


February 9, 2005

Note for: Assistant General Counsel
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From: Catherine M. Holzle 

Subject: Security-Related Information, Legal Authority for Potential Withholding under
Freedom of Information Act

The attached summary provides a broad outline of the legal basis under the Freedom of Information Act (FOIA) for protecting security-related information, the disclosure of which may adversely affect national security, or the personal safety and security of individuals. While

EX.5

The outline begins with information that has the greatest restrictions on disclosure, classified national security information and Restricted Data, and progresses through relatively lesser degrees of sensitivity, from Safeguards Information, to sensitive unclassified, non-Safeguards security-related information. For purposes of the outline, Restricted Data and Safeguards are grouped together because they share common legal authority in the form of their primary statute (Atomic Energy Act) and FOIA basis for withholding (exemption 3 incorporating nondisclosure provisions of other federal statutes). A certain minimum degree of sensitivity is presumed in even the lowest category of information described in the outline, however, which should be a reflection of concern that unrestricted public availability of such information may heighten risk of harm or vulnerability, may present increased threat of attack, or may result in greater ability to avoid detection or circumvent legal requirements.


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Portions Ex 5 Attorney-
Client privilege

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**LEGAL AUTHORITY FOR WITHHOLDING SECURITY-RELATED INFORMATION
UNDER THE FREEDOM OF INFORMATION ACT**

Classified National Security Information

- **FOIA Exemption 1:** exempts from public disclosure properly classified information specifically authorized under criteria established by Executive Order to be kept secret in interest of national defense. 5 U.S.C. §552(b)(1).
- E.O. 12,958, as amended by E.O. 13,292 of March 25, 2003, 68 Fed. Reg. 15,315, (March 28, 2003).
 - Sec. 1.4. Classification Categories include:
 - (e) scientific, technological, or economic matters relating to the national security, which includes defense against transnational terrorism;
 - (f) United States Government programs for safeguarding nuclear materials or facilities;
 - (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism.
 - Sec. 1.7. Classification Prohibitions and Limitations also apply:
 - (e) **Compilations** of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that: (1) meets the standards for classification under this order; and (2) is not otherwise revealed in the individual items of information. "Compilation" means an aggregation of pre-existing unclassified items of information.
- **Caselaw:** 

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Restricted Data/Safeguards Information

- **FOIA Exemption 3:** incorporates nondisclosure provisions of other federal statutes where statutory basis is non-discretionary and establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. §552(b)(3).
- **Atomic Energy Act** section 141, et seq., prescribes requirements for **Restricted Data**, including classification, declassification and authorized access. 42 U.S.C. §2161, et seq. Implementing regulations in 10 CFR Part 10, govern access to Restricted Data and national security information.
- **Atomic Energy Act** section 147a prohibits disclosure of **Safeguards Information**, implemented by 10 CFR §73.21.
- Caselaw: ✓

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Sensitive, Unclassified, Non-Safeguards Information/Homeland Security Information

- **FOIA Exemption 4:** authorizes withholding of trade secrets or privileged or confidential information obtained by the government from **external sources**. 5 U.S.C. §552(b)(4). NRC regulations, Availability of Official Records, 10 CFR §2.390 (formerly §2.790) historically applied exemption 4 as a basis to protect information concerning licensees' or applicants' **physical protection, classified matter protection, or material control and accounting program for special nuclear material** not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data. 10 CFR §2.390(d)(1). Department of Justice Office of Information and Privacy (DOJ OIP) establishes FOIA policy for federal government ✓
- Caselaw: ✓

Ex 5

Ex 5

- **FOIA Exemption "High" 2:** authorizes withholding of substantial internal matters, disclosure of which would risk circumvention of a legal requirement, such as vulnerability assessments or evaluations of items of critical infrastructure—information that reasonably could be expected to enable someone to succeed in causing the harm concerned.

Predominant Internality threshold generally must be met along with articulable threat (demonstrable harm). 5 U.S.C. §552(b)(2). Usually pertains to information originated by government

Ex 5

Also, potentially useable to withhold government-originated information with limited distribution outside government for a specific (limited) governmental purpose, such as exchange of sensitive security-related information for specific security activity.

- Caselaw: ✓

Ex. 5

- **FOIA Exemption 7:** authority to withhold information compiled for particular law enforcement purposes. 5 U.S.C. §552(b)(7).

- Caselaw: ✓

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