgeable person could not reconstruct the excised information.

When non-exempt material is so inextricably intertwined with exempt information that disclosure of it would leave only essentially meaningless words and phrases or where the editing required for proper disclosure would be so extensive as to effectively result in the creation of new records, the entire record can be withheld.

Indicate amount deleted

The amount of information deleted on released material must be indicated on the released record and, if technically feasible, at the place where the deletion is made. This requirement is usually met through use of administrative markings on redacted records. For complex electronic records, the FOIA gives special deference to an agency=s determination as to technical feasibility. In other words, use electronic markings to show the locations of electronic record deletions equivalent to the markings that show deletions on paper records -- to the extent that it is electronically practicable to do so.

Indicate amount withheld

When an entire record is withheld, you have to tell the requester approximately how much has been denied. Just use common sense in advising requesters how much information is being denied. The estimate will usually take the form of number of pages, or for large-volume requests, the estimate can be in terms of boxes, file drawers, or even linear feet. For withheld electronic records, you could use kilobytes, megabytes, an electronic Aword count,@ or a conventional record equivalent (standard document pages), whichever would be most effective in communicating the volume withheld.

10. CONSIDER BUSINESS SUBMITTER RIGHTS

Executive Order 12600 consists of a procedural structure for notifying those who submit business information to the Government when that information becomes the subject of a FOIA request. The Executive Order is based upon the principle that business submitters are entitled to such notification and an opportunity to object to disclosure before an agency makes a disclosure determination.

The text of the Executive Order can be found at the end of this chapter. A one-page guide to procedural requirements is also provided, along with Sample Letters l, 2 and 3 for use in composing the required notifications.

Upon receipt of a FOIA request for business information provided to the Department of the Treasury by a business submitter, the official to whom the FOIA request has been assigned for action shall promptly notify the business submitter, in writing, of the receipt of a FOIA request (refer to Sample Letter #1). The letter shall:

1. Give the submitter 10 working days within which to provide the Treasury bureau a detailed statement of any objection to disclosure. The submitter should be advised to clearly identify the information for which an exemption (or exemptions) is asserted; give the particular grounds supporting such an exemption; and describe how disclosure would cause the submitter competitive harm.

2. Either describe the business information requested or provide copies of the records containing the business information.

At the same time, notify the FOIA requester in writing of the following (refer to Sample Letter #2):

1. That notice has been given to the business submitter; and

2. That additional time will be required to process the request.

3. Invite the requester to agree to a voluntary extension of time; and

4. Advise the requester that he/she may seek judicial review, if appropriate.

If the Treasury bureau decides to disclose business information after carefully considering the objections and specific grounds for nondisclosure of the submitter, the Treasury bureau shall send a written notice (refer to Sample Letter #3) to the submitter that will include:

1. Reasons why submitter's objections were not sustained;

2. A description of the business information to be disclosed;

3. The actual disclosure date, which is 10 working days after the notice of final decision to release the information has been mailed to the submitter; and

4. A statement that if the business submitter is going to seek injunctive relief, to advise your office immediately.

You must promptly notify the business submitter if the requester brings suit seeking to compel disclosure of business information.

The notice requirement does not apply if:

1. The Treasury bureau determines that the information shall not be disclosed;

2. The information lawfully has been published or otherwise made available to the public;

3. Disclosure of the information is required by law other than the FOIA, 5 U.S.C. 552.

Executive Order No. 12,600 Issued June 23, 1987

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency subject to the Freedom of Information Act shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal by the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

Sec. 2. For purposes of this Order, the following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to, corporations, state governments, and foreign governments.

Sec. 3.(a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the

time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information has been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Sec. 4. When notification is made pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure of any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure of confidential commercial information, each agency's procedures shall require that the submitted be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

(b) The information has been published or has been officially made available to the public;

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes or records submitted to the agency that are to be released under the Freedom of Information Act, and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 of this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

FOIA REQUEST FOR BUSINESS INFORMATION

Upon receipt of a FOIA request for business information provided to the Department of the Treasury by a business submitter, the official to whom the FOIA request has been assigned for action shall:

Business Submitter

1. Promptly notify business submitter* in writing of receipt of a FOIA request (refer to **Sample Letter #1**). In your letter:

    a. Provide submitter 10 working days within which to provide the Treasury bureau with a detailed statement of any objection to disclosure;
    b. Either describe the business information requested, or provide copies of the records containing the business information.

2. If the Treasury bureau decides to disclose business information over the objection of the submitter, the Treasury bureau will send a written notice (refer to **Sample Letter #3**) to the submitter that will include:

    a. Reasons why submitter=s objections were not sustained.
    b. A description of business information to be disclosed;
    c. The actual disclosure date, which is 10 working days after the notice of final decision to release the information has been mailed to the submitter.

3. Promptly notify the business submitter if the requester brings suit seeking to compel disclosure of business information.

FOIA Requester

1. You are required to notify the requester in writing of the following (refer to **Sample Letter #2**):

    a. That notice has been given to the business submitter;
    b. That additional time will be required to process the request.
        (1) Invite requester to agree to a voluntary time extension;
        (2) Advise requester that he/she may seek judicial review, if appropriate.

2. Forward a copy of the intent to disclose notice simultaneous with it being sent to the business submitter.

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* Notification is provided when:

The business submitter has in good faith designated the information as commercially or financially sensitiveinformation; or the bureau has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm. Such notice is required for a period of not more than 10 years after the date of submission unless the business submitter requests, and provides acceptable justification for, a notice period of greater duration.

Sample Letter #1

INITIAL LETTER TO BUSINESS SUBMITTER

Dear [submitter]:

This office has received a Freedom of Information Act (FOIA) request for business information provided by you. The request is from [name of requester and/or company name].

The Department of the Treasury is required to provide predisclosure notification to the submitter of business information whenever that information has been requested under the Freedom of Information Act. This letter is to inform you that the enclosed [or following] information will be disclosed to the requester unless we are provided with a detailed statement of objection from you within 10 working days of receipt of this letter.

You are asked to support your claim of confidentiality with a statement or certification by an officer or authorized company representative that the information in question is in fact confidential commercial or financial information and has not been disclosed to the public. Separate determinations of confidentiality must be made for each type of in- formation, as opposed to a determination being made on the confidentiality of the total package. You will need to specify all grounds for withholding any of the information under any exemption of the FOIA. In the case of exemption (b)(4), you will need to demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential.

If we should decide to disclose the information over your objection, you will be notified in writing of the specified disclosure date. This disclosure date shall be 10 working days after notice of our final decision to release the requested information has been mailed to you.

If you should have any questions concerning this matter, please call [name and phone number of contact].

Sincerely,

Sample Letter #2

LETTER TO FOIA REQUESTER EXPLAINING DELAY OF RESPONSE

Dear [requester]:

We regret that we must ask for additional time to continue processing your Freedom of Information Act (FOIA) request.

Executive Order 12600 requires that a Government agency provide predisclosure notification to the submitter of business information whenever confidential commercial information has been requested under the FOIA. The business submitter is afforded 10 working days within which to provide the Treasury Department with a statement of objection to disclosure. If the Treasury Department decides to disclose the business information over the objection of the business submitter, the Department must notify the business submitter in writing of the specified disclosure date, which is 10 working days after the notice of the final decision to release the requested information has been mailed to the submitter.

We are in the process of fulfilling these requirements and will make every effort to respond by [date].

If you agree to this voluntary extension, no reply to this letter is necessary. You have the right, however, to consider a delay in responding to your request as a denial of access to records; and consequently you may proceed with an administrative appeal or seek judicial review. You will still have the right to file an appeal if we subsequently deny you access to any of the records requested.

Further inquiries concerning this request should be directed to [name and address].

Sincerely,

Sample Letter #3

FINAL LETTER TO BUSINESS SUBMITTER REGARDING RELEASE

Dear [submitter]:

This is in regard to the Freedom of Information Act request from [name of requester and/or company name] concerning business information provided by you to the Treasury Department.

After careful consideration of your stated objections to disclosure of the specified information, we have decided to release the information to the requester.

[State reasons why submitter's objections were not sustained.]

[Give a description of the business information to be disclosed.]

On [date],* this office will release the information described above. If you are going to seek injunctive relief, please advise this office immediately.

Sincerely,

cc: [name of requester]

***** Note: Treasury regulations require that this letter include a specified disclosure date, which is 10 working days after the notice of the final decision to release the requested information has been mailed to the submitter. It is suggested that you include at least two additional working days when computing the disclosure date to allow time for mail delivery to the submitter.)

11. THE EXCLUSIONS

Whenever a request is made which involves access to records described in 5 U.S.C. 552(b)(7)(A), and:

1. The investigation or proceeding involves a possible violation of criminal law; and

2. There is a reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings;

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of the FOIA. This is known as the **(c)(1) exclusion**.

In certain situations the very fact of an investigation's existence is in itself a disclosure, especially in a case where a carefully worded FOIA request may be used to find out if the subject of the request is being investigated. If exemption (7)(A) were cited, it would alert the subject of the fact of investigation.

The "(c)(1) exclusion" protects the existence of records of ongoing investigations or proceedings. The records must be of the type that could be withheld in their entirety and must relate to the investigation of possible violation of criminal law. Records relating to civil law enforcement will not qualify for this exclusion.

The agency must have reason to believe that the subject is unaware of an investigation on him or her, and this exclusion will apply only during the time that these circumstances exist. Once the target of the investigation becomes aware of the investigation, this exclusion may no longer be used. Use of this exclusion means that, as far as the FOIA requester is concerned, these records do not exist. The requester will be advised that no records responsive to the FOIA request exist. When the excluded records are part of a number of other records responsive to the request, the request will be handled as a presumably routine request, with the other responsive requests processed as though they were the only ones in existence.

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of the FOIA unless the informant's status as an informant has been officially confirmed. This treatment is known as the **(c)(2) exclusion**.

As with exemption (7)(A), invoking exemption (7)(D) in response to a FOIA request could indicate to a requester that a particular person is a confidential source. For example, if all members of an organized crime group request information about themselves, using Exemption (7)(D) could indicate a named individual as a confidential source. The (c)(2) exclusion is intended to remove this risk.

This (c)(2) exclusion should be used carefully, since stating that "records do not exist that are responsive to your request" could also be a tip-off to an individual having a known record of federal prosecutions. The individual making the request would recognize that the request was given special treatment and become suspicious. In these cases all information that would ordinarily be released to a first-party requester should be provided with the exception of the confidential source information.

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation (FBI) pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in exemption (b)(1), the FBI may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of the FOIA. This is known as the **(c)(3) exclusion**). Sometimes the very fact that the FBI does or does not hold any records on a specific person can itself be a sensitive fact, classifiable under E.O. 12356, and protectable under FOIA exemption (b)(1). Citing the exemption or a "no records" response can jeopardize sensitive activities. **Note that exclusion (c)(3) can be used only by the FBI**.

Any reply invoking the provisions of any of the exclusions should be carefully reviewed to assure appropriate application of the exclusions. The "excluded" records should be carefully identified and segregated from other records that are being processed. Uniform procedures should be prepared in advance to handle administrative appeals that seek review of a possibility that an exclusion was employed in a given case. There is no requirement to advise requesters of appeal rights when an exclusion has been used. However, requesters who specifically ask if an exclusion was used should be advised that it is the agency's policy to neither confirm nor deny that an exclusion was used.

12. CONSULTING AND REFERRAL OF DOCUMENTS

When a request is received for a record created by your office that includes information originated by or of substantial interest to another bureau or agency, the record shall be referred to the originating bureau or agency for a recommendation on whether to release or withhold the information. You are not to release the information without prior consultation with the originator. You, however, retain the responsibility for responding to the requester. A recommendation from the originating bureau or agency not to release information should be accompanied by the exemption(s) to be asserted and why.

Requested records that were originated by another bureau or agency are referred to the originator for determining whether or not the records will be disclosed, and the originating bureau or agency shall respond directly to the requester. **Sample referral letters are at the end of this chapter**.

When a requested record created by another agency or bureau of the Department is in the possession of your bureau, the responsible official will refer the record to the bureau or agency which originated the record for a direct response to the requester. The requester shall be informed of the referral.

A request is referred to another bureau when the request is for records under the control of or in the possession of that bureau, and not your bureau. The requester should be notified of the referral. The bureau of the Department to which the referral is made should treat this as a new request. The time limits for the response will begin when the referral is received in the appropriate bureau's FOIA office.

Classified records that must be referred to another bureau or agency should be handled in compliance with the instructions contained in 31 CFR Part 2, for handling and safeguarding of classified national security information.

A request may involve records pertaining to more than one DO office or more than one bureau of the Department. At the discretion of the Departmental Disclosure Office, the response may be coordinated by the DDO. Or, the primary responsibility for the coordinated response may be determined based on the office or bureau having major interest or by the office having the most records.

Records retired to the Federal Records Center are still the responsibility of the originating office, and they must be retrieved when they are or may be responsive to the request.

Bureaus receiving referred requests will answer them in accordance with the time limits established by FOIA and the regulations.

When the request is for a record not in the possession or control of any bureau of the Department of the Treasury, the requester will be notified accordingly and the request returned to the requester.

White House Records

At the end of this chapter is a copy of a Department of Justice memorandum explaining the procedure used for White House records. Questions about these procedures should be directed to the Department of Justice at 202/514-3642.

Sample letter to agency referring a Treasury record which contains information furnished by that agency.

Re: FOIA No. _____

Dear

While processing the Freedom of Information Act request of [name of requester], we located the enclosed Treasury Department record which contains information furnished by your agency. Please review your information (outlined in red) and return the record to me with your recommendation concerning disclosure of the information. If your recommendation is for your information to be withheld, please state the reasons why and cite the FOIA exemption(s) to be claimed.

Please return the record to me within 10 days to the following address:

[give name and complete address, including room number]

If you should have any questions concerning the enclosed record, please call me on [phone number].

A copy of the FOIA request is enclosed.

Sincerely,

Enclosures [state number of records]

Sample letter to requester explaining referral of a record containing information furnished by another agency.

Re: FOIA No. _____

Dear [name of requester]:

This concerns your Freedom of Information Act request for information relating to [subject of request].

A certain record that is responsive to your request contains information furnished by another agency. We are in the process of getting that agency's review and recommendation regarding disclosure of its information. We will respond further to your request as soon as we hear from that agency.

Sincerely,

Sample letter to agency referring a record which originated at that agency for review and response directly to the requester.

Re: FOIA No. _____

Dear

While processing the Freedom of Information Act request of [name of requester], we located the enclosed record which originated in your agency and appears to be responsive to the request.

Please review this record to determine if it can be disclosed, and respond directly to the requester. We have advised [name of requester] of this referral.

If you have any questions, please call [name and phone number of person processing request].

Enclosed is a copy of the FOIA request.

Sincerely,

Sample letter to requester explaining referral of a record to another agency for review and direct response to the requester.

Re: FOIA No. _____

Dear [name of requester]:

This concerns your Freedom of Information Act request for information relating to {subject of request].

A certain record which is responsive to your request originated at [name of agency]. We have referred this record to that agency for review and direct response to you. A copy of our referral to [name of agency] is enclosed for your information.

Sincerely,

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL

Washington, DC 20530

November 3, 1993

MEMORANDUM

SUBJECT: White House Records or Information Found in Agency Files: FOIA Consultation Procedures

The following is the full text of a memorandum sent by Associate Attorney General Webster L. Hubbell to the principal FOIA administrative and legal contacts at all federal agencies on November 3, 1993, regarding the FOIA consultation procedures required for any White House-originated record or information found in agency files:

The purpose of this memorandum is to set forth the procedures to be followed by all federal agencies for the handling of any White House-originated record or information that is found responsive to an access request made under the Freedom of Information Act, 5 U.S.C. § 552 (1988).[1]

In processing FOIA requests, agencies searching for responsive records occasionally find White House-originated records (or records containing White House-originated information) that are located in their files. These records raise special concerns, including questions of executive privilege, and require special handling--particularly in light of the White House's unique status under the FOIA.

By its terms, the FOIA applies to "the Executive Office of the President," 5 U.S.C. § 552(f), but this term does not include either "the President's immediate personal staff" or any part of the Executive Office of the President "whose sole function is to advise and assist the President." Meyer v. Bush, 981 F.2d 1288, 1291 n.1 (D.C. Cir. 1993) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974)); see also, e.g., Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971). This means, among other things, that the parts of the Executive Office of the President that are known as the "White House Office" are not subject to the FOIA; certain other parts of the Executive Office of the President are.

In coordination with the Office of the Counsel to the President, the Department of Justice has determined that agencies should implement the

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[1.] This memorandum supersedes the Department of Justice's January 28, 1992 memorandum on this subject.

following FOIA procedures regarding all White House-related records or information found in their files. Please note that these procedures prescribe "consultations," which do not involve a transfer of administrative responsibility for responding to a FOIA request, as distinct from complete record "referrals."[2] In all instances involving White House records or information, your agency will be responsible for responding directly to the FOIA requester once the process of consultation is completed.

1. Records originating with any part of the "White House Office"[3] should be forwarded to the Office of the Counsel to the President for any recommendation or comment it may wish to make, including any assertion of privilege, prior to your response to the FOIA requester. Please be sure to advise the White House Counsel's Office of any sensitivity that these records have from the perspective of your agency and whether you believe any FOIA exemption applies. If after considering the possibility of discretionary disclosure in accordance with the Attorney General's FOIA Memorandum of October 4, 1993 you believe that a FOIA exemption applies, you should mark each record accordingly to facilitate review by the Counsel's Office of your proposed response.

   All such consultation communications should be forwarded to the White House Counsel's Office at the following address:

   Office of the Counsel to the President
   The White House
   1600 Pennsylvania Avenue, N.W.
   Washington, D.C. 20500

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[2]. See FOIA Update, Summer 1991, at 3-4 ("OIP Guidance: Referral and Consultation Procedures") (further discussing differences between these two procedures).

[3]. The "White House Office" includes, among other components, the Offices of the President, Cabinet Affairs, Chief of Staff, Communications, First Lady, Counsel to the President, Intergovernmental Affairs, Legislative Affairs, Management and Administration, Operations, Political Affairs, Presidential Personnel, Public Liaison, Scheduling and Advance, Staff Secretary, Correspondence, Visitors, Policy Development, Domestic Policy Council, Environmental Policy, Council of Economic Advisors, National Economic Council, Assistant to the President for National Security Affairs and Deputy Assistant to the President for National Security Affairs, Assistant to the President for Science and Technology, and the President's Foreign Intelligence Advisory Board. The White House Office also includes task forces and working groups created by the President or an official in the White House Office, and reporting to the President or an official in the White House Office, including, for instance, the National Performance Review.

Please note that many records originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as, or appear to be, drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning records likely to be in the public domain should be referred to the White House Counsel's Office as well.

It is possible that a record originating in the White House Office (or in the Office of the Vice President--see below) will be one over which the White House Office (or the Office of the Vice President) has retained control, in which case it will not be an "agency record" subject to the FOIA even though it is located by a federal agency in response to a FOIA request. Accord, e.g., Goland v. CIA, 607 F.2d 339, 345-48 (D.C. Cir. 1978) (honoring "retention of control" by non-FOIA entity), cert. denied, 445 U.S. 927 (1980); see also Paisley v. CIA, 712 F.2d 686, 692-95 (D.C. Cir. 1983); Holy Spirit Ass'n v. CIA, 636 F.2d 838, 840-42 (D.C. Cir. 1981). Any such records should be identified for special handling.

2. Any record originating with the Office of the Vice President or any of its component offices, offices which likewise are not subject to the FOIA, should be forwarded for consultation purposes to the Office of the Counsel to the Vice President, Old Executive Office Building, Room 269, Washington, D.C. 20501.

3. All records originating with other offices within the Executive Office of the President (EOP)--including the Office of Administration; the Office of Management and Budget; the Office of Science, Technology and Space Policy; the Office of the U.S. Trade Representative; the Council on Environmental Quality; and the Office of National Drug Control Policy--should be forwarded to the FOIA officers of the relevant individual EOP offices. This, again, is for consultation purposes only; agencies remain responsible for responding directly to the FOIA requester once these EOP consultations have been completed. For your convenience, a contact list for these EOP offices is attached.

4. Responses to FOIA requests for any classified White House records or records originating with the National Security Council should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

    Director of Information Disclosure
    Office of Information Disclosure
    National Security Council
    Old Executive Office Building, Room 392
    Washington, D.C. 20500

Records originating with the Assistant to the President for National Security Affairs or his deputy should continue to be treated as records originating in the White House Office (see footnote 3 above).

If any question arises regarding these procedures, either generally or in any particular case, please do not hesitate to contact Margaret Ann Irving, Acting Deputy Director of the Justice Department's Office of Information and Privacy, at (202) 514-4251.

Attachment

cc: All Agency General Counsels

ATTACHMENT

Executive Office of the President--Agencies Subject to the FOIA

Council on Environmental Quality
Deputy General Counsel
722 Jackson Place, N.W., Room 31
Washington, D.C. 20006

Office of Administration
Director, Administrative Services Division
Old Executive Office Building,
Room 350
Washington, D.C. 20500

Office of Management and Budget*
Deputy Assistant Director for Administration
New Executive Office Building,
Room 9026*
Washington, D.C. 20503

Office of National Drug Control Policy
FOIA Officer
750 17th Street, N.W., 8th Floor
Washington, D.C. 20500

Office of Science, Technology and Space Policy
Executive Director
726 Jackson Place, N.W., Room 5013
Washington, D.C. 20500

Office of the U.S. Trade Representative
FOIA Officer
600 17th Street, N.W., Room 222
Washington, D.C. 20506

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* OMB requests that records be forwarded to the attention of Darrell A. Johnson at this address.

13. TIME LIMITS AND TIME EXTENSIONS

Twenty (20)-Day Limit For Responding.

The initial determination to release or deny a record will be made and the decision reported to the requester within 20 working days after the receipt of the request by the responsible official, unless the business submitter provisions of E.O. 12600 apply (see Chapter 10). Every effort must be made to meet the 20-day statutory response deadline.

Unusual Circumstances

The FOIA allows a time extension by written notice to the requester in unusual circumstances. Those circumstances are:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practical speed, with another bureau or agency having substantial interest in the determination of the request or among two or more bureaus or agencies having substantial subject matter interest therein.

In the above "unusual circumstances," you must give the requester an opportunity to limit the scope of the request so that it may be processed within the 20-day time limit, or an opportunity to arrange with you an alternative time frame for processing the request or a modified request.

Voluntary Extension of Time

If it's not possible to locate and review the records within 20 working days because of reasons other than "unusual circumstances" as defined above, the requester should be contacted and invited to agree to a voluntary extension of time. For DO, the FOIA contact for the office processing the request will advise Disclosure Services by e-mail that an extension of time is needed, along with an estimated completion date. Disclosure Services will send a letter to the requester asking the him to agree to the extension of time. The request for more time should not exceed 30 days, unless exceptional circumstances require a longer period.

Expedited Processing

Requesters may ask for expedited processing of their request when they can demonstrate a compelling need. "Compelling need" means:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

The demonstration of compelling need must be supported by a statement certified by the requester to be true and correct to the best of his or her knowledge and belief. The statement should be in the form prescribed by 28 U.S.C. 1746, "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date]."

The standard of "urgency to inform" requires that the records requested pertain to a matter of current exigency to the American public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public. The requester must adequately explain the matter or activity and why the records sought are necessary to be provided on an expedited basis.

Upon receipt by the appropriate bureau official, a determination as to whether to grant or deny a request for expedited processing must be made, and the requester notified, within 10 calendar days of the date of the request. However, the Department has at least 5 days from the date of receipt of the request to issue such determination. The determination to grant or deny a request for expedited processing may be made solely on the information contained in the initial letter requesting expedited treatment.

Appeals of initial determinations to deny expedited processing must be made within 10 calendar days of the date of such determination. The appeal determination must be made and the requester notified within 10 work days from the date of receipt of the appeal.

Multiple Tracks

You may establish different processing tracks based upon the amount of work or time (or both) involved in processing requests. For example, requests for voluminous records may be in one processing track; and simple requests (for few records, or for similar, just-processed requests) may be in a Afast@ track. You may provide a requester with an opportunity to limit the scope of the request in order to qualify for processing under the Afast@ track.

14. WRITING THE RESPONSE

You will find sample response letters at the end of this chapter. Each letter represents one of four standard findings that are normally made in response to a FOIA request. Below is a brief description of each finding.

No records found

If no records are located, tell the requester that a search was conducted and no responsive records were found. Appeal rights are cited because a no-records response is considered an adverse determination. This determination is a result of the judicial decision in *Oglesby v. Department of the Army*, 920 F.2d 57 (D.C. Cir 1990). Appeal rights for a no-records response may be given as follows:

> Should you choose to appeal this response, you must do so within 35 days from the date of this letter. Your appeal must be in writing, signed by you and should be addressed to:
>
> [Give bureau address]
>
> The deciding official on your appeal will be [give title of appeal official].

Full release of records

If a full grant of access is made, tell the requester that he/she is granted full access to the records located. No appeal rights are given.

Partial release of records

If a partial grant of access is made, tell the requester that access is being granted to part of the responsive records. Advise the requester regarding the types of records withheld and the FOIA exemption(s) claimed for withholding. All exemptions that are applicable must be cited so that the administrative record is complete. Exemptions should be cited in full. Appeal rights are given, as well as the title of the official who will make the appeal determination. A copy of the redacted copy of the record is provided to the requester.

Indicate amount withheld

When a record is only partially disclosed, the part deleted must be clearly indicated on the disclosed portion of the record at the place of deletion. This requirement does not apply if including an indication of deleted information would harm an interest protected by the exemption under which the deletion is made. This requirement applies to all record formats. For a paper record, the denied portion can be visibly indicated by the portions deleted. For electronic records, this requirement applies if it's technically feasible.

Full denial of access

When responsive records have been located but none are being disclosed, tell the requester that access to the records is denied in full. All exemptions that are applicable must be cited so that the administrative record is complete. Appeal rights are given.

Estimating the volume withheld

You must make a reasonable effort to estimate the volume of records or information withheld and inform the requester, unless providing such an estimate would harm an interest protected by the exemption under which the denial is made. This requirement can be met by using the response letter to say what is being withheld in number of pages, or some other form
of measurement. The notification of volume denied applies to all record formats, including electronic records, if technically feasible. Though not required, it's Treasury policy to also tell the requester the types of records being withheld (i.e., letters, memos, reports, notes, etc.).

Appeal rights language in letters of denial

Appeal rights for a partial or full denial differ slightly from the Ano records response,@ paragraph and may be given as follows:

> You may appeal this decision within 35 days from the date of this letter. Your appeal must be in writing, signed by you, and should be addressed to:
>
> [Give bureau address for appeals.]
>
> The deciding official on your appeal will be [give title].

Sending response in parts

The response can be made in parts. This method is recommended especially when processing requests for voluminous records. If records with deletions are released in a response

part, tell the requester what exemptions have been claimed. **However, appeal rights are provided only in the final response.** Advise the requester in each response part that appeal rights will be provided in the final response.

About fees

Also include a fee status in your response. For example, "A bill will follow under separate cover." Or, "fees were minimal and have been waived."

NO RECORDS FOUND
SAMPLE

Re: FOIA 99-00-000

Dear

This is in response to your Freedom of Information Act (FOIA) request dated January 1, 1999.

A search has been conducted by this office, and no records responsive to your request have been located.

Should you choose to appeal this response, you must do so within 35 days from the date of this letter. Your appeal must be in writing, must be signed by you, and should contain the reason(s) why you believe an adequate search was not conducted. Your appeal should be addressed to:

Freedom of Information Appeal
Disclosure Services, DO
Department of the Treasury
Washington, DC 20220

The deciding official on your appeal will be [ ].

No fees were incurred in processing your request. [or: A bill for fees incurred will be sent under separate cover.]

Sincerely,

FULL RELEASE
SAMPLE

Re: FOIA 99-00-000

Dear

This is in response to your Freedom of Information Act (FOIA) request dated January 1, 1999.

All responsive records are being released in their entirety and are enclosed. No other responsive records were found.

No fees were incurred in processing your request. [or: A bill for fees incurred will be sent under separate cover.]

Sincerely,

Enclosure

PARTIAL RELEASE
SAMPLE

Re: FOIA 99-00-000

Dear

This is in response to your Freedom of Information Act (FOIA) request dated January 1, 1999.

Enclosed are four pages found to be responsive to your request. Some information has been deleted in accordance with subsection (b)(5) of the FOIA, 5 U.S.C. 552. Exemption (b)(5) exempts from disclosure "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."

No other responsive records were located.

This is a partial denial of your request. You may appeal this decision within 35 days from the date of this letter. Your appeal must be in writing, signed by you, and should be addressed to:

Freedom of Information Appeal
Disclosure Services, DO
Department of the Treasury
Washington, DC 20220

The appeal should specify the date of your initial request and the date of this letter. If possible, please provide a copy of your request and this letter.

The deciding official on your appeal will be [ ].

No fees were incurred in processing your request. [or: A bill for fees incurred will be sent under separate cover.]

Sincerely,

Enclosures

FULL DENIAL
SAMPLE

Re: FOIA 99-00-000

Dear

This is in response to your Freedom of Information Act (FOIA) request dated January 1, 1999.

Your request is being denied in full. One two-page memorandum has been withheld pursuant to 5 U.S.C. 552(b)(1), which applies to matters which are "specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order." In addition, a draft letter consisting of three pages is being withheld pursuant to 5 U.S.C. 552(b)(5), "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

You may appeal this decision within 35 days from the date of this letter. Your appeal must be in writing, must be signed by you, and should be addressed to:

Freedom of Information Appeal
Disclosure Services, DO
Department of the Treasury
Washington, DC 20220

The appeal should specify the date of the initial request and the date of this letter. If possible, please provide a copy of your request and this letter.

The deciding official on your appeal will be [ ].

No fees were incurred in processing your request. [or: A bill for fees incurred will be sent under separate cover.]

Sincerely,

15. DOCUMENTATION

The administrative FOIA file

It is important that a request file reflects a reasonable basis for the withholding of any records. If a requester can show that a decision was made in an arbitrary or capricious manner, the court may direct the Special Counsel to initiate an investigation and determine if disciplinary action is warranted (5 U.S.C. 552(a)(4)(F)).

Use of an index is suggested when a FOIA request involves an extensive number of records, some of which may be granted and others denied. It is especially useful if the documents to be denied are subject to a variety of exemptions. The index is not to be provided to the requester and would not be attached to the response to the requester.

You should prepare an index whenever the request process is sufficiently complex to warrant one. The format and content of an index depends upon the circumstances of the request. The index should generally:

1. Contain a listing of numbered records;

2. Identify the record by type, date, recipient, and originator;

3. Indicate the nature of the record and, if part of an investigatory file, indicate how the record related to the investigation;

4. Identify the FOIA exemption (or exemptions) used;

5. Provide justification for the use of the exemption and specify the anticipated harm which might result from release, unless use of the exemption is mandatory; and

6. Indicate those items being withheld because exemption is mandatory and cite any applicable statutes.

Separate entries may be necessary if several segregable portions are being withheld from a record for different reasons.

Groups of substantially identical records may be described generally rather than in individual detail.

Vaughn index

A Vaughn index is an itemized list correlating each withheld document or portion with a specific FOIA exemption and the relevant part of the agency non-disclosure justification. There is no statutory requirement that either a Vaughn index or similar detailed list be prepared for the requester while the agency is administratively processing the FOIA request. TheVaughn index makes a trial court's job more manageable when reviewing documents that are the subject of litigation.

Completing the FOIA Action Form (FAF)

Each Treasury bureau is responsible for collecting its own data, which is mainly for the Department's annual report to the Attorney General. Departmental Offices (DO) uses the FOIA Action Form, which is explained below, but bureaus may elect to use another form or method.

Part I. If the AFee Waiver@ box has been checked, the request for fee waiver or reduction should first be decided. (See Chapter 6.) If the ACoordinator@ box has been checked, you must provide your portion of the response to the individual listed as coordinator, so that one response to the requester will be sent by DO.

The "Respond to" box in Part I is used by Disclosure Services to give the address of the referring Government agency when the response is to be sent to that agency. Or, the box may contain processing instructions or comments.

Part II. Check the appropriate boxes. For "Other," please explain. For example, "No records located," "Withdrawn by requester," "Records previously furnished."

Part III. This part is to be filled in for all requests, regardless of fee category or if fees are being charged. This is what Disclosure Services uses to determine the Acost@ to the DO for processing FOIA requests. Disclosure Services uses this information to compile DO's statistics for the FOIA annual report. Include time spent on phone with other offices discussing the request, meetings regarding the request and time spent searching for responsive records. Include anyone who has spent time looking for material that's responsive to a request, whether or not any records are actually found. Report the person's grade and time (even if only 5 minutes). Also include time spent examining the records, preparing them for release, and time spent drafting and typing the response.

Part IV. The fees reported in Part IV depend on the user category that has been assigned to the request. The terms used reflect those used in the regulations and not those in Part III of the form.

Search: All the time spent looking for material responsive to a request. A search can be done either manually in paper files or by using computers to locate electronic records. Reasonable efforts have to be made to search for records in electronic form or format. Indicate the grade and time of each employee performing the search.

Duplication: Refers to the process of making a copy of a record in order to respond to a FOIA request. The copies can be paper copies, microform, any type of magnetic media, audio visual material, etc. Specify what type of copies are provided, if other than paper. NOTE: The *time* spent copying records, however, is not a billable expense.

Review: Refers to the process of examining records located in response to a **commercial use request** to determine whether any portion of any record located should not be disclosed. It includes processing any records for disclosure.

Commercial: Report the actual number of whole or partial search hours, the actual number of copies, and the actual hours spent reviewing the records for release.

Educ/Scientific/Media: Report the actual number of pages released, even though this category is entitled to the first 100 pages free of charge. Note that this category of requester is not charged for search or review costs.

Other (Individual): Report the hours in excess of the first 2 hours of search time. Individuals are entitled to 2 free hours of search time. Report the actual number of pages released, even though individuals are entitled to the first 100 pages free of charge. No review costs are charged to individuals.

It's up to the responsible official to determine whether or not a bill should be sent to the requester or the fees are to be waived.

The responsible official or the FOIA contact should sign and date the form. Only offices within DO will complete the form and return it with a copy of the response letter to Disclosure Services; other Treasury bureaus will follow the data reporting procedures of their respective bureaus. Do not send Disclosure Services copies of records released to the requester.

16. PROCESSING APPEALS

If the responsible official makes an initial determination to deny a request for records, either in whole or in part, that decision may be appealed by the requester in writing to a designated appellate authority.

The appeal should:

1. Contain the basis for disagreement with the initial denial; and

2. Be received within 35 days of the date of the denial.

Appeal procedures also apply to: The denial of a request for a waiver or reduction of fees; when there has been an adverse determination of the requester's fee category; a finding of no responsive records located; or the denial of a request for expedited processing.

The responsible official who made the determination to withhold information in response to a request must make the file available to the appeal official. The file should contain such items as:

1. The initial FOIA request;

2. Any correspondence between the agency and the requester acknowledging the request, negotiating the scope, fees or time required to respond to the request;

3. Copies of any information released;

4. Copies of any information withheld;

5. Any document discussing the status of the request;

6. The initial determination and any interim responses;

7. Any index that may have been prepared at the discretion of the responsible official;

8. Any notes or memoranda generated as a result of the FOIA request.

Time Limits

If the requester chooses to appeal the initial determination, he must do so within 35 calendar days from the date of the final letter informing the requester that a determination to withhold has been made (or the date of the letter transmitting the last records released, whichever is later). *However,* an appeal of a denial for expedited processing must be made within 10 calendar days of the date of the initial determination to deny expedited processing.

Final determinations on appeals shall be made within 20 work days after receipt; *however,* appeal determinations of denials of requests for expedited processing shall be made within 10 work days from the date of receipt of the appeal.

Time Extensions

If it's not possible to review the case file and respond to an appeal within 20 work days, the requester should be contacted and invited to agree to a voluntary extension of time. For DO, the FOIA contact for the office processing the appeal will advise Disclosure Services by email that an extension of time is needed, along with an estimated completion date. Disclosure Services will send a letter to the requester asking him to agree to a voluntary extension of time. The extended period should not exceed l0 days, unless exceptional circumstances require a longer period.

No extension of time provision exists regarding a decision whether to grant or deny a request for expedited processing.

Preparing the administrative appeal letter

When the appeal official makes a determination to release all or a portion of records previously withheld in the initial determination, a copy of these records should be forwarded promptly to the requester.

If the appeal official determines that the appeal is to be denied, either in whole or in part, the written response shall notify the requester of the denial, the reasons for the denial including the FOIA exemptions relied upon, and the name and title of the appeal official. The response must also include a statement that judicial review of the denial is available in the U.S. district court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located, or the District of Columbia, in accordance with 5 U.S.C. 552(a)(4)(B).

17. READING ROOMS

The FOIA requires each agency to provide a place where the public may inspect and copy or have copied the material required to be made available under 5 U.S.C. 552(a)(2).

These places have become known as "reading rooms." Space for the reading room may be set aside for use by the public and should include facilities for copying documents located in the reading room. Reading room space may also be set aside on an ad hoc basis if the demand for inspection and/or copying by the public is insufficient to warrant the costs associated with dedicating space for this purpose.

To comply with this requirement of the Act, several bureaus have made arrangements with the Treasury Department library for the library to act as the bureau's reading room.

Although fees are not to be assessed for access to materials in the reading rooms, fees may be charged for copies of materials provided, in accordance with 31 CFR l.7.

Electronic Reading Room

Records that meet the criteria set forth in subsection (a)(2) of the FOIA (see "Contents of Reading Rooms," below) and which are created on or after November 1, 1996, must be posted on the Internet at the bureau's electronic reading room site.

Contents of Reading Rooms

The only criteria for what is to be placed in a reading room is the general guidance found in the FOIA under subsection (a)(2). It is recommended that only those records meeting the criteria found in subsection (a)(2) of the FOIA be posted to FOIA electronic reading rooms. Other records a bureau may want to make available to the public can be posted on other electronic pages of a bureau web site.

The FOIA requires that (a)(2) materials be made available to the public for inspection and copying, unless such materials are published and copies offered for sale. The primary purpose of subsection (a)(2) was to compel disclosure of any "secret law" of an agency which had the force and effect of law in most cases. This material would consist of documents which contain what an agency has treated as authoritative indications of its positions on legal or policy questions. Since the enactment of the 1974 and 1996 amendments to the FOIA, courts have broadened the types of documents which meet this criteria.

The (a)(2) materials include:

1. Final opinions, including concurring and dissenting opinions and orders made inadjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

Statements of policy and interpretations that have been adopted by the agency and are not published in the *Federal Register*. This qualification is generally met when action is taken by the head of an agency or a responsible official who has been empowered by the agency to make an authoritative issuance.

3. Administrative staff manuals and instructions, or portions thereof, that establish Department of the Treasury policy that affect a member of the public.

4. Records that have been located and processed in response to a request that have become or are likely to become the subject of subsequent requests for substantially the same records, regardless of form or format. These are often referred to as "frequently requested" records.

Each bureau must maintain and make available to the public a current index of material described in items 1, 2, and 3 above. Also, each bureau is to promptly publish, quarterly or more frequently, and distribute by sale or otherwise copies of each index or supplement unless the head of each bureau determines by order published in the *Federal Register* that the publication would be unnecessary and impractical. Even so, copies of the index must be provided on request at a cost not to exceed the direct cost of duplication.

Each bureau is to maintain in its electronic reading room an index of "frequently requested" records described in 4 above.

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