



# RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST

FOIA 2016-00726

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RESPONSE TYPE  INTERIM  FINAL

**REQUESTER:**

Lucas W. Hixson

**DATE:**

12/15/2016

**DESCRIPTION OF REQUESTED RECORDS:**

All guidance that the NRC provides to its staff for determining the applicability of FOIA Exemptions 4, 5, 6, 7(A), 7(C), 7(D), 7(E) and 7(F).

### PART I. -- INFORMATION RELEASED

- Agency records subject to the request are already available in public ADAMS or on microfiche in the NRC Public Document Room.
- Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

### PART I.A -- FEES

AMOUNT\*

\$

- You will be billed by NRC for the amount listed.
- None. Minimum fee threshold not met.
- You will receive a refund for the amount listed.
- Fees waived.

\*See Comments for details

### PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- We did not locate any agency records responsive to your request. *Note:* Agencies may treat three discrete categories of law enforcement and national security records as not subject to the FOIA ("exclusions"). 5 U.S.C. 552(c). This is a standard notification given to all requesters; it should not be taken to mean that any excluded records do, or do not, exist.
- We have withheld certain information pursuant to the FOIA exemptions described, and for the reasons stated, in Part II.
- Because this is an interim response to your request, you may not appeal at this time. We will notify you of your right to appeal any of the responses we have issued in response to your request when we issue our final determination.
- You may appeal this final determination within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

### PART I.C COMMENTS ( Use attached Comments continuation page if required)

In conformance with the FOIA Improvement Act of 2016, the NRC is informing you that: (1) you have the right to seek assistance from the NRC's FOIA Public Liaison; (2) you have the right to seek dispute resolution services from the NRC's FOIA Public Liaison or the Office of Government Information Services; and (3) notwithstanding the language in Parts I.B and II.B of this form, you may appeal this final determination within 90 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

SIGNATURE - FREEDOM OF INFORMATION ACT-OFFICER

*Nina Argent, Acting*

FOIA 2016-00726

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**RESPONSE TO FREEDOM OF INFORMATION  
ACT (FOIA) REQUEST Continued**

RESPONSE  
TYPE

INTERIM

FINAL

REQUESTER:

Lucas W. Hixson

DATE:

12/15/2016

**PART I.C COMMENTS (Continued)**

Some documents responsive to your request are publicly available. Please see attached list for description and list of ML #s. One training course, owned by NARA, included in the NRC online training materials, is available to the public online at <https://www.archives.gov/cui/training.html>. Enclosed are three dvds and one printed version of training sessions. Three additional training courses that are available for NRC staff to take online are owned by the DOJ; this part of your request has been referred to DOJ for direct response to you. We notified you of same by email dated October 3, 2016 for 2 of the trainings and October 31 for the other. One additional course is owned by Skillsoft Corporation and they have claimed a proprietary interest in the material preventing the release by the NRC.



**RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST**

2016-00726

DATE:

12/15/2016

**PART II.A -- APPLICABLE EXEMPTIONS**

Records subject to the request are being withheld in their entirety or in part under the FOIA exemption(s) as indicated below (5 U.S.C. 552(b)).

- Exemption 1: The withheld information is properly classified pursuant to an Executive Order protecting national security information.
- Exemption 2: The withheld information relates solely to the internal personnel rules and practices of NRC.
- Exemption 3: The withheld information is specifically exempted from public disclosure by the statute indicated.
  - Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
  - Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
  - 41 U.S.C. 4702(b), which prohibits the disclosure of contractor proposals, except when incorporated into the contract between the agency and the submitter of the proposal.
- Exemption 4: The withheld information is a trade secret or confidential commercial or financial information that is being withheld for the reason(s) indicated.
  - The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
  - The information is considered to be another type of confidential business (proprietary) information.
  - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
- Exemption 5: The withheld information consists of interagency or intraagency records that are normally privileged in civil litigation.
  - Deliberative process privilege.
  - Attorney work product privilege.
  - Attorney-client privilege.
- Exemption 6: The withheld information from a personnel, medical, or similar file, is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
  - (A) Disclosure could reasonably be expected to interfere with an open enforcement proceeding.
  - (C) Disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy.
  - (D) The information consists of names and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
  - (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
  - (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- Other

**PART II.B -- DENYING OFFICIALS**

In accordance with 10 CFR 9.25(g) and 9.25(h) of the U.S. Nuclear Regulatory Commission regulations, the official(s) listed below have made the determination to withhold certain information responsive to your request.

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL	
			EDO	SECY
Nina Argent	Acting FOIA Officer		<input checked="" type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>
			<input type="checkbox"/>	<input type="checkbox"/>

Appeals must be made in writing within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

Records Already Publicly Available  
FOIA-2016-00726

1. ML110050002 - Management Directive (MD) 3.1, Freedom of Information Act, dated June 8, 2011.
2. ML16155A088 - How to Respond to an Initial FOIA Request, dated June 3, 2015.
3. ML092990170 - Draft, The Freedom of Information Act (FOIA) at the U.S. Nuclear Regulatory Commission, internal on-line FOIA training, dated July 15, 2009.
4. ML093240198 - Exemptions 1 thru 7, dated October 20, 2009.
5. ML032240161 - FOIA Guide, dated February 1, 2004
6. ML093340414 - Web package for responses to FOIA-2009-0280

# **The Freedom of Information Act (FOIA)**

**U.S. Nuclear Regulatory Commission**

## **FOIA at the U.S. Nuclear Regulatory Commission**

The Commission directed the NRC staff to develop a training program for NRC staff members who routinely deal with FOIA matters. This on-line training was developed to meet that requirement and to provide individuals who have been assigned a FOIA action who do not routinely deal with FOIA matters, a tutorial on the provisions of the FOIA, and implementation of the FOIA at the NRC. The NRC Office of Information Services FOIA/PA staff also provides classroom FOIA training semiannually at NRC Headquarters. For information about FOIA classroom training, contact the Office of Information Services FOIA/PA staff via email at [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov).

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## **The Freedom of Information Act (FOIA) at the U.S. Nuclear Regulatory Commission**

- Module A -Introduction to the FOIA
- Module B -The FOIA Exemptions
- Module C -NRC Procedures Guidance
- Review

## **Introduction to the FOIA**

### **Module A**

### **Outline**

1. Definition of the FOIA

2. Purpose of the FOIA
3. General Provisions of the FOIA

## **Freedom of Information Act**

5 U.S.C. § 552 - Enacted in 1966, the FOIA established the first comprehensive statutory right of access to government information.

## **Principles of the FOIA**

- Government should be open and accountable
- Government should shed light on the functions and operations of the government
- The burden is on the government to justify the withholding of information

## **Who Is Subject to the FOIA?**

- The FOIA applies to all federal agencies in the Executive Branch
- The FOIA does NOT apply to Congress, the Federal Courts, or the Executive Office of the President

## **Who Can Make a FOIA Request?**

- FOIA provides that "any person" has a right, enforceable in court, to obtain access to federal agency records, except as protected from disclosure by the exemptions in the statute.
- The term "any person" encompasses individuals (including citizens of foreign countries), partnerships, corporations, associations, and foreign and domestic governments.

## Requirements for Making a Request

A FOIA request must be made in accordance with the NRC's published regulations in 10 CFR Part 9.

- Requester must cite the FOIA.
- Requester must reasonably describe the agency records sought in sufficient detail to allow a "reasonable" search and identification of records.
- Request does not require a signature (except for individuals who make requests for records about themselves).
- Requester may ask for records in the form or format desired (i.e., electronic or paper). Agency must provide them if they are readily reproducible by the agency in that form or format.

## What Records Can be Requested

- Records in any format (paper or electronic) that are:
  - Either created or obtained by the NRC
  - In the possession and control of the NRC associated with Government business
- Does not include:
  - Publicly available books, periodicals and other publications that are owned or copyrighted by non-Federal sources
  - Records solely in the possession and control of NRC contractors
  - Personal records that have not been circulated or integrated into agency files, including:
    - Notes concerning government business that are either typed or written and not shared with others
    - Records of a personal nature that are not associated with Government business

## Searches for Records

- A "search" means to review manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.
- An agency must undertake a search that is reasonably calculated to uncover all relevant records.
- An agency must search using methods which can be reasonably expected to produce the information requested.

- Failure to find a specific record does not render the search inadequate. It is unreasonable to expect even the most exhaustive search to uncover every responsive record because records can be lost, destroyed, and misfiled.
- Only agency records that are in existence on the date the NRC received the request are subject to the FOIA request.
- Agencies are not obligated to create a record to respond to a FOIA request.
- Agencies are not required to answer questions asked in a request.

## **Time Requirement for Agency's Response**

- Agencies must respond to a FOIA request within 20 days, excluding weekends and holidays, of receipt of a perfected request
  - A request is considered perfected when it describes the records sought well enough to allow a reasonable search to be made, all questions about the applicable fees have been resolved with the requester, and any other matters, such as verification of identity, have been resolved. If a request does not require clarification, further agreement to pay fees, or resolution of any other issues, it will be considered to be a perfected request as of the date of receipt by the OIS FOIA/PA staff.
- An agency can extend the 20-day time limit if there is:
  - An unusual circumstance
    - The need to search for and collect the requested records from regional offices or other establishments that are separate from the office processing the request
    - The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request
    - The need for consultation, which will be conducted with all practicable speed, with another Federal agency having a substantial interest in the determination of the request or among two or more components of the NRC having substantial subject-matter interest therein
  - An exceptional circumstance
    - A requester may be notified in certain exceptional circumstances, when it appears that a request cannot be completed within the allowable time, and will be provided an opportunity to limit the scope of the request so that it may be processed in the time limit, or to agree to a reasonable alternative time frame for processing.



## **Expedited Processing**

- NRC may place a person's request at the front of a queue upon receipt of a written request that clearly demonstrates a compelling need for expedited processing due to:
  - Imminent threat to the life or physical safety of an individual.
  - Media urgency to inform the public concerning actual or alleged Federal Government activity.
- Within 10 calendar days, the requester must be informed of an expedited processing determination.

## **Key Elements of a Response**

Agencies must provide:

- Fee information, if applicable
- Access to requested records where there is no legal basis to withhold
- Appropriate exemption(s) for withheld information
- Name of denial authority, if applicable
- Appeal procedures, if applicable

## **Appeal Process and Appeal Denials**

- A requester may appeal an adverse determination.
- A determination may be considered adverse when:
  - A request is denied in whole or in part
  - A search results in a "No record" determination (may raise questions regarding the adequacy of the search)
  - A request for expedited processing is denied
  - A fee waiver request is denied
  - The agency fails to provide the requested records within 20 days, excluding weekends and holidays
- The appeal must be sent to the specified NRC appellate authority within 30 calendar days of the date of the NRC denial.
- If an appeal is wholly or partially denied, the requester may seek judicial redress in a Federal district court.

## FOIA Requester Categories and Fees

The FOIA provides for three categories of requesters. The fees vary for each category:

- Commercial
  - Pay all fees: search, review, duplication
- Educational institution/non-commercial scientific institution/news media
  - Pay duplication fees with first 100 pages free
- All others
  - Pay search fees with first 2 hours free
  - Pay duplication fees with first 100 pages free

## Fee Waiver

- The FOIA provides that records shall be furnished without any charge or at a reduced charge "if disclosure of the information is in the public interest or activities of the government and is not primarily in the commercial interest of the requester."
- FOIA requesters asking for a waiver or reduction of fees must:
  - Describe the purpose for which they intend to use the requested information
  - Explain the extent to which they will extract and analyze the substantive content of the agency record
  - Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications they possess to utilize information for the intended purpose in such a way that it will contribute to public understanding
  - Describe the likely impact on the public's understanding of the subject as compared to the level of public understanding of the subject before disclosure
  - Describe the size and nature of the public to whose understanding a contribution will be made
  - Describe the intended means of dissemination to the general public
  - Indicate if public access to information will be provided free of charge or provided for an access fee or publication fee
  - Describe any commercial or private interest that they or any other party has in the agency records requested

# The FOIA Exemptions

## Module B

### Outline

- The FOIA Exemptions and Exclusions
- Application of the FOIA Exemptions

### What is an Exemption?

- The FOIA provides nine exemptions from mandatory disclosure provisions
- The FOIA requires agencies to provide information unless it fits into an exemption. The NRC uses seven of these exemptions
- The seven FOIA exemptions used by the NRC are:
  - Exemption 1 -Classified National Security Information
  - Exemption 2 -Internal Agency Rules and Practices Information
  - Exemption 3 -Information Required to be Withheld by Another Federal Statute
  - Exemption 4 -Commercial/Proprietary Information
  - Exemption 5 -Deliberative Process, Attorney-Client and Attorney Work Product Information
  - Exemption 6 -Personal/Privacy Information
  - Exemption 7 -Law Enforcement/Investigatory Information

### FOIA Exclusions

There are two special provisions for protecting certain especially sensitive law enforcement matters under certain specified circumstances that are rarely used by the NRC.

- The (c)(1) Exclusion: Whenever a request is made which involves access to records described in subsection (b)[7](A) and
  - (A) the investigation or proceeding involves a possible violation of criminal law; and
  - (B) there is reason to believe that
    - (i) the subject of the investigation is not aware of its pendency, and
    - (ii) 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 this section (the FOIA)

- The (c)(2) Exclusion: 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.

## **FOIA Exemption (b)(1) Classified National Security Information**

- 5 U.S.C. § 552 (b)(1) of the FOIA integrates the national security protections provided by Executive Order (E.O.) 13526, Classified National Security Information, December 29, 2009, with the FOIA disclosure mandate by protecting from disclosure all classified national security information concerning the national defense or foreign policy that has been properly classified in accordance with the substantive and procedural requirements of the current order
  - The information needs to be reviewed to determine whether the record in its entirety or portions thereof can be declassified and released
  - After review, if information remains classified, it must be withheld
- Classification levels:
  - Top Secret (TS)
  - Secret (S)
  - Confidential (C)

## **FOIA Exemption (b)(1) at NRC**

- NRC receives few FOIA requests for classified records.
- The classifying office will conduct a declassification review to segregate exempt classified information from nonexempt unclassified information, consulting with the Office of Nuclear Security and Incident Response (NSIR), if necessary.
- NSIR will prepare a memorandum advising the classifying office of the results of its declassification review and indicating which portions of the record are currently classified. NSIR also will send a copy of this memorandum to the OIS FOIA/PA staff.

## **FOIA Exemption (b)(2) Internal Agency Rules and Practices**

- 5 U.S.C. § 552 (b)(2) of the FOIA exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency."
- Encompasses only records relating to issues of employee relations and human resources.

Examples include such matters as:

- Hiring
- Firing
- Work rules
- Discipline
- Compensation
- Benefits
- Leave practices
- Parking rules
- Employee performance standards

## **FOIA Exemption (b)(3) Information Withheld by Statute**

- 5 U.S.C. § 552 (b)(3) of the FOIA allows the withholding of information prohibited from disclosure by another Federal statute: the statute either "(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."
- Exemption 3 statutes include:
  - Section 145 of the Atomic Energy Act which precludes release of Restricted Data
  - Section 147 of the Atomic Energy Act which precludes release of Safeguards Information
  - 41 U.S.C. Section 253(b), Subsection (m)(1), 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
- No discretion allowed for release of information under this exemption, the information must be withheld

## **FOIA Exemption (b)(4) Commercial/Financial**

- 5 U.S.C. § 552 (b)(4) of the FOIA protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

- In order to be exempt from disclosure under this exemption, information must originate outside the Federal government. Most information developed by government contractors on behalf of the government can not be withheld using this exemption
- Confidential business information (proprietary), the disclosure of which would likely cause the submitter competitive harm, can be withheld under this exemption and may encompass
  - Voluntary or mandatory submission of costing information
  - Unique technical approaches to problems
  - Customer lists
  - Information revealing vulnerabilities of nuclear facilities or materials to theft or sabotage
  - Product manufacturing and design information
  - Private sector information which could reasonably jeopardize the effectiveness of a Government security program
  - Facility drawing details showing specific locations of equipment or materials within a building that could be of use to an adversary
  - Non-public financial information
  - Contract proposal information
  - Confidential settlement agreement information
- Information can be withheld as proprietary if it is submitted in confidence by a foreign source or if it concerns a licensee's or applicant's physical protection program, program for protection of classified national security, or control and accounting program for special nuclear material in accordance with 10 CFR 2.390

## **FOIA Exemption (b)(5) Deliberative Process**

- 5 U.S.C. § 552 (b)(5) protects "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 encompasses memos, letters, drafts, and unclassified records normally not circulated beyond the Executive Branch
- Not all such information is withholdable. To be withheld, the information must generally be within one of three primary privileges
  - Attorney-client privilege
  - Attorney-work product privilege (documents prepared by attorneys in anticipation of litigation)
  - Pre-decisional/deliberative process privilege
- Covers communications between NRC employees or between NRC employees and other Federal agencies that have not been shared with the nuclear industry or public
- Even if the information is withholdable, the NRC frequently makes discretionary releases of records covered by Exemption 5, including drafts of records unless there is a foreseeable harm to releasing the information

## FOIA Exemption (b)(5) (Cont.)

- The deliberative process privilege has several purposes:
  - Encourages open, frank discussion on matters of policy
  - Protects against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for an agency's action
  - Protects against premature disclosure of proposed policies
- The deliberative process privilege only encompasses advice, opinions, and recommendations prepared as part of a decision making process. Segregable factual material must be disclosed
- Examples of withholdable information:
  - Non-factual parts of reports (pre-decisional) containing evaluations, opinions, suggestions, and/or recommendations
  - Advice, suggestions, or evaluations of consultants and task forces
  - Trade secret, confidential research, or commercial information owned by the government
  - Facts inextricably intertwined with recommendations and opinions

## FOIA Exemption (b)(6) Personal/Privacy Information

- 5 U.S.C. § 552 (b)(6) of the FOIA permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." This requires a balancing of the public's right to disclosure against the individual's right to privacy
- This exemption covers:
  - Medical files, personnel records, security clearance investigations, or any information not considered appropriate for release from a privacy perspective
  - Applications, resumes, and other material submitted by candidates not selected for a position applied for at the NRC
  - Information must be identifiable to a specific person not to a group or be statistical information
- Examples of Personal/Privacy Information that will be withheld
  - Date of birth/place of birth
  - Social security number
  - Other personal information

Home addresses, home phone numbers, personal cell phone numbers, home e-mail addresses, marital status, non-job-related interests, medical and financial information, religious affiliation or reference to religious activities, employee performance, and disciplinary information

## **FOIA Exemption (b)(6) and Civilian Federal Employees**

Federal employees have reduced privacy rights for certain information pertaining to their federal employment (see Yellow Announcement 2007-025).

### **Releasable information of Federal Employees**

- Name
- Title
- Grade
- Salary
- Duty station
- Work phone numbers
- Portions of successful employment applications that show their qualifications for their positions

### **FOIA Exemption (b)(7) Law Enforcement/Investigatory**

- 5 U.S.C. § 552 (b)(7) of the FOIA protects from disclosure "records or information compiled for law enforcement purposes."
- 5 U.S.C. § 552 (b)(7)(A) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to interfere with enforcement proceedings when
  - A law enforcement proceeding is pending or prospective
  - Release of information about it could reasonably be expected to cause some articulable harm
- Exemption (b)(7)(A) is temporal in nature and ends once the investigation has been completed and all enforcement action, including judicial proceedings, have ended
- At NRC, Exemption (b)(7)(A) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to interfere with a pending allegation, investigation, or enforcement action
- 5 U.S.C. § 552 (b)(7)(B) protects from disclosure the release of such law enforcement records or information which would deprive a person of a right to a fair trial or an impartial adjudication
  - Aimed at preventing prejudicial pretrial publicity that could impair a court proceeding
  - Not often invoked
  - Use of Exemption (b)(7)(A) serves the same purpose



## FOIA Exemption (b)(7) (Cont.)

- 5 U.S.C. § 552 (b)(7)(C) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to constitute an unwarranted invasion of personal privacy
  - Similar to Exemption (b)(6) but less stringent standards imposed
  - The passage of time will not ordinarily diminish the applicability of Exemption (b)(7)(C)
  - Examples of uses of Exemption (b)(7)(C) at the NRC
    - Personal information in closed allegation, investigation, or enforcement files
    - Names and other identifying information on alleged, informants, and/or subjects of investigation

## FOIA Exemption (b)(7) (Cont.)

- 5 U.S.C. § 552 (b)(7)(D) protects from disclosure the release of such law enforcement records or information which 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.
  - Source must be given an express promise of confidentiality, or under circumstances from which such assurances could be reasonably inferred
  - Interpretations of the term "source" include individuals and institutions and can include crime victims, citizens providing allegations of misconduct, citizens responding to inquiries from law enforcement agencies, employees providing information about their employers, and foreign law enforcement agencies
- 5 U.S.C. § 552 (b)(7)(E) protects from disclosure the release of such law enforcement records or 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
  - The technique must not be well known to the public

## **Examples of Terminology Not Covered by (b)(7)(E)**

The fact that the following investigative terminology may be used does not qualify them as an investigative technique within the meaning of Exemption (b)(7)(E) because the terminology is commonly known to the public.

- Wire tapping
- Mail cover
- Use of post office boxes
- Security flashes
- Tagging of fingerprints
- Pretext telephone calls
- Tracking devices
- Polygraph - lie detector testing
- Electronic monitoring or surveillance
- Computer forensic analysis

## **Examples of Specific Techniques Covered by (b)(7)(E)**

The details of whether a particular technique was used in an investigation and, if so, how it was done are protectable. This allows withholding of

- How a wiretap is performed
- How a mail cover is conducted
- Specific tracking devices used and their capabilities
- Polygraph test procedures, formats, and questions use
- The details about how electronic monitoring or surveillance are performed
- The methodology or software used to perform computer forensic analysis

## **FOIA Exemption (b)(7) (Cant.)**

5 U.S.C. § 552 (b)(7)(F) protects from disclosure the release of such law enforcement records or information which could reasonably be expected to endanger the life or physical safety of any individual

- No discretionary release
- Requires the withholding of any information necessary to protect the safety of individuals
  - Examples include:
    - Security-related information
    - Information that would aid a terrorist

- Locations and quantities of radionuclides
- Dam failure inundation data

## **Reasonable Segregation**

- The FOIA requires that any reasonably segregable portion of an agency record (except for attorney work product) shall be provided to any person requesting such a record after deletion of the portions which are exempt
- Agencies cannot withhold entire pages or records if only portions contain exempt information. Agencies must segregate releasable information from exempt information and provide nonexempt information
- All records, including non-public records, must be reviewed when subject to a FOIA request

## **NRC Procedures Guidance**

### **Module C**

### **Outline**

- General NRC Procedures
- OIS FOIA Officer and Staff Responsibilities
- Offices and Regions Responsibilities
- NRC Instructions for Processing a FOIA Request
- NRC Instructions for Processing a FOIA Appeal

## **General NRC Procedures**

- FOIA request is received at NRC
  - FOIA request is not considered received at NRC until it is received by the OIS FOIA/PA staff
- OIS FOIA/PA staff assigns the request to office(s) and/or region(s)
- The office(s) and/or region(s) provide an estimate of search and review time and pages

- Request is verified as valid (perfected). If the request is not perfected because of a need to collect fees
  - OIS FOIA/PA staff computes the total amount due based on fee estimates from office(s) and/or region(s)
    - Contacts requester for agreement to pay fees
    - May request advance payment
  - Action by office(s) and/or region(s) is suspended until notified by OIS FOIA/PA staff that the request is perfected
- The office(s) and/or region(s) search for records when notified by the OIS FOIA/PA Caseworker
- The office(s) and/or region(s) review responsive records line-by-line noting exemptions and bracket initial recommendations with pencil
- The office(s) and/or region(s) must provide foreseeable harm statements for Exemptions 2 and 5 (Deliberative Process)
- The OIS FOIA/PA Caseworker reviews the office(s) and/or region(s) recommendations and coordinates with the office(s) and/or region(s) to resolve any differences of opinion
- The OIS FOIA/PA Caseworker obtains Office of General Counsel (OGC) review, when required
- NRC FOIA/Privacy Officer approves and signs the response
- The OIS FOIA/PA staff provides the response and records, if applicable, to the FOIA requester

## **OIS FOIA/PA Officer and OIS FOIA/PA Staff Procedures When a Request is Received**

- OIS FOIA/PA Officer
  - Reviews request for completeness
  - Approves or disapproves expedited processing, if requested
  - Approves or disapproves fee waiver, if requested
  - Reviews office(s) and/or region(s) to be assigned action on requests
  - Assigns request to OIS FOIA/PA Caseworker
- OIS FOIA/PA Staff
  - Enters request in case tracking database
  - Sends request to the FOIA Coordinator in the appropriate office(s) and/or region(s) for estimates
    - Advises the FOIA Coordinator if expedited processing is requested
  - Sends acknowledgement letter or e-mail to requester with case number and name and telephone number of the OIS FOIA/PA Caseworker assigned to the case
  - Contacts requester for clarification of scope and fee issues, if necessary

## **Specific NRC Procedures for Office(s) and/or Region(s)**

FOIA Coordinator receives the request from the OIS FOIA/PA staff

- Reviews request for understanding of scope (see Section 3.10), if needed
  - Contacts OIS FOIA/PA staff for clarification, if necessary
- Provides estimates of duplication and time to complete the search and review of records
  - Must provide an estimate to the OIS FOIA/PA staff within 4 work days of the offices' receipt of the request
- When the request is perfected (see Section 3.2), the office and/or region locates, reviews, brackets records, prepares foreseeable harm statement for Exemptions 2 and 5 (Deliberative Process), and creates appendices (see Sections 3.9, 3.10, 3.11)
- Advises OIS FOIA/PA staff if other offices or employees may have responsive records

## **OIS FOIA/PA Officer and OIS FOIA/PA Staff Procedures After Records are Received from the Office(s) and/or Region(s)**

- Review proposed responses from office(s) and/or region(s) for accuracy and completeness
- Resolve differences with office(s) and/or region(s)
- Make referrals to other Federal agencies, private sector entities, and NRC offices, if necessary
- Obtain OGC review, if necessary
- Electronically redact the withheld information
  - Redaction is the electronic removal of withheld information from a record for the purpose of making a sanitized version of the record available
  - Records containing classified national security information are normally redacted manually
- Consolidate appendices received from office(s) and/or region(s)
- Prepare(s) response(s) to the requester

## **Office and Region Timelines**

- Within 4 days (excluding weekends and holidays) provide fee estimate to OIS FOIA/PA staff
- Within 10 days (excluding weekends and holidays), of receiving a perfected request, provide the OIS FOIA/PA staff any responsive records

- Responsive records should be reviewed and bracketed with a pencil by the office before providing records to the OIS FOIA/PA staff

## **Steps to Process a FOIA Request**

- Make sure you clearly understand what records the requester is seeking
  - If you do not have a clear understanding of what records the requester is seeking, contact the FOIA/PA Caseworker for clarification. Do not contact the requester directly. The FOIA/PA Caseworker will contact the requester, if necessary
- Determine if you are likely to have records subject to the request
- Provide an estimate of search and review time and an estimate of pages if required (NRC Form 496, Report of Staff Resources for Processing FOIA/PA Requests)
- When processing is required
  - Search for records responsive to the request
  - Determine if the records are to be released or withheld from the requester
  - Use a pencil to bracket information that should be withheld and identify which exemption should be applied
  - Provide a foreseeable harm statement for Exemptions 2 and 5 (Deliberative Process). A statement is not required for Exemptions 1, 3, 4, 6, 7(a) and 7(c) unless it is not obvious why these exemptions are claimed
  - indicate whether the records do or do not contain sensitive security information
    - If a record contains sensitive security-related information proposed for release because it does not rise to the level of exempt information under the FOIA, the record will be released to the requester only and not made publicly available in ADAMS until a third FOIA request is received for the same record
  - Organize the records responsive to the request and submit them to your office FOIA coordinator
  - Submit your response package to your office FOIA coordinator

## **Searches for Relevant Files**

Search all relevant files (paper and electronic)

- Based on knowledge of subject matter
- Where you reasonably expect to locate records covered by the request

## **Searching for Records**

- Paper Records
  - Paper records under your personal control including working papers you have retained in your possession
  - Paper records maintained in your office
  - Paper records in the NRC File Center
- Electronic Records
  - E-mails including property sheets in the Received, Sent, Archives, and Trash files. Note that since trash files are still within your control, e-mails responsive to a FOIA request in the trash folder must be identified, retrieved, printed, and processed. You should also move the e-mail out of the trash folder to eliminate the possibility that an automatic deletion of e-mail will destroy the only copy
  - Electronic records in ADAMS Main Library and Legacy Library including all versions
  - Other electronic files, including but not limited to WordPerfect, Microsoft Word, spreadsheets, and presentation files, including those files stored on disks
  - Databases including those files stored on disks
- Recording Computer Search Criteria
  - When a computer database such as ADAMS is searched to locate records responsive to a request, the search criteria used for conducting the search must be provided with the office response. The Department of Justice has advised agencies in order to justify that they have done an adequate search they must maintain computer search criteria. The search criteria must be provided even if no records are identified as a result of the computer search
- Searching Other Media
  - Audio or video files or tapes

## **Reviewing Relevant Records**

- Review records to determine if they should be released or withheld, after applying the FOIA exemption criteria
- Apply "reasonably segregable" rule (see Section 2.22)
- Bracket exempt information with a pencil
- Prepare a foreseeable harm statement for Exemptions 2 and 5 (Deliberative Process) information
- Mark outside of scope information
  - If any information on a page of a record that is responsive to the request falls outside of the scope of the request, the information must be marked that it is outside of the scope. The requester will then be provided a redacted copy of the record with the information withheld identified as being outside the scope of the request

- If entire pages from a record are outside of the scope of the FOIA request, indicate on those pages that they are outside of the scope of the request. Those pages will not be provided to the requester. The appendices for "Records Being Withheld in Part" will indicate the number of pages deemed outside of the scope
- When the request specifically asks for drafts of documents or "any and all" copies, search for all drafts including those in electronic form, such as in ADAMS.

## **Creating Appendices**

Office/Region FOIA Coordinator provides to OIS FOIA/PA staff six categories of appendices, as necessary

- Records Already Publicly Available
- Records Being Released in Their Entirety
- Records Containing Sensitive Security Information to be Released to the Requester Only
- Records Being Withheld in Part
- Records Being Withheld in Their Entirety
- Records to be Referred to Other Office, Agency, or Company

## **Receipt and Processing of FOIA Appeals**

- Any NRC employee who receives a FOIA appeal shall immediately send it to the OIS FOIA/PA Officer
- The FOIA requires that an agency respond to an appeal within 20 days (excluding weekends and holidays)
- A requester may appeal a denial of records in whole or in part and/or appeal
  - The adequacy of a search, or "No Record" determination
  - Failure to provide records within 20 days (excluding weekends and holidays)
  - Denial of a fee waiver request
  - Denial of an expedited processing request

## **Assigning FOIA Appeal Actions to Offices**

The OIS FOIA/PA staff will provide:

- A copy of the appeal correspondence
- A copy of the original request correspondence



- A copy of the initial request denial response with appropriate appendices
- The records that were denied, unless maintained in another office

## **Processing a FOIA Appeal**

To the Executive Director for Operations

- The original staff offices denying release of the records will review them again
- Consider any new information presented in the appeal correspondence
- Recommend to the OIS FOIA/PA staff whether or not the records, in whole or in part, should continue to be withheld from disclosure
- Office response must reflect the office director's or designee's personal approval of the decision to withhold each record or portion thereof
- A foreseeable harm statement for Exemptions 2 and 5 (Deliberative Process)
- The office response must indicate whether the records do or do not contain sensitive security information (see Section 3.11)
- After resolving all identified problems; the OIS FOIA/PA staff will prepare a response
- The OIS FOIA/PA staff will obtain concurrences from
  - The original offices denying the records
  - OGC
  - Any other offices that are appropriate
- The OIS FOIA/PA staff will send the response to the DEDO for approval and signature

## **Processing a FOIA Appeal (Cont.)**

To the Secretary of the Commission

- SECY will coordinate a review of the denied records with OGC and
- Consider any new information in the appeal letter
- OGC will prepare a response for approval and signature of SECY

To the Inspector General

- A response will be prepared by the OIG Counsel, following consideration of any new information presented in the appeal correspondence, for approval and signature of the IG

## **Appeal Denials and Dispatch of Appeals**

### **Appeal Denials**

If the appeal is denied, the response will specify the basis for the denial and will advise the requester of his or her right to seek a judicial review under 5 U.S.C. 552 (a)(4)(B) in the Federal District Court in their locale, or in the Federal District Court for the District of Columbia

### **Appeal Dispatch**

The OIS FOIA/PA staff will dispatch all appeal responses to the requester

Dear FOIA Requester:

The FOIA Improvement Act of 2016, which was enacted on June 30, 2016, made several changes to the Freedom of Information Act (FOIA). Federal agencies must revise their FOIA regulations to reflect those changes by December 27, 2016. In addition to revising our regulations, we intend to update the Form 464, which we use to respond to FOIA requests.

In the interim, please see the comment box in Part I.C of the attached Form 464. The comment box includes information related to the recent changes to FOIA that is applicable to your FOIA request, including an updated time period for filing an administrative appeal with the NRC.

Sincerely yours,

*Nina Argent /S/*

Nina Argent  
FOIA Officer (Acting)