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## **Appendix D - Nine Freedom of Information Act (FOIA) Exemptions**

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The Freedom of Information Act (FOIA) contains nine (9) exemptions to mandatory disclosure in the interest of protecting national security, individual and business interests, and certain internal government practices. Records that fall within one of the exemptions can still be released at the discretion of the individual agency.

A document containing exempt information can be released with the exempted information redacted. This is an important feature of FOIA because it prevents a request from being denied in whole because a single section or page falls within one of the exemption categories.

The 1996 amendment to FOIA mandates that agencies must identify the locations of deletions and show the deletion within the actual document when it is feasible to do so. NAVFAC identifies FOIA Exemptions and cites associated pages on the document cover page.

The proper classification of a few pages of a report does not mean that the remaining non-sensitive portions can be cloaked in secrecy. The government must justify the withholding of each document and within each document it must justify the withholding of paragraphs, sentences, words and phrases.

Only Executive Branch agencies of the federal government are subject to FOIA requests. FOIA applies to federal agency records which are either created or obtained by an agency and under the agency's control at the time of the request.

The rules for classification are established and periodically updated by the President. They are not a product of the FOIA or other law.

A small percentage (2-3%) of environmental documents may contain "sensitive" information.

Government personnel and contracting firms which create environmental documents are tasked to review the document to determine if there are pages, maps, drawings, figures, or photographs within the document which should be flagged as sensitive.

Document creators are required to identify the flagged pages using the Document Data Sheet and suggest a Distribution Statement for the document. The Distribution Statement has instructions and a list of Unit Identification Codes.

If a document contains sensitive information, the appropriate metadata fields are checked in NIRIS EDMS to ensure that the entire document or sensitive portions of the document are protected when it is displayed on the NIRIS Environmental Restoration public web pages.

If a document which contains sensitive information is requested via a FOIA request, the protected document or information must be reviewed by an attorney or the Command FOIA Office for release or denial.

If the document is approved for release, the attorney or FOIA Office will notify Records Management regarding which pages, maps, drawing, figures, or photographs must be protected, redacted or slip sheeted, before release.

If deemed necessary, draft or draft final versions of documents containing sensitive information sent to regulatory or other agencies for review can be protected by using the appropriate Distribution Statement to ensure that the agency does not release the document to unauthorized persons. Distribution Statements can change for different versions of the document.

Some records or parts of records may have been labeled sensitive prior to receipt by NAVFAC. Check with the Command which issued the document to determine if the record pages should retain the sensitive designation. If they have been declassified, place a notification in the record. If the record or record pages or sections remain sensitive, follow the guidance.

It is the responsibility of the Command FOIA Office to communicate with FOIA requesters.

### **FOIA EXEMPTIONS and ENVIRONMENTAL RESSTORATION DOCUMENTS**

While each of the FOIA exemptions should be evaluated to determine whether it protects an environmental restoration document from release, the FOIA exemptions that most often apply to environmental restoration documents are Exemptions 3, 5 and 6.

### **QUESTIONS TO ANSWER TO DETERMINE FOIA EXEMPTION APPLICABILITY**

1. Does the document contain information that would be exempt from release under FOIA?
2. Will the document be posted on a public web site? If the document contains FOIA exempted information, it must be protected.
3. Do other FOIA exemptions apply to the document? Does the document have multiple FOIA exemptions?
4. Does the document contain internal Command personnel rules and practices? See Exemption #2
5. Does the document contain information that is exempt from release under other laws? See Exemption #3
6. Does the document contain trade secrets and commercial or financial information received from a person which is privileged or confidential? See Exemption #4
7. Is the document pre-decisional or a direct part of the deliberative process or does it fall under the attorney work-product or attorney-client privilege? See Exemption #5
8. Does the document contain information that, if released, would be an unwarranted invasion of a person's privacy? See Exemption #6
9. Does the document contain information which, if released, would enable someone to circumvent DON legal responsibilities (e.g., requirement to safely transport hazardous substances)? See Exemption #7F

10. Does the document contain geological and geophysical information concerning wells?  
See Exemption #3
11. If an exemption applies or the document must be made available to other federal, state, or local agencies, is the document properly marked and does it have an appropriate Distribution Statement to address releasability and prevent an inadvertent disclosure by another agency?
12. Even if there is no FOIA-exempted information in the document, does it contain sensitive information that could be used by a terrorist to target military bases or personnel? When in doubt, consult with an environmental attorney.

## **9 FREEDOM OF INFORMATION ACT EXEMPTIONS**

The 9 FOIA exemptions are listed below and described in further detail in the following sections.

EXEMPTION 1. (5 USC 552(b)(1)). Matters of national defense or foreign policy. **Not used**

EXEMPTION 2. (5 USC 552(b)(2)). Internal Command personnel rules and practices.

EXEMPTION 3. (5 USC 552(b)(3)). Information exempted by other statutes.

EXEMPTION 4. (5 USC 552(b)(4)). Trade secrets and commercial or financial information received from a person which is privileged or confidential.

EXEMPTION 5. (5 USC 552(b)(5)). Privileged interagency or intra-agency memoranda and letters.

EXEMPTION 6. (5 USC 552(b)(6)). Personal information affecting an individual's privacy.

EXEMPTION 7. (5 USC 552(b)(7)(F)). Information that could endanger the life or physical safety of any individual

EXEMPTION 8 (5 USC 552(b)(8)). Records of financial institutions **Not used**

EXEMPTION 9 (5 USC 552(b)(9)). Geological and geophysical information concerning wells

## **FOIA EXEMPTION # 1 (5 USC 552(b)(1))**

### **Protects Material that is Properly Classified in the Interests of National Defense or Foreign Policy**

FOIA Exemption 1 relates to national defense or foreign policy records that are properly classified according to Executive Order 13526 (5 U.S.C. § 552(b)(1)). This exemption protects classified information and records on the basis of national security. The classification guidelines are established and maintained by the President.

Information categories that may be considered include “vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security,” and “military plans, weapons, or operations.”

There are currently no instances in which portions or an entire environmental restoration document meets the criteria to classify it as confidential, secret or top secret.

NAVFAC uses the subcategory, “For Official Use Only” (FOUO), to designate unclassified documents or information. This designation does not automatically mean that a document is classified.

**Do not use this Exemption unless directed to do so by an attorney**

**Citation in NIRIS EDMS: Matters of National Defense or Foreign Policy**

## **FOIA EXEMPTION # 2 (5 USC 552(b)(2))**

### **Internal Command related personnel rules and practices**

**Exemption 2** exempts disclosure of records and documents that are “related solely to the internal personnel rules and practices of an agency.”

“Personnel,’ is defined as ‘the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives...”

1. The Information Must be Related to “Personnel” Rules and Practices
2. The Information Must Relate “Solely” to those Personnel Rules and Practices
3. The Information Must be “Internal”

In assessing whether information relates “solely” to the “internal” personnel rules and practices of an agency, it is necessary for agencies to assess whether there is a “genuine and significant public interest in disclosure.” When there is a genuine and significant public interest in disclosure, the material falls outside of Exemption 2 as that interest would preclude it from satisfying the requirements of Exemption 2 that it relate “solely” to the “internal” personnel rules and practices of the agency.

The Supreme Court suggested that **Exemption 7(F)**, which exempts documents whose release could put others in danger, could be used in lieu of Exemption 2.

Whenever predominantly internal agency records may reveal information, the disclosure of which could reasonably be expected to cause harm, consider protecting the information under Exemption 2.

**Rarely used for Environmental documents**

**Citation in NIRIS EDMS: Internal Command personnel rules and practices**

## FOIA EXEMPTION # 3 (5 USC 552(b)(3))

### Information exempted by other statutes

As amended, **Exemption 3** allows the withholding of information prohibited from disclosure by another statute only if one of two requirements are met by the statute:

- 1) The statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue
- 2) The statute establishes particular criteria for withholding or refers to particular types of matters to be withheld

There is no single authoritative list of statutes to which Exemption 3 applies. The Department of Justice compiled a list of statutes that courts have found to qualify as Exemption 3 statutes. The list does not include statutes which have been found not to qualify under Exemption 3, nor does it include any statute which has not yet been considered by a court as a possible Exemption 3 statute.

On occasion a statute has been found to qualify under Exemption 3 by one court and found not to qualify by another. Those statutes are marked with asterisks.

SEE: List of statutes found to qualify under Exemption 3  
<http://www.justice.gov/oip/foiapost/2009foiapost24.htm>

Statutes which can be used to exempt information which may be contained within environmental restoration cleanup documents include:

- *The Archaeological Resource Protection Act (ARPA)* of 1979. 16 U.S.C. § 470hh Mandates protection of archaeological data and explicitly excludes these data from FOIA requests.
- *The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act)*

Below are two statutory provisions that sometimes are mistakenly believed to qualify as Exemption 3 statutes. There are more than 150 provisions of law incorrectly used by federal agencies under Exemption 3.

- 5 U.S.C. § 552a (Privacy Act of 1974)
- 10 U.S.C. § 130(d) (pertaining to certain "confidential business information and other sensitive but unclassified homeland security information")

## Citations in NIRIS EDMS:

- **10 USC Section 130(e) Treatment of Certain Critical Infrastructure Security Information EXEMPTION 3. (5 USC 552(b)(3))**
- **16 U.S.C. § 470hh Archaeological Resources Protection Act of 1979 |EXEMPTION 3. (5 USC 552(b)(3))**
- **16 USC § 470w-3 National Historic Preservation Act |EXEMPTION 3. (5 USC 552(b)(3))**
- **41 U.S.C. § 423(a)(1) Procurement Integrity Act; contractor bid or proposal information |EXEMPTION 3. (5 USC 552(b)(3))**
- **Other EXEMPTION 3 (5 USC 552(b)(3))**

## **MEMORANDUM: Critical Infrastructure Security Information Reporting Process, DoN, CNO, 28 March 2017**

**Affects:** 10 USC 130(e) Treatment under Freedom of Information Act of certain critical infrastructure security information and 10 USC 2254a Data Files of Military Flight Operations Quality Assurance Systems

Critical but unclassified information is information, if disclosed, would reveal vulnerabilities in DOD Critical Infrastructure or significant disruption, destruction or damage to DOD operations, property or facilities including explosives, hazardous chemical or pipeline and other SITE SPECIFIC information on or relating to installation security

Command level FOIA Offices will coordinate with the legal office if a FOIA request is for documents which have critical infrastructure security information. Sensitive information may be difficult to identify in older Environmental documents. Newer documents identify sensitive information which fall under 10 USC 130e but older documents added to NIRIS before 2015 may or may not have sensitive information identified and if identified, correctly labeled.

If a requested document has information which falls under 10 USC 130(e), the Memorandum directs Commands to coordinate with the DON CIO and DNS-36 to review the FOIA package the Command puts together before release. The Memorandum creates a new layer of complexity and a new requirement.

## **FOIA EXEMPTION #4 (5 USC 552(b)(4))**

### **Trade secrets and commercial or financial information received from a person\* which is privileged or confidential**

A “trade secret” is narrowly defined as “any secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding or processing of trade commodities that can be said to be the end product of either innovation or substantial efforts”.

“Confidential commercial Information” is defined as “privileged or confidential commercial Information used in the course of one’s business and is obtained from a person. It must be the type of information not customarily disclosed to the public. It is usually information which, if disclosed could cause harm to the competitive process.

Many laboratories or other businesses have proprietary trade secrets and/or confidential business information or processes which they do not want to be made publicly available.

Do not include business confidential or proprietary information in reports or other documents unless it is required by the Navy or other laws or statutes.

If it is necessary to include laboratory data, other business confidential and/or proprietary information or other types of sensitive information in a document, see **Appendix H**, Documents with Sensitive Information and Sensitive Definitions

**This Exemption is not normally applicable to Environmental Restoration documents and should be applied only after consultation with an Environmental Attorney and Records Management.**

**Citation in NIRIS EDMS: Privileged/confidential trade secrets, commercial, financial information**

## **FOIA EXEMPTION # 5 (5 USC 552(b)(5))**

### **Privileged interagency or intra-agency memoranda and letters**

**Exemption 5** exempts from release those documents that are normally privileged in the civil discovery context and includes the deliberative process privilege, attorney-client privilege, and attorney work-product privilege.

The deliberative process privilege covers documents that are pre-decisional and a direct part of the deliberative process (i.e., those that make recommendations or express opinions on legal or policy matters).

The exemption generally protects opinions rather than facts, though facts may be protected when their release would disclose the subject of the deliberations.

It protects inter-agency or intra-agency memorandums or letters which would not be available, by law, unless litigation is underway/

Some environmental restoration documents will be protected from release under Exemption 5.

### **Draft and Draft Final Versions of Documents**

Generally, draft and draft final versions of reports will fall under this privilege. Draft and draft final documents should contain "DRAFT" or "DRAFT FINAL" as a header or footer on every page. See Appendix L, Managing Special Documents for additional information

### **Attorney Work Products, Attorney-Client Privilege, and Deliberative Process Documents**

Documents prepared by or for an attorney in contemplation of litigation are protected from release by the attorney work-product privilege. To invoke this privilege, "some articulable claim, likely to lead to litigation" must have arisen.

Documents which contain "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." are protected from release.

This privilege does not necessarily exempt a whole document, but it will exempt from disclosure only the portions that actually contain confidential communications

Legal documents should be marked, by the issuing attorney, with a joint attorney work-product and attorney-client privilege marking:

- *This document contains confidential attorney work-product and/or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, P.L. 93-502 (5 U.S.C. § 552). Do not release without prior specific approval of the originator or higher authority.*

**Citation in NIRIS EDMS: Privileged inter-/intra-agency memoranda/letters; e.g., attorney client**

## **FOIA EXEMPTION # 6 (5 USC 552(b)(6))**

### **Personal information affecting an individual's privacy**

**Do not confuse FOIA Exemption #6 with the Privacy Act of 1974, 5 U.S.C. § 552a (2000)**

**Exemption 6** protects information in personnel and medical files and similar files when disclosure would constitute a clearly unwarranted invasion of personal privacy.

Exemption 6 protects from release those portions of environmental restoration documents that contain information about a specific individual, where release of the information would be a clearly unwarranted invasion of his or her personal privacy and includes information such as an individual's medical information, social security number, home address and home phone number.

Examples of Privacy Interests:

- Age
- Birth date
- Marital status
- Social Security Number
- Family Information
- Home address (postal and email)
- Disciplinary actions
- Medical conditions and disabilities
- Performance appraisals
- Criminal convictions

**Citation in NIRIS EDMS: Personal information affecting an individual's privacy**

## **FOIA Exemption #7 (5 USC § 552(b)(7)(F)**

### **To Endanger the life or Physical Safety of an Individual**

**Exemption 7(F)** protects law enforcement information that "could reasonably be expected to endanger the life or physical safety of any individual."

Courts have routinely upheld the use of Exemption 7(F) to protect the identities of law enforcement agents.

However, given that this Exemption protects the safety of "any individual," courts have held that Exemption 7(F) can protect the names and identifying information of non-law enforcement federal employees, local law enforcement personnel, and other third-party persons in connection with particular law enforcement matters.

Courts have applied Exemption 7(F) in order to protect persons from possible harm from a requester who has threatened them in the past or one who has a violent past or who has a connection to violent organizations.

Agencies should consider whether Exemption 7F is available to protect information that no longer qualifies under Exemption 2.

#### ***Milner v. Department of the Navy, Supreme Court Decision 7 March 2011***

In *Milner*, the Navy's assertion of Exemption 7(F) for the explosives data and maps at issue will be reviewed by the lower courts. In Justice Alito's concurring opinion in *Milner*, he opined that the phrase "compiled for law enforcement purposes" should be construed to encompass not only traditional law enforcement in the sense of investigating and prosecuting criminals for crimes that have already occurred, but also preventative law enforcement and security, meaning the prevention of future illegal acts.

Justice Alito noted in his concurrence in *Milner*, "the Navy has a fair argument that the explosives data and maps fall within Exemption 7F" given that they are used "for the purpose of identifying and addressing security issues and for the 'protection of people and property on the base, as well as in the nearby community, from the damage, loss, death, or injury that could occur from an accident or breach of security.'" Quoting the government's brief, Justice Alito opined that, assuming Exemption 7's threshold was satisfied, the explosives data and maps "may fall comfortably within Exemption 7F.

**Consult with an Environmental Attorney before using this Exemption**

**CITATION IN NIRIS EDMS: Information that could endanger human life or physical safety**

## **FOIA Exemption # 8 (5 USC 552(b)(8)). Records of financial institutions**

**Exemption 8** applies to matters that are "contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

This seldom-encountered exemption is broadly applied by the courts to withhold a wide variety of reporting materials from many different kinds of "financial institutions."

The term, '*financial institution*' is not defined in the FOIA or its legislative history. Case law has ruled that it may include any entity authorized to do business under federal laws concerning banks and related institutions.

This Exemption is not normally applicable to Environmental Restoration documents and should be used only after consultation with an Environmental attorney.

**Citation in NIRIS EDMS: Records of financial institutions**

## **FOIA EXEMPTION # 9 (5 USC 552(b)(9))**

### **Geological and Geophysical Information Concerning Wells**

**Exemption 9** covers “geological and geophysical information and data, including maps, concerning wells.”

Congress seemingly intended the Exemption to protect the oil and gas exploration industries from the unfair competition of “speculators”.

Courts have found Exemption 9 to support the nondisclosure of information regarding various types of wells.

While this exemption is rarely invoked and has received few judicial interpretations, it has applicability in the environmental restoration area because military facilities generate and maintain documents that include information about wells, such as drinking water wells and, in some cases, monitoring wells.

Even if Exemption 9 would otherwise protect from release certain installation well information, the information may have been made public pursuant to public notice and comment requirements that must be satisfied during certain cleanup activities.

If the information has been previously disclosed to the public, DON may have waived any potential exemption.

- Sensitive information may include an installation’s access to groundwater and hydrological explanations of the location of drinking water.

**Consult with an Environmental Attorney before using this Exemption**

**Citation in NIRIS EDMS: Geological and geophysical information concerning wells**