

Exemption 1

Classified Information

Confidential – Secret - Top Secret

- ❖ **Exempts from public disclosure records that are specifically authorized under criteria established by Executive Order 12958 to be kept secret in the interest of national defense or foreign policy, and that are properly classified pursuant to such Executive Order**
 - This includes information classified as Confidential National Security Information (C/NSI), Secret National Security Information (S/NSI), or Top Secret National Security Information (TS/NSI)
 - Classification is indicated in parenthesis after each paragraph
 - Classified records must have a cover sheet attached indicating the highest-level of classified information contained in the record. (SF 703, Top Secret; SF 704, Secret; SF 705, Confidential)
 - Classified NRC records relate to foreign and/or domestic policy
 - The NRC sometimes consults with other federal agencies before making a release determination for classified records

NOTE: See Management Directive 12.2, NRC Classified Information Security Program for further information

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

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Exemption 2
Internal Personnel Rules and Practices
of an Agency

Exemption 2 (High)

- ❖ The information is predominately internal and disclosure significantly risks circumvention of statutes or agency regulations. Homeland Security Information can be withheld using this exemption including critical infrastructure systems and assets and vulnerability assessments. Other information properly withheld include:

- General guidelines for conducting investigations
- Computer programs and source codes
- Bridge passcodes
- Agency credit card numbers
- Crediting plans

A foreseeable harm statement must accompany any denials using this exemption

Exemption 2 (Low)

- ❖ Exemption 2 (low) has historically applied to internal information of a trivial nature, such as NRC parking lists or room numbers for NRC office buildings. Public release of such information would typically cause no harm, so the agency should generally authorize discretionary releases of Exemption 2 (low) records.

Exemption 3
Disclosure Prohibited by
Other Federal Statutes

Exemption 3

The withheld information is specifically exempted from public disclosure by the statute indicated:

- ❖ **Section 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data**
 - Information whose compromise would assist in the design, manufacture, or utilization of nuclear weapons
- ❖ **Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information**
 - Concerns the physical protection of operating power reactors, spent fuel shipments, or the physical protection of Special Nuclear Materials
 - A Safeguards Information cover sheet (NRC Form 461) must be attached to the record
- ❖ **41 U.S.C., Section 253b, Subsection (m)(I), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under Section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal**

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

Exemption 4
Trade Secrets, Commercial or
Financial Information

Exemption 4

Trade Secret, Commercial, or Financial Information

- ❖ **Disclosure will harm an identifiable private or governmental interest**
- ❖ **The exempt information is originated by non-government sources**
- ❖ **Information is confidential business (proprietary)**
 - Records marked "proprietary information" or "10 CFR 2.390" are submitted to the NRC from outside government sources (companies, licensees, etc.), and are accompanied by an affidavit which details what information should be withheld from public disclosure, and what harm would come from release of the information. When these records become subject to a FOIA request, the program office must review the records to determine whether the records (or portions of the records) are still proprietary, and provide a disclosure determination to the FOIA/PA Caseworker.
 - If the program office determines that the information is no longer proprietary, the FOIA/PA caseworker will send a letter informing the submitter that because it is subject to a FOIA request, the records (or portions of the records) will be released unless the submitter objects to the release. If the submitter objects, the objection must be received by the NRC within 10 days of the date of the letter. The records will then be returned to the program office for re-review, and a final disclosure determination.
- ❖ **Information concerns a licensee or applicant's physical protection, material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1)**
- ❖ **Information was submitted by a foreign source which was received in confidence pursuant to 10 CFR 2.390(d)(2)**

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

Exemption 5
Predecisional Information

Exemption 5

Predecisional Information

- ❖ **This exemption covers information referred to as predecisional information. It is frequently used to cover records that (1) would reveal a deliberative process, portions of which are advice, opinions, or recommendations, (2) attorney work-products, and (3) records covered by the attorney-client privilege**
- ❖ **Normally records received from outside NRC cannot qualify for Exemption 5**
 - **Exception: External experts working as if an employee**
- ❖ **Attorney Work Product**
 - **Records prepared by an OGC attorney in anticipation of litigation**
- ❖ **Attorney-Client**
 - **Confidential communications between an OGC attorney and client providing legal advice**
 - **Must be applied by client**
 - **usually OGC requests it be used**
 - **record referred by FOIA/PA caseworker to client**
 - **facts divulged by client to OGC attorney**
 - **opinions given by OGC attorney**
- ❖ **Inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the agency**
- ❖ **On March 19, 2009, Attorney General Holder issued new guidelines reaffirming President Obama's commitment to accountability and transparency. Agencies must adopt a presumption in favor of disclosure and make discretionary releases in response to requests for records**
- ❖ **Request could ask the agency to release a draft containing preliminary recommendations. Such a record might be eligible for withholding under FOIA Exemption 5 because it contained analysis and recommendations that constituted part of a deliberative process, but that should not be the end of the agency's review. Rather, the age, content, and character of that particular draft should be reviewed in determining whether the agency reasonably foresees that disclosure would harm an interest protected by Exemption 5**
- ❖ **A Foreseeable Harm Statement must be provided for Exemption 5, Deliberative Process. Attorney-Client Privilege and Attorney-Work Product do not require a Foreseeable Harm Statement**

Exemption 6
Personal Information

Exemption 6

Personal Information

- ❖ **Protects from disclosure of personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy**
- ❖ **When personal information is found, the agency must balance the person's privacy interest against the public's interest in knowing these facts--how do these facts show how the agency functions**
 - If the balance is in favor of the individual, then the agency will redact the information
 - If the balance is in favor of the public, the agency will release the information
- ❖ **Personal information is normally not disclosed to third parties**
 - There may be circumstances when this information may be disclosed
 - with the consent of the person to whom the information pertains, or
 - a determination is made that disclosure is in the public interest
 - this requires a balancing of the public interest in disclosure against the individual's right to privacy
- ❖ **The following are examples of personal information that may be located in job applications, resumes, personnel records, materials licenses, etc., that are exempt from disclosure pursuant to Exemption 6:**
 - Social Security number
 - Home street address, city, state and zip code
 - Home phone number, personal cell phone, and pager numbers
 - Names of children, spouse, number of children
 - Marital status
 - Email address (non-government)
 - Date of birth and age
 - Citizenship
 - Personnel dosimetry records
 - Type of military discharge, serial/service number, disciplinary actions, performance evaluations*
 - Veteran preference information
 - Lowest pay applicant will accept
 - Non-Federal salaries
 - Non-job related interests

- Reason for leaving a job
- Supervisor's name, address, and telephone number exception: release if last supervisor was a Federal employee
- Personal medical and financial information
- Personal performance and disciplinary matters
- Date graduated from high school, high school name and location of high school
- Dates attended colleges and date of degrees
- Scholarships/fellowships
- References' name, address and telephone number
- References to language skills that are not job required
- Responses to questions whether a person has been fired from a job
- Responses to questions regarding criminal activity, court martials, forfeited of collateral, imprisonment due to firearms or explosives violations, pending charges of violations of law or delinquency on any Federal debt
- Response to whether you ever applied for retirement pay
- Response to whether you have relatives working for the Federal Government
- Religious affiliation or reference to religious activities
- ❖ **Form SF 50 and SF 52 - Request for Personnel Action**
 - FEGLI Plan
 - Annuitant Indicator
 - Service Computation Date
 - Veterans Preference (both places)
- ❖ **Form 178, Candidate Evaluation - Certification & Selection Record (CERT)**
 - On Part A, withhold all names except for the selectee and the requester. Release all ratings for each rating factor and overall rating
 - On Part B, withhold all names except for the selectee and the requester
- ❖ **Form 412, Non-SES Performance Appraisal Summary Rating**
 - Withhold all notations in the chart giving the element's rating and numerical equivalent, the summary rating and the numerical total
- ❖ **Form 412A, Non-SES Performance Appraisal System Performance Plan**
 - Withhold ratings and appraisal narratives

Must be accompanied by a foreseeable harm statement only if it is not obvious why the agency is citing this exemption

*There may be additional protectable aspects of military services but this will be determined on a case-by-case basis.

Exemption 7 and Allegation Files

Protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" could be expected to cause one of the harms outlined in one of the subparts, 5 U.S.C. Section 552(b)(7)

❖ Law Enforcement Purpose Standard

- May include civil, criminal, administrative and regulatory proceedings
- May apply to records compiled to enforce state law, unless the agency lacks the authority to pursue a particular law enforcement matter

❖ Exemption 7A

- Could reasonably be expected to interfere with enforcement proceedings
 - two step analysis
 - is the law enforcement proceeding pending/prospective
 - could the release reasonably be expected to cause some articulable harm
- Not designed to endlessly protect law enforcement information. May only apply to enforcement proceedings that are:
 - pending (still investigating)
 - prospective (actually have a concrete plan to investigate in the future)
- May apply to closed investigations, if records substantially relate to another proceeding
- Information provided by the requester:
 - generally may not withhold this material, unless it can articulate how it would interfere with enforcement
- Changed circumstances:
 - if 7A is no longer valid while the FOIA request is pending, office will need to review the records for release
- 7A Certification - Do not need to provide the records [Exhibit 19]
 - complete the 7A cert (Form 656 on Informs)
 - file must still be reviewed to determine if there are any records that can be released

- office denying the material must mark in their file what material was subject to the request at the time the denial was made

❖ **Exemption 7B**

- Would deprive a person of a right to a fair trial or an impartial adjudication
 - rarely invoked
 - in the situation in which it would most logically be employed (ongoing law enforcement proceeding) an agency's application of 7A to protect law enforcement interests would serve to protect the interests of the defendants to the prosecution as well

❖ **Exemption 7C**

- Could reasonably be expected to constitute an unwarranted invasion of personal privacy
 - to protect personal privacy information in a closed investigation/allegation/enforcement file
 - fingerprinting [Exhibit 20]
 - the passage of time does not ordinarily diminish the 7C protection
 - fact that was previously public knowledge or disclosed, may be so far from the public arena today that it is practically obscure and 7C may apply
 - privacy interest may increase with the passage of time
 - 7C is not precluded by the fact that the requester could piece together the identity of a third party from the other sources, or from improperly redacted documents
- Balancing the Public Interest
 - interest is whether the records shed light on the agency's performance of its statutory duties
- Minimal Privacy Interest?
 - even a minimal privacy interest is superior to no public interest
- Glomarization
 - a defense that an agency can use to protect the privacy of persons mentioned in records compiled for law enforcement purposes and for particularly sensitive non-law enforcement records. This "neither confirm nor deny" response is used when even the mere acknowledgment of the existence or non-existence of records would cause "a clearly unwarranted invasion of personal privacy." (Exhibit 5)
 - example: request from a third party for allegations/investigations/complaints on a named individual

Exemption 7D

- "...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 that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

❖ Exemption 7E

- 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
 - covers techniques and procedures for investigations or prosecutions, but only if they are not well known to the public. (Courts have held that common law enforcement techniques, such as wiretapping or the placement of radio tracking devices on suspect vehicles, are well known to the public)
 - in some cases, commonly known procedures have been protected when "the circumstances of their usefulness may not be widely known" or their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a 'technique' which merits protection
 - agency must make a determination whether the disclosure could reasonably be expected to risk circumvention of the law
 - similar to Exemption 2 (high) and designed to protect only the material that would harm investigations or prosecutions

❖ Exemption 7F

- Could reasonably be expected to endanger the life or physical safety of any individual
 - can withhold names and identifying information of Federal employees and third persons who may be unknown to the requester in connection with law enforcement matters
 - can withhold identities of individuals who testified at requester's criminal trial
 - can withhold law enforcement officer subsequently retired
 - not limited to criminal law enforcement information
 - can be used to protect information that would aid a terrorist
 - must be some enforcement related regulatory requirement that caused the information to come into the NRC's possession
 - **A foreseeable harm statement is not needed for Exemption 7 unless it is not obvious why the information is being withheld.**

Allegation Files

❖ **Agency Allegation Advisor (AAA)**

- OE

❖ **Office Allegation Coordinators (OAC)**

- FSME, NRR, NRO, NMSS, NSIR, RI, RII, RIII, and RIV
- FOIA requests involving allegation records must be transmitted with either the red or blue cover sheet in accordance with MD 8.8
 - green cover sheet – Investigation Information
 - red cover sheet - Confidential Allegation Material
 - blue cover sheet - Sensitive Allegation Material
- The appropriate cover sheet will remain with the FOIA package throughout the processing of the records
- If the incoming FOIA request clearly identifies an alleged, the request will be Fed-Ex'd or hand-carried to the office/region and not scanned into ADAMS
- Allegation records will not be made publicly available in ADAMS without the approval of the regional or program OAC or the AAA or his/her assistant
- The AAA or designee will review and concur in all responses to FOIA requests involving allegation records
 - in providing his/her concurrence, the AAA or designee is certifying that the information to be disclosed from each record would not cause harm to an open allegation or disclose the identity of an alleged whose identity still warrants protection
- If alleged is widely publicly known - will not protect his/her identity
- Definition of Widely Known Alleged:
 - alleged notified media
 - alleged held press conference about the allegation
 - alleged identified himself/herself as the alleged at a public meeting
- Alleged must be notified if NRC is going to release their identity in FOIA requests involving TECHNICAL issues. (OAC's will notify the alleged)
- Records in an Allegation/Investigation file originated by the licensee:
 - licensee records marked "Confidential," "Proprietary," or "Withhold from Public Disclosure under 2.390" must be reviewed for release
 - if the determination is made to release the record in its entirety or in part, the FOIA/PA caseworker will send a letter to the licensee
 - the FOIA/PA caseworker will not tell the licensee who the requester is unless it is a 3rd party and we are going to be placing the FOIA request, response and records in ADAMS as public