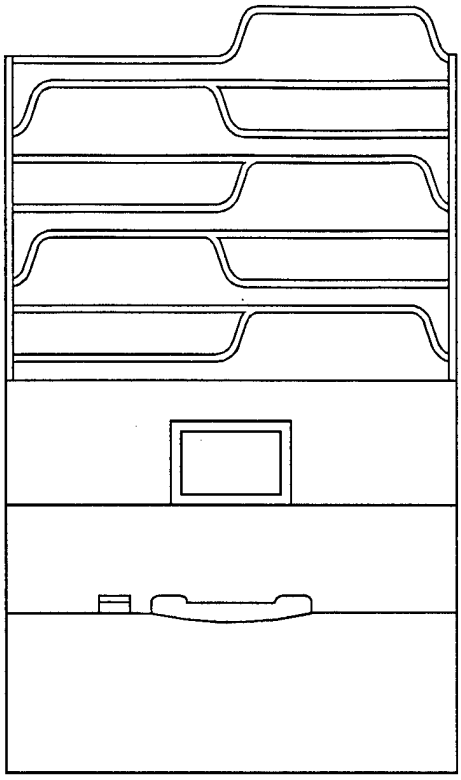
GOVERNMENT INFORMATION PRACTICES



Administrative and Civil Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia

JA 235

August 1996

19960726 047

REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.

1. AGENCY USE ONLY (Leave blank)	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	1996	Final

4. TITLE AND SUBTITLE
Government Information Practices

5. FUNDING NUMBERS
NA

6. AUTHOR(S)
Administrative & Civil Law Division, TJAGSA
Charlottesville, VA 22903-1781

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
The Judge Advocate General's School
600 Massie Road
Charlottesville, VA 22903-1781

8. PERFORMING ORGANIZATION REPORT NUMBER
JA 235 (96)

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)
Same as 7.

10. SPONSORING/MONITORING AGENCY REPORT NUMBER
Same as 8.

11. SUPPLEMENTARY NOTES
New, revised text--replaces AD A298059, JA 235 (95), 430 pages

12a. DISTRIBUTION/AVAILABILITY STATEMENT
A

DISTRIBUTION STATEMENT A
Approved for public release
Distribution Unlimited

12b. DISTRIBUTION CODE

13. ABSTRACT *(Maximum 200 words)*

This compilation of cases and materials is designed to provide students with primary source material concerning government practices.

14. SUBJECT TERMS
The Concept of Open Governmentt, Exemptions Permitting With-holding, Information Gathering and Information Systems and Government Disclosure of Personal Information

15. NUMBER OF PAGES
526

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT
Unclassified	Unclassified	Unclassified	NA

GENERAL INSTRUCTIONS FOR COMPLETING SF 298

The Report Documentation Page (RDP) is used in announcing and cataloging reports. It is important that this information be consistent with the rest of the report, particularly the cover and title page. Instructions for filling in each block of the form follow. It is important to ***stay within the lines*** to meet ***optical scanning requirements***.

Block 1. Agency Use Only *(Leave blank)*.

Block 2. Report Date. Full publication date including day, month, and year, if available (e.g. 1 Jan 88). Must cite at least the year.

Block 3. Type of Report and Dates Covered. State whether report is interim, final, etc. If applicable, enter inclusive report dates (e.g. 10 Jun 87 - 30 Jun 88).

Block 4. Title and Subtitle. A title is taken from the part of the report that provides the most meaningful and complete information. When a report is prepared in more than one volume, repeat the primary title, add volume number, and include subtitle for the specific volume. On classified documents enter the title classification in parentheses.

Block 5. Funding Numbers. To include contract and grant numbers; may include program element number(s), project number(s), task number(s), and work unit number(s). Use the following labels:

C	- Contract	**PR**	- Project
G	- Grant	**TA**	- Task
PE	- Program Element	**WU**	- Work Unit Accession No.

Block 6. Author(s). Name(s) of person(s) responsible for writing the report, performing the research, or credited with the content of the report. If editor or compiler, this should follow the name(s).

Block 7. Performing Organization Name(s) and Address(es). Self-explanatory.

Block 8. Performing Organization Report Number. Enter the unique alphanumeric report number(s) assigned by the organization performing the report.

Block 9. Sponsoring/Monitoring Agency Name(s) and Address(es). Self-explanatory.

Block 10. Sponsoring/Monitoring Agency Report Number. *(If known)*

Block 11. Supplementary Notes. Enter information not included elsewhere such as: Prepared in cooperation with...; Trans. of...; To be published in.... When a report is revised, include a statement whether the new report supersedes or supplements the older report.

Block 12a. Distribution/Availability Statement. Denotes public availability or limitations. Cite any availability to the public. Enter additional limitations or special markings in all capitals (e.g. NOFORN, REL, ITAR).

- **DOD** - See DoDD 5230.24, "Distribution Statements on Technical Documents."
- **DOE** - See authorities.
- **NASA** - See Handbook NHB 2200.2.
- **NTIS** - Leave blank.

Block 12b. Distribution Code.

- **DOD** - Leave blank.
- **DOE** - Enter DOE distribution categories from the Standard Distribution for Unclassified Scientific and Technical Reports.
- **NASA** - Leave blank.
- **NTIS** - Leave blank.

Block 13. Abstract. Include a brief *(Maximum 200 words)* factual summary of the most significant information contained in the report.

Block 14. Subject Terms. Keywords or phrases identifying major subjects in the report.

Block 15. Number of Pages. Enter the total number of pages.

Block 16. Price Code. Enter appropriate price code *(NTIS only)*.

Blocks 17. - 19. Security Classifications. Self-explanatory. Enter U.S. Security Classification in accordance with U.S. Security Regulations (i.e., UNCLASSIFIED). If form contains classified information, stamp classification on the top and bottom of the page.

Block 20. Limitation of Abstract. This block must be completed to assign a limitation to the abstract. Enter either UL (unlimited) or SAR (same as report). An entry in this block is necessary if the abstract is to be limited. If blank, the abstract is assumed to be unlimited.

Except as otherwise noted, the contents of this publication are not copyrighted and may be freely reprinted. The citation is as follows: The Judge Advocate General's School, U.S. Army, JA 235, Government Information Practices--Casebook [page number] (August 1996). Copyrighted material may not be reproduced further without the prior permission of the author(s) or compliance with 17 U.S.C. § 107.

Plagiarism is the presentation of distinctive words or ideas of another as one's own without crediting the source. Plagiarism may be avoided by citing the source from which the material was taken. This applies to the publication and other material prepared by instructors at The Judge Advocate General's School, U.S. Army.

DEPARTMENT OF THE ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
CHARLOTTESVILLE, VIRGINIA 22903-1781

PREFACE

This compilation of cases and materials is designed to provide students with primary source material concerning government information practices.

The right of the American public to be informed about the operation of its government has been established. Through the Freedom of Information Act, Congress has sought to ensure that this right is preserved. Of equal importance to American citizens is their right of privacy. Only in recent years has it become evident that this right is subject to infringement by the record-keeping practices of government. The Privacy Act of 1974 is the first comprehensive legislative scheme designed to assure individuals that their privacy will not be improperly eroded by such practices.

The first part of this casebook is devoted to a study of public access to agency records under the Freedom of Information Act and the need to protect legitimate commercial and governmental interests. The second part of the book focuses on the individual's right of privacy as affected by the federal government's collection, use, and dissemination of information. It includes material related to the key provisions of the Privacy Act and the "privacy exemption" of the Freedom of Information Act.

This casebook does not purport to promulgate Department of the Army policy or to be in any sense directory. The organization and development of legal materials are the work product of the members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and feminine gender unless otherwise specifically stated.

GOVERNMENT INFORMATION PRACTICES
(JA 235)

TABLE OF CONTENTS

		Page
PART A.	THE PUBLIC'S RIGHT TO KNOW	
CHAPTER 1.	THE CONCEPT OF OPEN GOVERNMENT	
1.1	Introduction	1-1
1.2	Publication of Information in the Federal Register	1-4
1.3	The Indexing and Public Inspection and Copying Requirement	1-7
1.4	The Release Upon Request Requirements	1-17
CHAPTER 2.	EXEMPTIONS PERMITTING WITHHOLDING	
2.1	Exemption 1: Classified Documents	2-1
2.2	Exemption 2: Internal Personnel Rules and Practices	2-9
2.3	Exemption 3: Statutory Restrictions on Disclosure	2-20
2.4	Exemption 4: Trade Secrets and Financial Information	2-21
2.5	Exemption 5: Internal Agency Communications	2-46
2.6	Exemption 6: Personnel, Medical and Similar Files	2-87
2.7	Exemption 7: Records or Information Compiled for Law Enforcement Purposes	2-87
2.8	Exclusions	2-107
PART B:	THE INDIVIDUAL'S RIGHT OF PRIVACY	
CHAPTER 3.	INFORMATION GATHERING AND INFORMATION SYSTEMS	
3.1	Historical Background of the Privacy Act	3-1
3.2	Record and System of Records	3-6
3.3	Access, Amendment, and Judicial Review	3-11
3.4	Collection and Maintenance of Information	3-20

CHAPTER 4. GOVERNMENT DISCLOSURE OF PERSONAL INFORMATION

4.1	General Rule	4-1
4.2	Disclosure Within the Agency	4-1
4.3	Information Required to be Disclosed by the Freedom of Information Act	4-3
4.4	Disclosure for a "Routine Use"	4-27
4.5	Miscellaneous Authorized Disclosures	4-30
4.6	Accounting for Disclosures	4-33

APPENDIX A:	The Freedom of Information Act, 5 U.S.C. § 552, as amended	A-1
APPENDIX B:	Army Regulation 25-55, The Department of the Army Freedom of Information Act Program	B-1
APPENDIX C:	Extract from Federal Acquisition Regulations and Supplements	C-1
APPENDIX D:	The Privacy Act of 1974, 5 U.S.C. § 552a, as amended	D-1
APPENDIX E:	Army Regulation 340-21, The Army Privacy Program	E-1
APPENDIX F:	TJAG Opinions on the Freedom of Information and Privacy Acts	F-1
APPENDIX G:	Defense Privacy Board Advisory Opinions	G-1

PART A: THE PUBLIC'S RIGHT TO KNOW

CHAPTER 1

THE CONCEPT OF OPEN GOVERNMENT

1.1 Introduction.

The public information section of the Administrative Procedure Act was somewhat vague and contained language that resulted in the withholding, rather than disclosure, of many documents. It was amended in 1966 by what is now known as the Freedom of Information Act (codified at 5 U.S.C. § 552). A foreword to the Attorney General's memorandum concerning the Act explains its purpose.

> Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967)[hereinafter cited as Attorney General's 1967 Memorandum]
>
> FOREWORD
>
> If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.
>
> Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.
>
> Public Law 89-487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a

mere statement of objectives or an expression of intent.

Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

--that disclosure be the general rule, not the exception;

--that all individuals have equal rights of access;

--that the burden be on the Government to justify the withholding of a document, not on the person who requests it;

--that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

--that there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and

beneficial influence on administration itself---in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

"* * * a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest * * *. I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of

Public Law 89-487 in line with its spirit and purpose and the President's instructions.

RAMSEY CLARK,
Attorney General,
June 1967.

In 1974 Congress amended the Freedom of Information Act substantively by narrowing the scope of the Act's exemptions, and procedurally by requiring more expeditious agency responses to requests for records by members of the public. A further substantive change was made in 1976 narrowing the reach of exemption 3. Also, a minor change to the Act's provision for disciplinary proceedings was made in 1978. In 1986 Congress further amended the Act by substantially revising the fee charging and waiver provisions and broadening the protection for law enforcement information.

1.2 Publication of Information in the Federal Register.

a. The Freedom of Information Act divides government information into three major categories: (1) that which must be published in the Federal Register, (2) that which must be made available for public inspection and copying, and (3) records which do not fall into the first two categories but must be furnished to members of the public upon request. The first category is set forth in subsection (a)(1) of the Act. Its provisions are repeated, almost verbatim, in Army Regulation No. 310-4:

Army Regulation 310-4
(22 July 1977)

. . . .

2-2. Information to be published. In deciding which information to publish, consideration will be given to the fundamental objective of informing all interested persons of how to deal effectively with the Department of the Army. Information to be currently published will include--

a. Descriptions of the Army's central and field organization and the established places at which, the officers from whom, and the methods whereby the public may obtain

information, make submittals or requests, or obtain decisions;

b. The procedures by which the Army conducts its business with the public, both formally and informally;

c. Rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

d. Substantive rules of applicability to the public adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Army; and

e. Each amendment, revision, or repeal of the foregoing.

. . . .

---

b. Army Regulation 310-4 defines a "rule" as "the whole or part of any Department of the Army statement . . . of general or particular applicability and future effect, which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice of the Army." The regulation prohibits the issuance of a "rule" "unless there is on file with The Adjutant General . . . a statement to the effect that it has been evaluated in terms of this regulation." Major commands are given responsibility for ensuring compliance with the regulation by their subordinate installations, activities, and units. While the "notice and comment" rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), do not apply to military or foreign affairs functions, the Army has, in effect, adopted such provisions for certain types of proposed rules which are required to be published in the Federal Register.

Army Regulation No. 310-4
(22 July 1977)

. . . .

3-2. Applicability.

a. These provisions apply only to those Department of the Army rules or portions thereof which--

(1) Are promulgated after the effective date of this regulation; and

(2) Must be published in the FEDERAL REGISTER in accordance with chapter 2 of this regulation; and

(3) Have a substantial and direct impact on the public or any significant portion of the public; and

(4) Do not merely implement a rule already adopted by a higher element within the Department of the Army or by the Department of Defense.

b. Subject to the policy in paragraph a above, and unless otherwise required by law, the requirement to invite advance public comment on proposed rules does not apply to those rules or portions thereof which--

(1) Do not come within the purview of paragraph a above; or

(2) Involve any matter pertaining to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy; or

(3) Involve any matter relating to Department of the Army management, personnel, or public contracts; e.g., Armed Services Procurement Regulation, including nonappropriated fund contracts; or

(4) Constitute interpretative rules, general statements of policy, or rules of organization, procedure, or practice; or

(5) The proponent of the rule determines for good cause that inviting public comment would be impracticable, unnecessary, or contrary to the public interest. This provision will not be utilized as a convenience to avoid the delays inherent in obtaining and evaluating prior public comment. (See also para. 3-7.)

. . . .

Note. An example of an Army regulation required to be published in the Federal Register is AR 25-55, The

Department of the Army Freedom of Information Act Program, which in part explains how to request information from the Army under the Freedom of Information Act. What is the practical effect of these provisions at the installation level? Can you think of an example of an installation regulation to which any of the provisions of AR 310-4 would apply? What kind of Army regulations are affected? See United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Dep't of Army, 755 F. Supp. 362 (D. Kan. 1991). For a helpful article which is still correct in this slowly developing area of the law, see Schempf and Eisenberg, Publish or Perish: An Analysis of the Publication Requirement of the Freedom of Information Act, The Army Lawyer, August 1980, at 1-11.

1.3 The Indexing and Public Inspection and Copying Requirement.

a. The second major subsection of the Freedom of Information Act requires that certain kinds of information be indexed and made available for public inspection and copying. These so-called "(a)(2)" materials fall into three subcategories. The first subcategory consists of "final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases." Litigation concerning this obligation has had an impact on the armed services. The settlement of a case involving discharge review procedures has resulted in a requirement that decisions of all Discharge Review Boards and Boards for the Correction of Military Records be indexed and made available to the public. Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civil No. 76-530 (D.D.C., stipulation of dismissal approved Jan. 31, 1977), discussed in Stickman, Developments in the Military Discharge Review Process, 4 Mil. L. Rep. 6001, 6009-11 (1976). Similarly, the case of Hodge v. Alexander, Civil No. 77-288 (D.D.C., order filed May 13, 1977), requires that the Army publish or make available for public inspection and copying, an index to all final dispositions of complaints under Article 138, UCMJ.

b. The second subcategory under (a)(2) includes "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." This provision has resulted in little litigation. Most Army regulations which need not be published in the Federal Register under the provisions of AR 310-4 fall into this category.

c. The final subcategory under (a)(2) consists of "administrative staff manuals and instructions to staff that affect a member of the public." A case which considers this provision helps explain the reasons for the existence of the public inspection and copying requirement.

Cuneo v. Schlesinger
484 F.2d 1086 (D.C. Cir. 1973)
[Most footnotes omitted.]

Before BAZELON, Chief Judge, and ROBINSON and WILKEY, Circuit Judges.

WILKEY, Circuit Judge:

Appellant sought to obtain disclosure under the Freedom of Information Act of the Defense Contract Audit Manual, a manual prepared by the Defense Contract Audit Agency in the Department of Defense. On cross-motions for summary judgment, and after an in camera inspection, the District Court held that the portions of the Manual not available to the public were exempt from disclosure under exemptions two and five of the FOIA. For lack of a detailed record essential to this type action, we are unable to determine if the information sought by appellant falls within one of the exemptions. We remand for further proceedings.

I. Facts

The Defense Contract Audit Agency was established to provide necessary audit services to government officers in contract administration. DCAA acts in an advisory capacity to the contracting officer, and verifies that the costs incurred in performing a contract for the Armed Services comply with criteria of the Armed Services Procurement Regulations by conducting an examination of government contractors' books and records. In view of the large number of government contractors and the great volume of contracts in different stages of performance, the DCAA must necessarily be selective and must limit its scrutiny to a relatively small portion of the books and records which could be audited. The Defense Contract Audit Agency Manual, first issued in its current form in 1965, was

designed to guide DCAA auditors in effective auditing in a selective manner.

Appellant alleges that the Manual, or parts of it, have regularly been made available to members of the public, including on occasion appellant's clients. Appellees do not dispute this but, rather, allege that these disclosures were never authorized. In addition, a relatively complete description of the contents of the Manual, including quotations from it, has been published in a treatise on defense contract auditing. Finally, the Manual is made available to certain non-federal agencies and foreign governments who deal with American contractors. Thus, to at least some extent, the Manual has been made available to individuals outside the DCAA.

The Government argued before the trial court that the information in controversy was exempt because it was "(2) related solely to the internal personnel rules and practices of an agency"; constituted "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; and/or was composed of "(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The trial court, after examining the Manual in camera, on motions for summary judgment held that it was a "playbook," or "game plan," i.e., tactics to be employed, and that this playbook was exempt from disclosure under categories (2) and (5).

On appeal appellant abandoned his efforts to obtain those portions of the Manual that constitute a mere playbook.[8] He redoubled his

---

[8] There was considerable confusion regarding precisely what appellant wanted to have disclosed. After questioning by this court during oral argument it became obvious that appellant was not asking for the Manual to be disclosed in its entirety. The following dialogue indicates the parameters of appellant's request for disclosure:

(continued...)

argument, however, that portions of the Manual dealt with the allowability of costs. Such portions, according to appellant, constitute a form of substantive "secret law" that must be disclosed under the FOIA. Appellant also argued that the disclosure of portions of the Manual to various individuals, other non-federal agencies and foreign governments, constituted a waiver of exemption as to those portions.

---

[8](...continued)

THE COURT: Are there any instructions available to the field auditors which you would agree you do not have access to?

APPELLANT: Well, as we have suggested in our brief, if there are such things as saying the time of the audit, or it is not necessary to audit, say, fringe benefits, then of course, that might be excluded, but to the extent that any of the principles of ASPR--ASPR has the force and effect of law, in accordance with several decisions of the Supreme Court--to the extent that this Manual refines ASPR and its application, it becomes secret law, because it is ASPR that we are bound by.

* * *

THE COURT: How would you distinguish between what Judge Hart referred to as the "game plan" and the law?

APPELLANT: Well, to the extent that the Manual refines ASPR--which we believe it must because ASPR is very general and every agency has an audit manual refining the cost principles set forth in their regulations--that is law and that becomes secret law. To the extent that the Manual might say "conduct the audit at a certain hour during the day or pick out this account and not that account," we don't need that and I don't think the public is entitled to it. But, to the extent that there are refinements of cost principles, I think that is clearly secret law. That is not giving away the game plan; that is a refinement of regulations that have the force and effect of law.

* * *

THE COURT: If we find some things in there that don't fall within your definition of secret law, and are outside those areas that you contended relate to costs of contracts audited, then perhaps those things should remain secret?

APPELLANT: I agree, I agree.

II. The Nature of the Information Sought

Before the trial court appellant was requesting the entire contents of the Manual. According to the Government, the non-public portions of the Manual provide "uniform guidance and instructions concerning the criteria to be used in deciding what must be audited, how it shall be audited, what is to be the depth of the examination, what the frequency of the audit shall be, and how to determine the extent of reliance which may be placed on the contractor's own internal controls." In other words, the Manual is a mere "playbook" that tells auditors where to look in the mass of books and records confronting them, but does not provide substantive guidance or otherwise set standards for what costs will actually be allowed. If a contractor knows in advance the coverage, depth, and scope of an audit, the contractor may be able to claim improper costs in areas that will receive little or no scrutiny. Thus, the Government argues that, for an audit to be effective, the portion of the Manual on coverage, depth, and scope must be kept secret.

Appellant disputes as a matter of fact this characterization of the Manual's contents. As a matter of law appellant's primary theory originally was that the Manual was an "administrative staff manual . . . that affect[s] a member of the public." The FOIA specifically requires that such "administrative staff manuals" be made available to the public.

In addition to his principal contention that the entire Manual be disclosed as being an "administrative staff manual," appellant advanced two subsidiary arguments that, if accepted, would require the disclosure of portions of the Manual. First, appellant contended that at least portions of the Manual set forth standards of interpretation of ASPR and guidelines for the allowability of costs; these portions were said to constitute a form of "secret law" that must be disclosed under the FOIA. Secondly, appellant claimed that portions of the Manual had been made available to various persons and entities outside the

Federal Government, and that at least as to these disclosed portions, DCAA had waived any right it might have to keep them secret.

At oral argument appellant abandoned his request for the entire Manual and narrowed his efforts to seeking disclosure of the portions that constituted "secret law." Due to this concession, we no longer have reason to consider whether the entire Manual must be disclosed under the requirement covering "administrative staff manuals." By like token, we need not consider the argument that disclosure to certain individuals and entities constituted a waiver of any right to keep those portions secret. This is true because appellant has stated that he wants only those portions of the Manual which constitute "secret law." Since appellant has an undeniable right to obtain such law, it is irrelevant whether those portions may also be obtained under a theory of waiver. We therefore do not decide any waiver issue here.

There does not appear to be any disagreement between the parties regarding what the nature of the "secret law" being sought actually is. The portions sought by appellant, which the Government agrees should be made available if they actually exist, are those which either create or determine the extent of the substantive rights and liabilities of a person affected by those portions. Information that falls within this definition would include, for example, guidelines for what costs would be allowed under ASPR, and rules or interpretations dealing with other substantive laws. Appellant does not seek to obtain disclosure of those portions of the Manual that prescribe techniques to uncover the facts relevant to a particular contract. Nor is a right to disclosure claimed for procedures directing auditors to concentrate examination on certain elements of a contractor's records.

It is clear that if any portion of the Manual does consist of interpretations of rules and statutes or guidelines for allowability of costs, appellant has a right to obtain disclosure. Indeed, this was conceded by government counsel during oral

argument. The sole remaining issue is thus purely factual--whether the Manual does contain any "secret law".

In the unsatisfactory manner in which these FOIA cases have been arising, we have no record before us containing the answer to this issue. The District Judge was confronted with appellant's original claim for total access to the Manual, opposed by the Government's claim to blanket exemption under three exceptions to disclosure. On cross-motions for summary judgment, after in camera examination of the several volumes constituting the Manual, the District Judge sustained the Government's overall non-disclosure position under exemptions (2) and (5). Counsel apparently made no discriminating analysis of how portions of the Manual might differ in their purpose, nature, and content, and thus be subject to different criteria of disclosure; understandably, the trial judge made none.

III. Procedures Under the FOIA

A. Problems of Testing Disclosability of Allegedly Secret Information

Recently in Vaughn v. Rosen this court had occasion to discuss the problems inherent in implementing the FOIA. Despite the heavy emphasis in favor of disclosure and the specific requirement that the Government shall have the burden of proving that information need not be revealed, we noted in Vaughn that procedures most often used in FOIA cases permit the Government very easily to avoid disclosure. Since the party seeking disclosure does not know the contents of the information sought, he cannot argue as effectively that the documents sought are, for example, "secret law" to which he is entitled access. In contrast, the Government does have access to the information and with confidence can convincingly argue to the trial judge that the factual nature of the information is as the Government alleges.

As we noted in Vaughn, the burden of actually determining whether the information is as the Government describes it falls ultimately on the court system. After the

Government alleges that the documents in controversy do not contain material which must be disclosed, but on the other hand consist of information whose secrecy must be preserved, the very claim of secrecy, under the usual court procedures in vogue, means that the Government has substantially relieved itself of the burden of proving more. To preserve secrecy it is then up to the trial judge to wade through the mass of documents and determine whether the information must be disclosed. The party seeking disclosure is helpless to contradict the Government's description of the information or effectively to assist the trial judge.

In Vaughn we concluded that the ease with which the Government could carry its burden, and the difficulty that a trial judge faces in determining whether information should be disclosed, created intolerable problems. First, it encouraged agencies to argue for the widest possible exemption from disclosure for the greatest bulk of material. Secondly, it had a tendency to undermine the reliability of a trial judge's findings; a trial judge, without the aid of counsel seeking disclosure, cannot be expected to investigate and isolate the factual nature of individual documents in a mass of similar appearing material. Thirdly, because the points of factual dispute have not been isolated by the traditional forms of argumentation and adversary testing, a determination is virtually unreviewable on appeal. The case at bar we remand for additional proceedings which hopefully will rectify to some extent these flaws.

B. Procedures Upon Remand

1. As in Vaughn v. Rosen, we believe that the problems adverted to will be substantially ameliorated if the Government is required to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of "conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments." It is particularly important that information which

is in effect substantive law not be concealed beneath a mass of other material. Even when the law is closely intermingled with other data, we cannot conceive of a situation in which legal interpretations and guidelines could not be segregated from other material and isolated in a form which could be disclosed.

2. Upon remand the Government should correlate its reasons for claiming that the various portions of the Manual should not be disclosed with the relevant portions of the Manual.

> [A]n indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list.

3. Finally, if the District Judge deems it appropriate, he may appoint a special master to examine the Manual, the Government's justification, and the indexing. This could, in some circumstances, relieve much of the burden of evaluating voluminous documents that currently falls on the trial judge.

IV. Conclusion

The case is remanded so that the Government may undertake to index and justify the Manual in a manner consistent with Part III of this opinion, and for the District Judge to rule thereon.

So ordered.

BAZELON, Chief Judge, concurring:

I agree entirely with Judge Wilkey's exposition of the impediments that have

confronted courts in enforcing compliance with the mandate of openness in the Freedom of Information Act. These impediments derive, of course, from exactly the problem against which the Act was directed--the enthusiasm for secrecy that seems all too often epidemic in our Government. Courts are responsible under the Act for testing broad claims of exemption from disclosure, claims that information must remain secret, against the precise categories of necessary secrecy that Congress has defined. Yet the claim of exemption has, in the past, foreclosed adversary analysis of whether, in fact, exemption is warranted, presenting the grave danger that, despite the best efforts of the court, the claim alone might conclude the case. See Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 450 F.2d 698, 715-716 (1971) (Bazelon, C. J., concurring in part and dissenting in part).

I do not suppose, nor, I assume, does the Court, that the procedures we have mandated to govern the remands here and in Vaughn v. Rosen, --- U.S. App. D.C. ---, --- F.2d --- (1973) will completely dispose of the problem. They are, like much in the law, an experiment to be tried by experience. And experience may prove that additional steps or different approaches are called for. Nonetheless, I think that these procedures bear substantial promise of facilitating enforcement of the Act. I join in the opinion of the Court.

Note 1. Do any opinions of The Judge Advocate General fall within any of the provisions of "(a)(2)"? Yes, in those instances where The Judge Advocate General has authority to act for the Secretary, but not in those instances where The Judge Advocate General is issuing non-binding opinions. See Vietnam Veterans of America v. Department of Navy, 876 F.2d 164 (D.C. Cir. 1989).

Note 2. The idea that "secret law is an abomination" comes from Professor Davis' treatise on administrative law. Administrative Law Treatise § 3A.12 (1970 Supp.) The treatise, as updated in the second edition, is one of the leading scholarly works on the Freedom of Information Act.

1.4 The Release Upon Request Requirement.

The best known disclosure mandate in the FOIA requires that, upon request, an agency must make available any agency record to any person, unless the record is exempt under paragraph (b) of the Act. Denials of access to agency records under this disclosure mandate generate most of the litigation under the Freedom of Information Act.

Note 1. An important initial determination before releasing information under subparagraph (a)(3) of the FOIA is whether the information is contained in an "agency record." Physical possession by an agency of a record generated outside that agency does not, by itself, dictate "agency" status. To be an "agency record," the agency must not only possess the record but also exercise dominion and control over it. See Department of Justice v. Tax Analysts, 492 U.S. 136 (1989) and McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983). Additionally, the Supreme Court has held that agencies are not required by the Act to retrieve records formerly in their possession, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), nor must agencies exercise their legal power to obtain records from outside sources in order to satisfy a FOIA request. Forsham v. Harris, 445 U.S. 169 (1980).

Note 2. Is a commander's or supervisor's notebook containing personal notes an agency record for purposes of the Freedom of Information Act? For a discussion of the factors relevant to determining whether something is an agency record or a personal record, see Bureau of National Affairs, Inc. v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984); see also Kalmin v. Dep't of the Navy, 605 F. Supp. 1492 (D.D.C. 1985).

Note 3. Agencies are required under the FOIA to disclose "reasonably segregable" nonexempt portions of otherwise exempt records. 5 U.S.C. § 552(b). See Long v. IRS, 596 F.2d 362 (9th Cir. 1979). When does segregating exempt information from agency records become so burdensome that it becomes unreasonable? See Yeager v. DEA, 678 F.2d 315 (D.C. Cir. 1982); Lead Industries Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979); DAJA-AL 1978/3159, 13 July 1978.

CHAPTER 2

EXEMPTIONS PERMITTING WITHHOLDING

2.1 Exemption 1: Classified Documents.

a. While disclosure is the normal rule under the Freedom of Information Act, Congress recognized that certain internal matters are appropriately kept from the public. Among these are national security matters which are classified pursuant to Executive Order. In the 1974 amendments to the Freedom of Information Act, Congress provided that classified records are exempt from release only if they are "in fact properly classified pursuant to [the] Executive Order." 5 U.S.C. § 552(b)(1). This change is discussed by the Attorney General in a memorandum for federal executive departments and agencies.

> Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (February 1975) [hereinafter cited as Attorney General's 1975 Memorandum]
>
> PART I. AMENDMENTS PERTAINING TO THE SCOPE AND APPLICATION OF THE EXEMPTIONS
>
> I-A.CHANGES IN EXEMPTION 1 (CLASSIFIED NATIONAL DEFENSE AND FOREIGN POLICY RECORDS) AND THE PROVISION CONCERNING IN CAMERA INSPECTIONS
>
> The 1974 Amendments modify the national defense and foreign policy exemption of the Act, 5 U.S.C. 552(b)(1), and add an express provision concerning in camera judicial inspection of records sought to be withheld under any exemption, including exemption 1. The change in exemption 1 primarily affects the procedures and standards applicable to an agency's processing of requests for classified records. The provision concerning in camera judicial inspection affects the manner in which a court may treat classified records which an agency seeks to withhold.
>
> AMENDMENT OF EXEMPTION 1
>
> Exemption 1 of the 1966 Act authorized the withholding of information "specifically required by Executive order to be kept secret

in the interest of the national defense or foreign policy." As amended, exemption 1 will permit the withholding of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." The previous language established a standard which essentially was met whenever a record was marked "Top Secret," "Secret," or "Confidential" pursuant to authority in an Executive order such as No. 10501 or its successor, No. 11652. The more detailed standard of the amended exemption limits its applicability to information which, as noted in the Conference Report, "is 'in fact, properly classified' pursuant to both procedural and substantive criteria contained in such Executive order." (Conf. Rept. p. 12.)

When it is not possible to make the necessary determination within the time limits established by 1974 Amendments, because of the volume, the complexity, or the inaccessibility of the records encompassed by the request, it will frequently be desirable to negotiate a time arrangement for processing the request mutually acceptable to the requester and the agency. . . . If in such circumstances a requester is unwilling to enter into an arrangement of this nature, an agency will be compelled to rely upon the original classification marking until classification review can be accomplished. Such review must proceed as rapidly as possible.

When requested records contain information classified by the agency receiving the request, but as to which one or more other agencies have a subject matter interest, the agency receiving the request must process and act upon it without referral. Any interagency consultation required by the Executive Order or otherwise desired must be completed within the time limits established by the Act. Agencies consulted in such circumstances must provide guidance to the primary agency as rapidly as possible in view of the time constraints.

IN CAMERA INSPECTION WITH RESPECT TO EXEMPTION 1

The terms of the amended Act authorize a court to examine classified records in camera to determine the propriety of the withholding under the new substantive standards of the exemption. The Conference Report makes clear, however, that "in camera examination need not be automatic" and that before a court orders in camera inspection "the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." (Conf. Rept. p. 9.) The Conference Report also emphasizes congressional recognition that:

> [T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. (p.12)

A recent Court of Appeals decision--not involving a Freedom of Information Act request, but taking account of the amendment of exemption 1 and the new provision for in camera inspection--comports with this legislative view. It affirms the need for judicial restraint in the field of national security information and the appropriateness of judicial deference to classification decisions made and reviewed administratively in accordance with the provisions of Executive Order 11652, particularly decisions reflecting the expertise and independent judgment of the interagency review body established under that Order.

In his veto of the 1974 Amendments, accompanied by suggestions for acceptable revisions, the President had expressed concern that the Amendments posed serious problems, including a problem of constitutional dimensions, to the extent that they authorized a court to overturn an Executive classification decision which had a reasonable basis. To avoid this difficulty, the President proposed:

> "that where classified documents are requested, the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document." Veto Message, 10 Weekly Compilation of Presidential Documents 1318 (1974).

The language of the bill was not changed, but Congressman Moorhead, House manager of the bill and a conferee for the House, after quoting this portion of the President's veto message, stated: "[I]n the procedural handling of such cases under the Freedom of Information Act, this is exactly the way the courts would conduct their proceedings." (120 Cong. Rec. H 10865 (November 20, 1974).)

In Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), the Supreme Court acknowledged the power of Congress to alter the Court's holding of unreviewability of classification decisions. It expressly recognized, however, that this power was subject "to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." 410 U.S. at 83. The Amendments, in other words, do not affect the responsibility of the President to protect certain Executive branch information to the extent that such responsibility is conferred upon him by the Constitution; and they do not enlarge the power of the courts insofar as that Presidential function is concerned.

b. The Court of Appeals for the District of Columbia Circuit has considered the question of in camera inspection of classified records in Freedom of Information Act litigation.

Ray v. Turner
587 F.2d 1187 (D.C. Cir. 1978)
[Footnotes omitted.]

[This case is a suit brought under the Freedom of Information Act seeking disclosure of any files maintained by the Central Intelligence Agency (CIA) on the plaintiffs. The district court denied plaintiff's motion for in camera inspection and upheld the government's withholding on the basis of Exemptions 1 and 3.

In denying in camera inspection, the district court relied on Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977). It specifically relied on the passage holding that:

> [t]he affidavits in this record are specific and detailed. The record further indicates that the Agency dealt with plaintiffs' requests in a conscientious manner and released segregable portions of the material. No abuse of discretion has been shown.

The original decision in Weissman further held that Congress had recognized the lack of judicial expertise in reviewing national security cases by indicating that courts should not substitute their judgment for that of the agency.

In fact, Congress had not permitted such deference, and the original version of Weissman was corrected by the D.C. Circuit by amendment. A number of courts, including the district court in this case, erroneously have continued to rely upon the original version.]

. . . .

B. The Nature of De Novo Review.

Procedures to be observed

In Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, (1973) cert. denied, 415 U.S. 977 (1974), this court sought to cope with the difficulty of providing de novo review of exemptions claimed by the government. It initiated procedures designed to mitigate the administrative burden on the courts and ensure that the burden of justifying claimed exemptions would in fact be borne by the agencies to whom it had been assigned by Congress.

The court took its cue from a portion of the Supreme Court's Mink opinion that was not overruled by Congress--the portion discussing how a court should proceed when there is a factual dispute concerning the nature of the materials being withheld. "Expanding" on the Supreme Court's "outline," the court established the following procedures: (1) A requirement that the agency submit a "relatively detailed analysis [of the material withheld] in manageable segments." "[C]onclusory and generalized allegations of exemptions" would no longer be accepted by reviewing courts. 484 F.2d at 826. (2) "[A]n indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification." Id. at 827. This index would allow the district court and opposing counsel to locate specific areas of dispute for further examination and would be an indispensable aid to the court of appeals reviewing the district court's decision. (3) "[A]dequate adversary testing" would be ensured by opposing counsel's access to the information included in the agency's detailed and indexed justification and by in camera inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous. Id. at 828.

. . . .

The salient characteristics of de novo review in the national security context can be

summarized as follow: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing that, it must first "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." (4) Whether and how to conduct an in camera examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases. To these observations should be added an excerpt from our opinion in Weissman (as revised): "If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated."

In part, the foregoing considerations were developed for Exemption 1. They also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests.

In camera inspection

In the case at bar, the district court observed: "With respect to documents withheld under exemption 3, in camera inspection is seldom, if ever, necessary or appropriate." The legislative history does not support that conclusion. Congress left the matter of in camera inspection to the discretion of the district court, without any indication of the extent of its proper use. The ultimate criterion is simply this: Whether the district judge believes that in camera inspection is needed in order to make a responsible de novo determination on the claims of exemption.

In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt." When an agency affidavit or other showing is specific, there may be no need for in camera inspection.

On the other hand, when the district judge is concerned that he is not prepared to

make a responsible de novo determination in the absence of in camera inspection, he may proceed in camera without anxiety that the law interposes an extraordinary hurdle to such inspection. The government would presumably prefer in camera inspection to a ruling that the case stands in doubt or equipoise and hence must be resolved by a ruling that the government has not sustained its burden.

The issue of bad faith merits a word. The memorandum of the district court noted that there was no evidence of bad faith on the part of the Agency's officials. Where the record contains a showing of bad faith, the district court would likely require in camera inspection. But the government's burden does not mean that all assertions in a government affidavit must routinely be verified by audit. Reasonable specificity in affidavits connotes a quality of reliability. When an affidavit or showing is reasonably specific and demonstrates, if accepted, that the documents are exempt, these exemptions are not to be undercut by mere assertion of claims of bad faith or misrepresentation.

In camera inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order in camera inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account.

For further refinement of the appropriate standard for judicial review of national security claims under Exemption 1 and use of in camera inspection, see Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980), Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981), Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982), and McGehee v. CIA, 711 F.2d 1076 (D.C. Cir. 1983). A review of the cases demonstrates that courts have deferred to agency expertise in national security cases, after examining publicly filed affidavits which in some cases are supplemented by in camera affidavits

or an in camera examination of the documents by the judge.

c. Exemption 1 protects matters that are specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy. The applicable executive order, in effect since October 16, 1995, is Executive Order 12,958, which recognizes three levels of classification--Top Secret, Secret, and Confidential--and several classification categories, including military plans, weapons systems or operations; foreign government information; intelligence activities, intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; and vulnerabilities or capabilities of systems, installations, projects or plans relating to national security.

Recognizing the dramatic changes that have altered the national security threats in recent years, President Clinton declared, when promulgating the new Executive Order, that "these changes provide a greater opportunity to emphasize our commitment to open Government." This is accomplished by setting a 10-year limit for most newly classified information and providing for automatic declassification of 25-year-old information, both of which are subject to narrowly drawn exceptions. Executive Order 12,958 authorizes officials to consider whether the "public interest" in disclosure outweighs the national security interest in classification of the information and requires the creation of a governmentwide declassification database under the auspices of the National Archives and Records Administration. The new order also eliminates the current presumption that certain categories of national security information are classified and provides that "if there is significant doubt about the need to classify information, it should not be classified."

2.2 Exemption 2: Internal Personnel Rules and Practices.

a. The Freedom of Information Act's second exemption pertains to matters that are "related solely to the internal personnel rules and practices of an agency." The Supreme Court has resolved some of the issues involved in Exemption 2 litigation.

Department of the Air Force v. Rose
425 U.S. 352 (1976)
[Footnotes omitted.]

. . . .

Mr. Justice Brennan delivered the opinion of the Court.

Respondents, student editors or former student editors of the New York University Law Review researching disciplinary systems and procedures at the military service academies for an article for the Law Review, were denied access by petitioners to case summaries of honor and ethics hearings, with personal references or other identifying information deleted, maintained in the United States Air Force Academy's Honor and Ethics Code Reading Files, although Academy practice is to post copies of such summaries on 40 squadron bulletin boards throughout the Academy and to distribute copies to Academy faculty and administration officials. Thereupon respondents brought this action under the Freedom of Information Act, as amended, 5 USC § 552, in the District Court for the Southern District of New York against petitioners, the Department of the Air Force and Air Force officers who supervise cadets at the United States Air Force Academy (hereinafter collectively the "Agency"). The District Court granted petitioner Agency's motion for summary judgment--without first requiring production of the case summaries for inspection--holding in an unreported opinion that case summaries even with deletions of personal references or other identifying formation were "matters . . . related solely to the internal personnel rules and practices of an agency," exempted from mandatory disclosure by § 552(b)(2) of the statute. The Court of Appeals for the Second Circuit reversed, holding that § 552(b)(2) did not exempt the case summaries from mandatory disclosure. 495 F.2d 261 (1974). . . .

. . . .

We granted certiorari, 420 U.S. 923 (1975). We affirm.

I.

The District Court made factual findings respecting the administration of the Honor and Ethics Codes at the Academy. See Petition for Certiorari, at 28A-29A nn 5, 6. Under the Honor Code enrolled cadets pledge that "We will not lie, steal, or cheat, nor tolerate among us anyone who does." The Honor Code is administered by an Honor Committee composed of Academy cadets. Suspected violations of the Code are referred to the Chairman of the Honor Committee, who appoints a three-cadet investigatory team which, with advice from the legal advisor, evaluates the facts and determines whether a hearing, before a Board of eight cadets, is warranted. If the team finds no hearing warranted, the case is closed. If it finds there should be a hearing, the accused cadet may call witnesses to testify in his behalf, and each cadet squadron may ordinarily send two cadets to observe.

. . . .

At the announcement of the verdict, the Honor Committee Chairman reminds all cadets present at the hearing that all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative. A case summary consisting of a brief statement, usually only one page, of the significant facts is prepared by the Committee. As we have said, copies of the summaries are posted on 40 squadron bulletin boards throughout the Academy, and distributed among Academy faculty and administration officials. Cadets are instructed not to read the summaries, unless they have a need, beyond mere curiosity, to know their contents, and the Reading Files are covered with a notice that they are "for official use only." Case summaries for not guilty and discretion cases are circulated with names deleted; in guilty cases, the guilty cadet's name is not deleted from the summary, but posting on the bulletin boards is deferred until after the guilty cadet has left the Academy.

Ethics Code violations are breaches of conduct less serious than Honor Code violations, and administration of Ethics Code cases is generally less structured, though similar. In many instances, Ethics cases are handled informally by the Cadet Squadron Commander, the Squadron Ethics Representative, and the individual concerned. These cases are not necessarily written up and no complete file is maintained; a case is written up and the summary placed in back of the Honor Code Reading Files only if it is determined to be of value for the Cadet population. Distribution of Ethics Code summaries is substantially the same as that of Honor Code summaries, and their confidentiality, too, is maintained by Academy custom and practice.

. . . .

III

The phrasing of Exemption 2 is traceable to congressional dissatisfaction with the exemption from disclosure under former § 3 of the Administrative Procedure Act of "any matter relating solely to the internal management of an agency." 5 U.S.C. § 1002 (1964). The sweep of that wording led to withholding by agencies from disclosure of matter "rang[ing] from the important to the insignificant." H.R. Rep. No. 1497, 89th Cong, 2d Sess., at 5 (1966) (hereinafter H.R. Rep. No. 1497). An earlier effort at minimizing this sweep, S. 1666 introduced in the 88th Congress in 1963, applied the "internal management" exemption only to matters required to be published in the Federal Register; agency orders and records were exempted from other public disclosure only when the information related "solely to the internal personnel rules and practices of any agency." The distinction was highlighted in the Senate Report on S. 1666 by reference to the latter as the "more tightly drawn" exempting language. S. Rep. No. 1219, 88th Cong., 2d Sess., 12 (1964).

No final action was taken on S. 1666 in the 88th Congress; the Senate passed the Bill, but it reached the House too late for action. Renegotiation Board v. Bannercraft Clothing

Co., 415 U.S. 1, 18 n.18 (1974). But the Bill introduced in the Senate in 1965 that became law in 1966 dropped the "internal management" exemption for matters required to be published in the Federal Register and consolidated all exemptions into a single subsection. Thus, legislative history plainly evidences the congressional conclusion that the wording of Exemption 2, "internal personnel rules and practices," was to have a narrower reach than the Administrative Procedure Act's exemption for "internal management."

But that is not the end of the inquiry. The House and Senate Reports on the Bill finally enacted differ upon the scope of the narrowed exemption. The Senate Report stated:

> "Exemption 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 813, p. 8.

The House Report, on the other hand, declared

> "2. Matters related solely to the internal personnel rules and practices of any agency. Operating rules, guidelines and manuals of procedure for Government investigators or examiners would be exempt from disclosure but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." H.R. Rep. No. 1497, p. 10.

Almost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional purpose. Those cases relying on the House, rather than the Senate, interpretation of Exemption 2, and permitting Agency withholding of matters of

some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. See, e.g., Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972); Cuneo v. Laird, 338 F. Supp. 504 (D.C. 1972); rev'd on other grounds sub nom. Cuneo v. Schlesinger, 157 U.S. App. D.C. 368, 484 F.2d 1086; City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Cal. 1971)(dictum). Moreover, the legislative history indicates that this was the primary concern of the committee drafting the House Report. See Hearings on H.R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 29-30 (1965), cited in H.R. Rep. No. 1497, p. 10 n.14. We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards. Release of the [sanitized] summaries, which constitute quasi-legal records, poses no such danger to the effective operation of the Codes at the Academy." 495 F.2d, at 265 (footnote omitted). Indeed, the materials sought in this case are distributed to the subjects of regulation, the cadets, precisely in order to assure their compliance with the known content of the Codes.

It might appear, nonetheless, that the House Report's reference to "[o]perating rules, guidelines, and manuals of procedure" supports a much broader interpretation of the exemption than the Senate Report's circumscribed examples. This argument was recently considered and rejected by Judge Wilkey speaking for the Court of Appeals of the District of Columbia Circuit in Vaughn v. Rosen, 173 U.S. App. D.C. at 193-194, 523 F.2d 1136, 1142 (1975):

> "Congress intended that Exemption 2 be interpreted narrowly and specifically. In our view, the House Report carries the potential of exempting a wide swath of

information under the category of 'operating rules, guidelines, and manuals of procedure. . . .' The House Report states that the exemption 'would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures . . .' and yet it gives precious little guidance as to which matters are covered by the exemption and which are not. Although it is equally terse, the Senate Report indicates that the line sought to be drawn is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest.

"This is a standard, a guide, which an agency and then a court, if need be, can apply with some certainty, consistency and clarity. . . . .

"Reinforcing this interpretation is 'the clear legislative intent [of FOIA] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.' [Soucie v. David, 145 U.S. App. D.C. 144, 157, 448 F.2d 1067, 1080 (1971)]. As a result, we have repeatedly stated that '[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.' [Ibid.; Vaughn v. Rosen, 157 U.S. App. D.C. 340, 343, 484 F.2d 820, 823 (1973).] Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure.

"The second major consideration favoring reliance upon the Senate Report is the fact that it was the

> only committee report that was before both houses of Congress. The House unanimously passed the Senate Bill without amendment, therefore no conference committee was necessary to reconcile conflicting provisions. . . .
>
> ". . . [W]e as a court viewing the legislative history must be wary of relying upon the House Report, or even the statements of House sponsors, where their views differ from those expressed in the Senate. As Professor Davis said: 'The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one.' [See generally K. Davis, Administrative Law Treatise, § 3A.31 (1970 Supp.), p. 175.] By unanimously passing the Senate Bill without amendment, the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy). This being the case, we choose to rely upon the Senate Report."

For the reasons stated by Judge Wilkey, and because we think the primary focus of the House Report was on exemption of disclosures that might enable the regulated to circumvent agency regulation, we too "choose to rely upon the Senate Report" in this regard.

The District Court had also concluded in this case that the Senate Report was "the surer indication of congressional intent." Pet. for Cert. 34A n.21. The Court of Appeals found it unnecessary to take "a firm stand on the issue," concluding that "the difference of approach between the House and Senate Reports would not affect the result here." 495 F.2d, at 265. The different conclusions of the two courts in applying the Senate Report's interpretation centered upon a disagreement as to the materiality of the public significance of the operation of the Honor and Ethics

Codes. The District Court based its conclusion on a determination that the Honor and Ethics Codes "[b]y definition . . . are meant to control only those people in the agency. . . . The operation of the Honor Code cannot possibly affect anyone outside its sphere of voluntary participation which is limited by its function and its publication to the Academy." Pet. for Cert. 34A. The Court of Appeals on the other hand concluded that under "the Senate construction of Exemption Two, [the] case summaries . . . clearly fall outside its ambit" because "[s]uch summaries have substantial potential for public interest outside the Government." 495 F.2d, at 265.

We agree with the approach and conclusion of the Court of Appeals. The implication for the general public of the Academy's administration of discipline is obvious, particularly so in light of the unique role of the military. What we have said of the military in other contexts has equal application here: it "constitutes a specialized community governed by a separate discipline from that of the civilian," Orloff v. Willoughby, 345 U.S. 83, 94 (1953), in which the internal law of command and obedience invests the military officer with "a particular position of responsibility." Parker v. Levy, 417 U.S. 733, 744 (1974). Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior. The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military. Moreover, the same essential integrity is critical to the military's relationship with its civilian direction. Since the purpose of the Honor and Ethics Codes administered and enforced at the Air Force Academy is to ingrain the ethical reflexes basic to these responsibilities in future Air Force officers, and to select out those candidates apparently unlikely to serve these standards, it follows that the nature of this instruction--and its adequacy or

inadequacy--is significantly related to the substantive public role of the Air Force and its Academy. Indeed, the public's stake in the operation of the Codes as they affect the training of future Air Force officers and their military careers is underscored by the Agency's own proclamations of the importance of cadet-administered Codes to the Academy's educational and training program. Thus, the Court of Appeals said, and we agree:

> "[Respondents] have drawn our attention to various items such as newspaper excerpts, a press conference by an Academy officer and a White House Press Release, which illustrate the extent of general concern with the working of the Cadet Honor Code. As the press conference and the Press Release show, some of the interest has been generated--or at least enhanced--by acts of the Government itself. Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline. . . . [This factor] differentiate[s] the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '<u>solely</u> to the internal personnel rules and practices of an agency.'" 495 F.2d, at 265 (emphasis in Court of Appeals opinion).

In sum, we think that, at least where the situation is not one where disclosure may risk

> circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest. The exemption was not designed to authorize withholding of all matters except otherwise secret law bearing directly on the propriety of actions of members of the public. Rather, the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest. The case summaries plainly do not fit that description. They are not matter with merely internal significance. They do not concern only routine matters. Their disclosure entails no particular administrative burden. We therefore agree with the Court of Appeals that, given the Senate interpretation, "the Agency's withholding of the case summaries (as edited to preserve anonymity) cannot be upheld by reliance on the second exemption." Id., at 266.
>
> . . . .

---

b. A case authorizing the withholding of mundane administrative matters unrelated to personnel practice is Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983). Note, however, that the D.C. Circuit cautioned that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interest." Id. at 830-31 n.4.

c. The Government has also sought to protect sensitive internal agency instructions to investigators, inspectors, auditors, and other law enforcement personnel under Exemption 2. See, e.g., DOD Regulation 5400.7-R, para. 3-200 (Oct 1990) and AR 25-55, para. 3-200 (Jan 1990). The Supreme Court expressly left open in Rose whether Exemption 2 permits withholding where disclosure would risk circumvention of agency regulation. The Government has been successful in protecting sensitive internal instructions, but not always on the strength of the circumvention of agency regulation theory. Compare Caplan v. BATF, 587 F.2d 554 (2d Cir. 1978) with Jordan v. United States Dep't of

Justice, 591 F.2d 753 (D.C. Cir. 1978) and Cox v. United States Dep't of Justice, 601 F.2d 1 (D.C. Cir. 1979). The District of Columbia Circuit in Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) has recognized the circumvention theory thereby clarifying the law in that circuit.

d. In Schwaner v. Department of the Air Force, 898 F.2d 793 (D.C. Cir. 1990), the D.C. Circuit rejected an Exemption 2 claim and granted a commercial request for a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base, holding that it did not meet the exemption's threshold requirement of being "related solely to the internal rules and practices of an agency."

2.3 Exemption 3: Statutory Restrictions on Disclosure.

a. The third exemption was intended to make the Act consistent with other federal withholding statutes. Exemption 3 protects material which another federal statute protects, provided that the other federal statute either (1) requires that the matters be withheld or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Statutes establishing the confidentiality of alcohol and drug abuse records are considered Exemption 3 statutes by the Department of the Army.

b. From 1982 through late 1984 the Department of Justice advocated the controversial position that the systemic exemptions of the Privacy Act, 5 U.S.C. § 552a(j)(1) and (2), served as a statutory bar to first-person disclosures under FOIA's Exemption 3. After a split in the circuit courts of appeal, the Supreme Court agreed to resolve the issue. See Provenzano v. Department of Justice, 717 F.2d 779 (3rd Cir.), cert. granted, 466 U.S. 926 (1984); and Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984). However, as a part of the Central Intelligence Information Act, Congress specified that the Privacy Act may not serve as an Exemption 3 statute under the FOIA. See Pub. L. 98-477, 98 Stat. 2209, Sec. 2(c) (effective Oct. 15, 1984) (amending what is now subsection (t) of the Privacy Act, 5 U.S.C. § 552a(t). Consequently, the Supreme Court dismissed the issue as moot, see 469 U.S. 413 (1984).

c. Another hotly debated Exemption 3 issue was whether the Trade Secrets Act, 18 U.S.C. § 1905, is within the exemption. The Justice Department asserted

that it was not; however, the Supreme Court in Chrysler v. Brown, 441 U.S. 281 (1979) expressly did not decide the issue. The issue was finally settled in CNA Financial Corp v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988), which held the Trade Secrets Act is not an Exemption 3 statute. Accord Anderson v. HHS, 907 F.2d 936 (10th Cir. 1990); Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988). The "Trade Secrets Act" will be discussed further in paragraphs 2.4c and d concerning Exemption 4.

2.4 Exemption 4: Trade Secrets and Financial Information.

a. This exemption applies to two categories of information in federal agency records:

(1) trade secrets, or

(2) information which is

(a) commercial or financial, and

(b) obtained from a person, and

(c) confidential or privileged.

To determine whether the particular information is a trade secret, several courts have referred to the definition of a trade secret contained in the Restatement of Torts, 4 Restatements of Torts § 757, comment on clause (b) (1939). In a departure from that accepted definition, the U.S. Circuit Court of Appeals for the District of Columbia has adopted a more restrictive "common law" definition of "trade secret" as used in Exemption 4. The new definition covers only a "secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizens Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983). In 1990, the Tenth Circuit Court of Appeals adopted the D.C. Circuit's test for "trade secrets." Anderson v. HHS, 907 F.2d 936 (10th Cir. 1990). Because either definition is more restrictive than the other category, confidential business information, trade secrets may be entitled to absolute protection under Exemption 4. See Martin Marietta Corp. v. FTC, 475 F. Supp. 338 (D.D.C.

1979); and Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976). Due to the protection extended by the courts in the release of trade secrets, there has been little litigation in this area. Most Exemption 4 cases concern whether the records contain confidential information.

b. To come within the meaning of confidential commercial or financial information the information must satisfy all three of the criteria set forth in the second category in the paragraph above. See, e.g., Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527, 529 (D.C. Cir. 1979). An important question addressed by the courts is the meaning of the word "confidential" in the context of Exemption 4. The leading case in the area is National Parks.

National Parks and Conservation Association v. Morton
498 F.2d 765 (D.C. Cir. 1974)
[Footnotes omitted.]

Before BAZELON, Chief Judge, and WRIGHT and TAMM, Circuit Judges.

TAMM, Circuit Judge:

Appellant brought this action under the Freedom of Information Act, 5 U.S.C. § 552 (1970), seeking to enjoin officials of the Department of the Interior from refusing to permit inspection and copying of certain agency records concerning concessions operated in the national parks. The district court granted summary judgment for the defendant on the ground that the information sought is exempt from disclosure under section 552(b)(4) of the Act which states:

(b) This section does not apply to matters that are--

. . . .

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

In order to bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial

or financial, (b) obtained from a person, and (c) privileged or confidential. Getman v. NLRB, 146 U.S.App.D.C. 209, 450 F.2d 670, 673 (1971), quoting Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed, 436 F.2d 1363 (2d Cir. 1971). Since the parties agree that the matter in question is financial information obtained from a person and that it is not privileged, the only issue on appeal is whether the information is "confidential" within the meaning of the exemption.

I.

Unfortunately, the statute contains no definition of the word "confidential." In the past, our decisions concerning this exemption have been guided by the following passage from the Senate Report, particularly the italicized portion:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added), cited in Sterling Drug, Inc. v. FTC, 146 U.S.App.D.C. 237, 450 F.2d 698, 709 (1971); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 138 U.S.App.D.C. 147, 425 F.2d 578, 582 (1970). We have made it clear, however, that the test for confidentiality is an objective one. Bristol-Myers Co. v. FTC, 138 U.S.App.D.C. 22, 424 F.2d 935, 938, cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L. Ed. 2d 52 (1970); cf. Benson v. General Services Administration, 289 F. Supp. 590, 594 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969). Whether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is "confidential" for purposes of section 552(b)(4). A court must also be

satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption. Our first task, therefore, is to ascertain the ends which Congress sought to attain in enacting the exemption for "commercial or financial" information.

In general, the various exemptions included in the statute serve two interests--that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy. The Senate Report acknowledges both of these legislative goals:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Some of the exemptions serve only one or the other of the two interests. The exemption for "inter-agency or intra-agency memorandums" is an example of an exemption intended to protect the orderly conduct of official business. On the other hand, the exemption for "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" is clearly intended for the benefit of the individual from whom information is obtained. The exemption with which we are presently concerned has a dual purpose. It is intended to protect interests of both the Government and the individual.

The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to

cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired. This concern finds expression in the legislative history as well as the case law. During debate on a predecessor to the bill which was ultimately enacted, Senator Humphrey pointed out that sources of information relied upon by the Bureau of Labor Statistics would be "seriously jeopardized" unless the information collected by the Bureau was exempt from disclosure. He was assured that such information was fully protected under the exemption as it then appeared. Although the exemption now contains the additional qualifying words "commercial or financial" the purpose of protecting government access to necessary data remains. As the Senate Report explains:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries. . . .

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). The House Report states with respect to section 552(b)(4):

> It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), U.S. Code Cong. & Admin. News 1966 at 2427. This court has formulated a similar definition of the governmental interest protected by the exemption:

> This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.

Soucie v. David, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1078 (1971).

Apart from encouraging cooperation with the Government by persons having information useful to officials, section 552(b)(4) serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication. The need for such protection was raised several times during hearings on S. 1966, the predecessor of the bill which became law. As introduced, this bill contained no exemption for trade secrets or commercial or financial information. Among the witnesses who pointed out this deficiency was a representative of the National Association of Broadcasters who testified that broadcasters are required to file business information with the Federal Communications Commission which, if not exempt from public disclosure, could be exploited by competitors. A member of the subcommittee which conducted the hearings raised the issue again with respect to Small Business Administration loan applications:

> I am thinking of a situation, for example, where the company couldn't qualify for funds, and they have exposed their predicament to the world and it might give competitors unfair advantage to know their weak condition at that time. I wonder if there might be some cases where it might be in the public interest if all the facts about a company were not made public.

A representative of the Treasury Department added similar comments:

> We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.

In each of these instances it was suggested that an exemption for "trade secrets" would avert the danger that valuable business information would be made public by agencies which had obtained it pursuant to statute or regulation. A representative of the Department of Justice endorsed this idea at length:

> A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions.
>
> Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection, at least from competitors.

A particularly significant aspect of the latter statement is its recognition of a twofold justification for the exemption of commercial material: (1) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

After the hearings, the bill was reported with amendments, one of which added the following exemption:

> . . . trade secrets and other information obtained from the public and customarily privileged or confidential . . . .

S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964). Although the bill passed the Senate, Congress adjourned before the House of Representatives had completed action. The bill was reintroduced in the Senate in the following session with only two changes in the fourth exemption:

> . . . trade secrets and commercial or financial information obtained from the public and privileged or confidential . . . .

This version substitutes the words "commercial or financial" for the word "other" and deletes the word "customarily." No explanation was given for either change. During hearings on this bill, the question was again raised whether businessmen would be protected against disclosure of commercial or financial information obtained by the Government pursuant to administrative regulation. A witness testified that the Rural Electrification Administration requires detailed "financial, economic and technical" information from applicants under its loan program. Public release of this material, it was said, would provide an unfair advantage to a borrower's competitors. In reply, a member of the subcommittee stated: "Well, there is a specific exemption in here to cover that point, and I do not think anybody has any intention that this material be made public." After the hearings, the bill was reported with no significant amendment of the fourth exemption. The explanation of the fourth exemption was identical to that appearing in the Report on the previous bill except for the following significant addition:

> Specifically [the exemption] would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). This history firmly supports the inference that section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies which gather it.

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

II.

The financial information sought by appellant consists of audits conducted upon the books of companies operating concessions in national parks, annual financial statements filed by the concessionaires with the National Park Service and other financial information. The district court concluded that this information was of the kind "that would not generally be made available for public perusal." While we discern no error in this finding, we do not think that, by itself, it supports application of the financial information exemption. The district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

On the record before us the Government has no apparent interest in preventing disclosure of the matter in question. Some, if not all, of the information is supplied to the Park Service pursuant to statute. Whether supplied pursuant to statute, regulation or some less formal mandate, however, it is clear that disclosure of this material to the Park Service is a mandatory condition of the concessionaires' right to operate in national parks. Since the concessionaires are <u>required</u> to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of

the Government to obtain this information in the future.

As we have already explained, however, section 552(b)(4) may be applicable even though the Government itself has no interest in keeping the information secret. The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position. Appellant argues that such a showing cannot be made in this case because the concessionaires are monopolists, protected from competition during the term of their contracts and enjoying a statutory preference over other bidders at renewal time. In other words, appellant argues that disclosure cannot impair the concessionaires' competitive position because they have no competition. While this argument is very compelling, we are reluctant to accept it without first providing appellee the opportunity to develop a fuller record in the district court. It might be shown, for example, that disclosure of information about concession activities will injure the concessioner's competitive position in a nonconcession enterprise. In that case disclosure would be improper. This matter is therefore remanded to the district court for the purpose of determining whether public disclosure of the information in question poses the likelihood of substantial harm to the competitive positions of the parties from whom it has been obtained. If the district court finds in the affirmative, then the information is "confidential" within the meaning of section 552(b)(4) and exempt from disclosure. If only some parts of the information are confidential, the district court may prevent inappropriate disclosures by excising from otherwise disclosable documents any matters which are confidential in the sense that the word has been construed in this opinion.

The judgment of the district court is reversed and this matter is remanded for further proceedings consistent with this opinion.

So ordered.

---

c. The Freedom of Information Act does not require the withholding of any records from the public--it merely authorizes federal agencies and departments to do so under certain circumstances. The Army, for example, has taken the position that exempt records will be released if no governmental interest will be jeopardized by release. AR 25-55 (Jan 1990). In response to a Freedom of Information Act request or otherwise, an agency may wish to release exempt records. When this situation arises or when an agency decides that certain records are not exempt from release under the Act, a third party who has an interest in maintaining the confidentiality of the records may sue to prevent their disclosure. These suits have come to be known as "reverse FOIA" cases.

Chrysler Corporation v. Brown
441 U.S. 281 (1979)
[Most footnotes omitted.]

Mr. Justice Rehnquist delivered the opinion of the Court.

. . . .

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corporation (hereinafter "Chrysler") seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider whether the documents at issue in this case fall within the terms of § 1905.

I

As a party to numerous Government contracts, Chrysler is required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations who benefit from Government contracts provide equal employment opportunity regardless of race or sex. The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations which require Government contractors to furnish reports and other information about their affirmative action programs and the general composition of their work forces.

The Defense Logistics Agency (DLA) (formerly the Defense Supply Agency) of the Department of Defense is the designated compliance agency responsible for monitoring Chrysler's employment practices. OFCCP regulations require that Chrysler make available to this agency written affirmative action programs (AAPs) and annually submit Employer Information Reports, known as EEO-1 Reports. The agency may also conduct "compliance reviews" and "complaint investigations," which culminate in Compliance Review Reports (CRRs) and Complaint Investigation Reports (CIRs), respectively.[4]

Regulations promulgated by the Secretary of Labor provide for public disclosure of information from records of the OFCCP and its compliance agencies. Those regulations state that notwithstanding exemption from mandatory disclosure under the Freedom of Information Act, 5 U.S.C.§ 552,

> "records obtained or generated pursuant to Executive Order 11246 (as amended) . . . shall be made

[4] Id., §§ 60-1.20, 60-1.24. The term "alphabet soup" gained currency in the early days of the New Deal as a description of the proliferation of new agencies such as WPA and PWA. The terminology required to describe the present controversy suggests that the "alphabet soup" of the New Deal era was, by comparison, a clear broth.

> available for inspection and copying . . . if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law."

It is the voluntary disclosure contemplated by this regulation, over and above that mandated by the FOIA, which is the gravamen of Chrysler's complaint in this case.

. . . .

II

We have decided a number of FOIA cases in the last few years. Although we have not had to face squarely the question whether the FOIA ex proprio vigore forbids governmental agencies from disclosing certain classes of information to the public, we have in the course of at least one opinion intimated an answer. We have, moreover, consistently recognized that the basic objective of the Act is disclosure.

In contending that the FOIA bars disclosure of the requested equal employment opportunity information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4:

> (b) [FOIA] does not apply to matters that are
>
> . . . .
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . . 5 U.S.C. § 552(b)(4).

Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities. That contention may be conceded

without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the language, logic or history of the Act.

The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the limits of the agency's obligation to disclose; it does not foreclose disclosure.

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(b). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions to the FOIA. The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making. Congress appreciated that with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters. But the congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is

endorsed by the agency collecting the information.

Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.

. . . .

We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure.

III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U.S.C. § 1905. The Act provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income

> return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment.

There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

A

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants. Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905.

It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. . . .

. . . .

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the Administrative Procedure Act (APA) is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other. A "substantive rule" is not defined in

the APA, and other authoritative sources essentially offer definitions by negative inference. But in Morton v. Ruiz, 415 U.S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule--or a "legislative-type rule," id., at 236--as one "affecting individual rights and obligations." Id., at 232. This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." Id., at 235, 236.

That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. As this Court noted in Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977):

> "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. . . . Such rules have the force and effect of law.' "

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. Morton v. Ruiz, supra, at 232. For agency discretion is not only limited by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the Government in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to

information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a congressional grant of legislative authority.

. . . .

[The court went on to reject Government arguments that its disclosure regulations had the force and effect of law by virtue of Executive Order 11246 or 5 U.S.C. § 301, the "housekeeping statute."]

There is also a procedural defect in the OFCCP disclosure regulations which precludes courts from affording them the force and effect of law. The defect is a lack of strict compliance with the APA. Recently we have had occasion to examine the requirements of the APA in the context of "legislative" or "substantive" rulemaking. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), we held that courts could only in "extraordinary circumstances" impose procedural requirements on an agency beyond those specified in the APA. It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so. In Vermont Yankee we recognized that the APA is " 'a formula upon which opposing social interests and political forces have come to rest.' " Id., at 547 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)). Courts upset that balance when they override informed choice of procedures and impose obligations not required by the APA. By the same token courts are charged with maintaining the balance: ensuring that agencies comply with the "outline of minimum essential rights and procedures" set out in the APA. H.R. Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946); see Vermont Yankee Nuclear Power Corp., supra, at 549 n.21. Certainly regulations subject to the APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act.

Section 4 of the APA, 5 U.S.C. § 553, specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. "Interpretive rules, general statements of policy or rules of agency organization, procedure or practice" are exempt from these requirements. When the Secretary of Labor published the regulations pertinent in this case, he stated:

> As the changes made by this document relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U.S.C. 553. Since the changes made by this document either relieve restrictions or are interpretative rules, no delay in effective date is required by 5 U.S.C. 553(d). These rules shall therefore be effective immediately.
>
> In accordance with the spirit of the public policy set forth in 5 U.S.C. 553, interested persons may submit written comments, suggestions, data, or arguments to the Director, Office of Federal Contract Compliance. . . . 38 Fed. Reg. 3192, 3193 (1973).

Thus the regulations were essentially treated as interpretative rules and interested parties were not afforded the notice of proposed rulemaking required for substantive rules under 5 U.S.C. § 553(b). As we observed in Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977), "a court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." We need not decide whether these regulations are properly characterized "interpretative rules." It is enough that

such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law. An interpretative regulation or general statement of agency policy cannot be the "authoriz[ation] by law" required by § 1905.

. . . .

B

We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In Cort v. Ash, 422 U.S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in Cort present here. As our review of the legislative history of § 1905--or lack of same--might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the congressional purpose," J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), for we find that review of DLA's decision to disclose Chrysler's employment data is available under the APA.

IV

. . . .

Both Chrysler and the Government agree that there is APA review of DLA's decision. They disagree on the proper scope of review. Chrysler argues that there should be de novo review, while the Government contends that such review is only available in extraordinary cases and this is not such a case.

The pertinent provisions of § 10(c) of the APA, 5 U.S.C. § 706 (1976), provide that a reviewing court shall

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . .
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). De novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court of Appeals may consider whether the contemplated disclosures would violate the prohibition of § 1905.[49] Since the decision regarding this substantive issue--the scope of § 1905--will necessarily have some effect on the proper form of judicial

---

[49] Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary expressly to decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, 5 U.S.C. § 552(b)(3) (1976). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary "author[ization] by law" for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.

review pursuant to § 706(2), we think it unnecessary, and therefore unwise, at the present stage of this case for us to express any additional views on that issue.

Vacated and remanded.

MR. JUSTICE MARSHALL, concurring.

I agree that respondents' proposed disclosure of information is not "authorized by law" within the meaning of 18 U.S.C. § 1905, and I therefore join the opinion of the Court. Because the number and complexity of the issues presented by this case will inevitably tend to obscure the dispositive conclusions, I wish to emphasize the essential basis for the decision today.

This case does not require us to determine whether, absent a congressional directive, federal agencies may reveal information obtained during the exercise of their functions. For whatever inherent power an agency has in this regard, § 1905 forbids agencies from divulging certain types of information unless disclosure is independently "authorized by law." Thus, the controlling issue in this case is whether the OFCCP disclosure regulations, 41 CFR §§ 60.40-1 to 60.40-4 (1978), provide the requisite degree of authorization for the agency's proposed release. The Court holds that they do not, because the regulations are not sanctioned directly or indirectly by federal legislation. In imposing the authorization requirement of § 1905, Congress obviously meant to allow only those disclosures contemplated by congressional action. Ante, at 17-28. Otherwise the agencies Congress intended to control could create their own exceptions to § 1905 simply by promulgating valid disclosure regulations. Finally, the Court holds that since § 10(c) of the Administrative Procedure Act requires agency action to be "in accordance with law," 5 U.S.C. § 706(2)(A), a reviewing court can prevent any disclosure that would violate § 1905.

Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not

mean the regulations themselves are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" for purposes of the Administrative Procedure Act. 5 U.S.C. § 706(2)(C). As the Court recognizes ante, at 25 n.40, that inquiry involves very different considerations than those presented in the instant case. Accordingly, we do not question the general validity of these OFCCP regulations or any other regulations promulgated under § 201 of Executive Order 11246. Nor do we consider whether such an Executive order must be founded on a legislative enactment. The Court's holding is only that the OFCCP regulations in issue here do not "authorize" disclosure within the meaning of § 1905.

Based on this understanding, I join the opinion of the Court.

---

d. DOD Regulation 5400-7.R, para 3-200, adopts the three-prong National Parks test. However, the D.C. Circuit, sitting en banc, recently established an additional basis for protecting information under Exemption 4 in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992). Although the court in Critical Mass reaffirmed National Parks, it specifically limited its application to information which is "required" by the government to be submitted. Most significantly, it established "categorical" protection for information submitted on a "voluntary" basis, if the information "would customarily not be released to the public" by the submitter. By memorandum dated 23 Mar 1993, Ref: 93-CORR-037, the Office of the Assistant Secretary of Defense (Public Affairs) issued interim guidance on the application of Critical Mass. (That office finalized its guidance by memorandum dated 17 Jul 1993, Ref: 93-CORR-094.) That guidance includes:

(1) Submitted information is "required" when it is submitted in accordance with an exercised authority for submission; examples include statutes, executive orders, regulations (such as the Federal Acquisition Regulation (FAR)), invitations for bids, requests for proposals, or contracts.

(2) When bids or proposals are incorporated into a contract, they do not lose their "required" submission nature.

(3) If the information was voluntarily submitted, then determine whether the submitter customarily releases it to the public. If the submitter's practice is uncertain, the submitter should be asked to describe its disclosure practices.

(4) With respect to unit prices, except in unusual circumstances, continue to release for successful offerors in accordance with the FAR.

(5) With unsuccessful offerors, unit prices are normally releasable unless a National Parks analysis permits withholding.

(6) Option prices are to be treated as unit prices.

Note 1. When a request is received for business information that was required to be submitted, how does the Government know whether the source of the information considers it to be confidential commercial or financial business information? Executive Order 12,600, 52 Fed. Reg. 23781 (1987) and DOD Regulation 5400.7-R, para. 5-207, requires that the submitter of the business information be notified and given an opportunity to present arguments before the agency decides to release or withhold the requested information. Must the agency hold a formal hearing to consider the claims of the submitter before making its decision? The court in CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988), held that the "paper hearing" offered was sufficient. The court determined that a full evidentiary hearing was not needed and recognized the tremendous burden such a hearing would place on the agency. Accord, NOW v. Social Security Administration, 736 F.2d 727 (D.C. Cir. 1984).

Note 2. A basic principle of the Freedom of Information Act confirmed by the Chrysler opinion is that the exemptions permit but do not compel withholding. Do agency employees risk violation of 18 U.S.C.§ 1905 by release of exempt information? CNA Financial Corporation v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), cert. denied, 485 U.S. 977 (1988), held that 18 U.S.C. § 1905 is at least coextensive with Exemption 4, and that in absence of a regulation effective to authorize disclosure, the Trade Secrets Act prohibits agency release of information that falls within Exemption 4. The policy of the Criminal Division, U.S. Department of Justice, is "not to prosecute government

employees for a violation of 18 U.S.C. § 1905 if the release of information in question was made in a good faith effort to comply with the Freedom of Information Act and the appropriate applicable regulations." See United States Attorneys' Manual, § 9-2.025.

Note 3. In Chrysler, the Supreme Court held that an agency's contemplated disclosure of information in violation of 18 U.S.C. § 1905 was reviewable under the Administrative Procedure Act. An adequate administrative record must be developed to support the agency's decision. See General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984) (a single sentence determination which did not address any of the submitter's contentions held inadequate). Procedures have been suggested by the Department of Justice.

Note 4. Although the Court in the Chrysler opinion did not define the scope of 18 U.S.C. § 1905 or Exemption 4, the Court held that certain agency regulations can permit disclosure of information protected by § 1905. To have the force of law, the Court held that the regulation must satisfy three requirements. First, it must be substantive in nature; it must affect individual rights and obligations. Second, it must have been promulgated in compliance with applicable procedural requirements. Finally, Congress must have clearly delegated its legislative powers to make disclosure regulations. Do military disclosure regulations satisfy these standards?

In McDonnell Douglas Corp. v. Widnall, No. 94-0091 (D.D.C. Apr. 11, 1994), Federal Acquisition Regulation (FAR) 5.303, 48 C.F.R. § 205.303, which provides for the public disclosure of unit prices in contract actions over $5 million, was held to satisfy Chrysler's requirements. In so holding, the district court ruled that the legislative authority for the FAR is the Office of Federal Procurement Policy (OFPP) Act of 1974 under which Congress gave OFPP broad authority to establish regulations to govern government procurement. This statutory grant of authority was held to include "within its broad mandate the ability to promulgate regulations regarding public disclosure of exercised options." However, on appeal, in a rather opaque and confusing decision, the D.C. Circuit remanded the matter back to the agency to determine whether the unit prices were covered by the Trade Secrets Act and the effect a collateral FOIA request would have on the issue. McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162 (D.C. Cir. 1995).

e. Exemptions 8 and 9, pertaining to reports of financial institutions and geological data concerning wells, respectively, have resulted in little litigation and are of minimal interest to the military departments. Both are designed to protect specific commercial interests.

2.5 Exemption 5: Internal Agency Communications.

a. This exemption incorporates into FOIA certain discovery privileges which the Government has traditionally enjoyed in litigation. Two privileges recognized by the courts are the attorney-client privilege and the attorney-work product privilege.

Mead Data Central, Inc. v.
United States Department of the Air Force,
566 F.2d 242 (D.C. Cir. 1977)
[Most footnotes omitted.]

Opinion for the court filed by TAMM, Circuit Judge.

Dissenting opinion filed by McGOWAN, Circuit Judge.

TAMM, Circuit Judge:

Mead Data Central, Inc. appeals from a judgment of the United States District Court for the District of Columbia, 402 F. Supp. 460, holding that seven documents relating to a licensing agreement between the United States Department of the Air Force and West Publishing Co. need not be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970 & Supp. V. 1975), because they fall within exemption five of the FOIA. While we agree with the district court that the attorney-client privilege and the deliberative process privilege are essential ingredients of exemption five, we find that both the Air Force and the district court applied interpretations of the scope of those privileges that are impermissibly broad, and accordingly remand the case to the district court for further consideration under the narrower constructions set forth in this opinion. We also hold that the Air Force did not adequately justify its claim that there

was no non-exempt information which was reasonably segregable, and direct that agency segregability decisions be accompanied by adequate descriptions of the documents' content and articulate the reasons behind the agency's conclusion.

I. BACKGROUND

In early 1975, Mead Data filed a FOIA request with the Air Force seeking disclosure of several categories of documents dealing generally with the Department's "Project FLITE," a computerized legal research system. The Air Force agreed to disclose some of the requested documents, but the Chief of the General Litigation Division of the Office of The Judge Advocate General advised Mead Data by letter that eight of the documents would be withheld. He provided a very brief description of each document and asserted that "[t]he foregoing are exempt from disclosure under . . . 5 U.S.C. 552(b)(5), as attorney work products or intra-agency memoranda." Mead Data appealed this decision to the Office of the Secretary and was informed that, although one of the eight documents would be disclosed, the remaining seven would not. The Air Force characterized three of these seven documents as legal opinions of Air Force attorneys advising their client as to applicable law and recommending courses of action with respect to Project FLITE. The other four were described as internal memoranda prepared by Air Force employees, which reflect the course of negotiations between the Air Force and West Publishing Co. for a licensing agreement to use the copyrighted West key number system and offer recommendations as to negotiating positions. The Air Force claimed that the legal opinions fell within the attorney-client privilege incorporated into exemption five of the FOIA, and that the internal memoranda were also covered by that exemption because their disclosure would adversely affect the decisional process within the Air Force by inhibiting the expression of candid opinions.

Mead Data filed suit in the United States District Court for the District of Columbia

seeking an injunction to compel the disclosure of the withheld documents. During the court proceedings the Air Force submitted two affidavits offering more detailed descriptions of the contents of the documents and the bases for nondisclosure. . . .

. . . .

The parties filed cross-motions for summary judgment, and following an in camera inspection of the seven documents, the district court entered a judgment in favor of the Air Force. The court noted that although the Air Force's initial description of the withheld documents hardly comported with the requirements of Vaughn v. Rosen and Cuneo v. Schlesinger, the elaborated description contained in the affidavits it had submitted to the court was adequate. On the merits, the court held that documents 1, 4, and 5 fall within the attorney-client privilege of exemption five and that documents 2, 3, 6, and 7 fit squarely within the same exemption because they reflect ongoing developments in a government negotiating process and discuss obstacles, alternatives, and recommendations as the agency progresses toward a final decision. Finally, the court stated that on the basis of its examination of the documents there is no factual or other non-exempt material which can be segregated and disclosed, and that disclosure of these documents would be harmful to future deliberations and contract negotiations.

II. PROCEDURAL REQUIREMENTS

The dispute between the parties in this case over whether the information sought by Mead Data is within exemption five of the FOIA centers basically around the question of how that information ought to be characterized. Mead Data contends that the information is purely factual and that consequently its disclosure would not adversely affect the Air Force's deliberative process. The Air Force argues to the contrary and insists that the documents withheld consist of advisory opinions, recommendations, and other

deliberative material that fall squarely within exemption five.

Where there is such a factual dispute over the nature of the information sought in a FOIA suit, the lack of access of the party seeking disclosure undercuts the traditional adversarial theory of judicial dispute resolution. Vaughn v. Rosen (Vaughn I), 484 F.2d 820, 824-25 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Although in camera inspection of the disputed documents may compensate somewhat for this deficiency, it is a far from perfect substitute. Moreover, as this court held in Vaughn I, supra at 824, the burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption plus submission of disputed material for in camera inspection. Id. at 825-26. Thus, we require that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. . . .

. . . .

III. EXEMPTION FIVE CLAIMS

Exemption five of the FOIA exempts from mandatory disclosure those matters that are "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1970). Although Congress clearly intended to refer the courts to discovery principles for the resolution of exemption five disputes, the situations are not identical, and the Supreme Court has recognized that discovery rules should be applied to FOIA cases only "by way of rough analogies." Accepting this "rough analogy" rule as a guiding principle and bearing in mind that FOIA exemptions should be narrowly construed, we turn to the particular documents at issue.

A. Legal Opinions

The district court held that exemption five permitted the Air Force to withhold documents 1, 4, and 5 because they contained information which qualifies for protection under the attorney-client privilege--confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. We agree that the attorney-client privilege has a proper role to play in exemption five cases. The policy objective of that privilege is certainly consistent with the policy objective of the exemption. Exemption five is intended to protect the quality of agency decision-making by preventing the disclosure requirement of the FOIA from cutting off the flow of information to agency decision-makers. Certainly this covers professional advice on legal questions which bears on those decisions. The opinion of even the finest attorney, however, is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. We see no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

. . . .

The Air Force's description of documents 1, 4, and 5 adequately demonstrates that the information in those documents was communicated to or by an attorney as part of a professional relationship in order to provide the Air Force with advice on the legal ramifications of its actions. To that extent it satisfies most of the necessary conditions for application of the attorney-client privilege. The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however. It must also be demonstrated that the information is confidential. If the information has been or

is later shared with third parties, the privilege does not apply.[24]

The description of documents 1 and 5 gives no indication as to the confidentiality of the information on which they are based. It simply states the subject, source, and recipient of the legal opinion rendered. In the federal courts the attorney-client privilege does extend to a confidential communication from an attorney to a client, but only if that communication is based on confidential information provided by the client. The Air Force has not shown that the information on which the legal opinions in documents 1 and 5 were based meets this confidentiality requirement, and since the FOIA places the burden on the Government to prove the applicability of a claimed privilege, the court could not assume that it was confidential. We therefore reverse the district court's judgment that documents 1 and 5 are covered by the attorney-client privilege component of exemption five. On remand, the court should order disclosure of these documents unless the Air Force demonstrates either that the attorney-client privilege does apply to these documents because the information on which they are based was supplied by the Air Force with the expectation of secrecy and was not known by or disclosed to any third party, or that they fall within exemption five for some other reason.[28]

---

[24]. . . The fact that the communication at issue in this case may have been circulated among more than one employee of the Air Force does not necessarily destroy their confidentiality, however. Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.

[28]With respect to documents containing legal opinions and advice, there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component. The distinction between the two is that the attorney-client privilege permits nondisclosure of an attorney's opinion

(continued...)

. . . .

B. Internal Memoranda

The district court decided that the remaining documents, documents 2, 3, 6, and 7, fit squarely within exemption five since "each reflects ongoing developments in a Government negotiating process" as documents wherein "[a]dvice, obstacles, alternatives, and recommendations are weighed and balanced."

It generally has been accepted that exemption five incorporates the governmental privilege, developed in discovery cases, to protect documents containing advisory opinions and recommendations or reflecting deliberations comprising the process by which government policy is formulated. Under this facet of exemption five, the courts have required disclosure of essentially factual material but allowed agencies to withhold documents which reveal their deliberative or policy-making processes. The Supreme Court approved this approach in EPA v. Mink and found it consistent with the discussion of a "factual-deliberative" distinction in the legislative history of exemption five.

---

[28](...continued)
or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process. On remand the district court may well conclude that, although these documents are not exempt by the attorney-client privilege, they are nonetheless still free from mandatory disclosure under the deliberative process privilege. Such a result will be more than a mere switch in rationales without substantive impact. If these documents are exempt only because of the deliberative process privilege, the district court must require the Air Force to describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.

Congress adopted exemption five in recognition of the merits of arguments from the executive branch that the quality of administrative decision-making would be seriously undermined if agencies were forced to "operate in a fishbowl" because the full and frank exchange of ideas on legal or policy matters would be impossible. A decision that certain information falls within exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.

Many exemption five disputes may be able to be decided by application of the simple test that factual material must be disclosed but advisory material, containing opinions and recommendations, may be withheld. The test offers a quick, clear, and predictable rule of decision, but courts must be careful not to become victims of their own semantics. Exemption five is intended to protect the deliberative process of government and not just deliberative material. Montrose Chemical Corp. v. Train, 160 U.S.App.D.C. 270, 275-278, 491 F.2d 63, 68-71 (1974). Perhaps in the great majority of cases that purpose is well served by focusing on the nature of the information sought. In some circumstances, however, the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5). See Brockway v. Department of the Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975); Montrose Chemical Corp., supra; Amway Corp. v. FTC, 1976-1 Trade Cas. ¶ 60,798, at 68,445 (D.D.C. 1976); Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D.N.Y. 1976). See also Kent Corp. v. NLRB, 530 F.2d 612, 620 (5th Cir.), cert. denied, 429 U.S. 920, 97 S.Ct. 316, 50 L. Ed. 2d 287 (1976).

Mead Data argues that documents 6 and 7 are "reportorial and factual in nature rather than policy deliberative," Brief for Appellant at 21, because they only provide summaries of discussions among Air Force staff relating to the negotiating positions of the Department and West Publishing Co. and do not affirmatively make recommendations or offer

opinions. Discussions among agency personnel about the relative merits of various positions which might be adopted in contract negotiations are as much a part of the deliberative process as the actual recommendations and advice which are agreed upon. As such they are equally protected from disclosure by exemption five. See Ash Grove Cement Co. v. FTC, 519 F.2d 934, 935 (D.C. Cir. 1975). It would exalt form over substance to exempt documents in which staff recommend certain action or offer their opinions on given issues but require disclosure of documents which only "report" what those recommendation and opinions are. The evaluations, opinions, and recommendations reported in documents 6 and 7 are the raw materials which went into the decision of the Air Force to contract with West Publishing Co. on certain terms. This is not a case like Scwartz v. IRS or Sterling Drug Inc. v. FTC where an agency is attempting to invoke exemption five to protect the private transmittal of binding agency opinions and interpretations. The policy of promoting the free flow of ideas within an agency by guaranteeing protection from disclosure is therefore fully applicable to this information, and we hold that to the extent documents 6 and 7 reflect the views and opinions of Air Force staff on the state of negotiations between the Air Force and West Publishing--the potential problems and available alternatives--they are exempt from disclosure under the FOIA by section 552(b)(5).

Document 3 consists entirely of a running summary of the offers and counter-offers made by each side in the Air Force's negotiations with West Publishing Co. The Air Force insists that this information is exempt simply because it reflects negotiating positions of the parties which predate the final agreement on the contract terms. The district court apparently accepted this proposition, for in holding that documents 2, 3, 6, and 7 fit "squarely" within exemption five, it reasoned that "[e]ach document reflects ongoing developments in a Government negotiating process." We find this to be an entirely too broad reading of exemption five.

Predecisional materials are not exempt merely because they are predecisional; they must also be a part of the deliberative process within a government agency. Vaughn v. Rosen (Vaughn II), 523 F.2d 1136, 1144 (D.C. Cir. 1975). The documents in this case which would reveal the Air Force's internal self-evaluation of its contract negotiations, including discussion of the merits of past efforts, alternatives currently available, and recommendations as to future strategy, fall clearly within the test. Information about the "deliberative" or negotiating process outside an agency, between itself and an outside party, does not. Moreover, neither of the policy objectives which exemption five is designed to serve--avoiding premature disclosure of agency decisions and encouraging the free exchange of ideas among administrative personnel--is relevant to a claim of secrecy for a proceeding between an agency and an outside party. All of the information as to what the Air Force offered West Publishing, initially and in response to West's counteroffers, has already been fully disclosed to at least one party outside the Department--West itself--and the Department has no control over further disclosure.

Perhaps it could be shown that the threat of disclosure of negotiation proceedings would so inhibit private parties from dealing with the Government that agencies must be permitted to withhold such information in order to preserve their ability to effectively arrange for contractual agreements. Cf. Brockway, supra, 518 F.2d at 1193; Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963). Arguments that the disclosure mandated by the FOIA would seriously hamper the performance of an agency's other duties have not fared well in the courts, however. An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA. See Brockway, supra, 518 F.2d at 1194.

Whatever might be shown with respect to the harm caused by disclosure of the offers and counter-offers made during negotiation of

> a government contract, the justification claimed by the Air Force in this case is far from sufficient. Unless far more compelling reasons are brought forth on remand and supported by adequately detailed proof, the district court will have no option but to compel disclosure of document 3.

[The court went on to address plaintiff's argument that the Government had violated its own regulations by failing to demonstrate that withholding served a significant and legitimate Government purpose. Because this issue was beyond the purview of the Freedom of Information Act, the court's review was limited to determining whether the Air Force's action amounted to an abuse of discretion.

The court also discussed the issue of segregability of non-exempt portions of the records in question and concluded as follows:]

> Requiring a detailed justification for an agency decision that non-exempt material is not segregable will not only cause the agency to reflect on the need for secrecy and improve the adversarial position of FOIA plaintiffs, but it will also enable the courts to conduct their review on an open record and avoid routine reliance on in camera inspection. It is neither consistent with the FOIA nor a wise use of increasingly burdened judicial resources to rely on in camera review of documents as the principal tool for review of segregability disputes. See Vaughn I, supra, 484 F.2d at 825-26. In Weissman v. CIA, we held that neither the legislative history of the statutory segregability requirement nor the court decisions it endorsed require the courts to conduct an in camera line-by-line analysis of withheld documents whenever a FOIA plaintiff claims that there may be non-exempt material which was reasonably segregable but not disclosed. 565 F.2d 692 at 697-698 (D.C. Cir. 1977). If an agency has provided the description and justification suggested by this opinion, a district court need not conduct its own in camera search for segregable non-exempt information unless the agency response is vague, its claims too sweeping, or there is a reason to suspect bad faith. Id. at 698.

VI. CONCLUSION

The district court's judgment that exemption five of the FOIA permits the Air Force to withhold all of the material in the seven documents at issue in this case rests on an impermissibly broad interpretation of the attorney-client privilege and the deliberative process privilege. We therefore remand the case for further proceedings under the narrower constructions outlined above and direct that the segregability inquiry be augmented by a more detailed justification of the Air Force's decision, accompanied by an indication of the proportion of the material which is non-exempt and how it is distributed throughout the documents.
Remanded.

Note 1. In order to qualify as attorney work-product, a document must be "prepared in anticipation of litigation." Fed. R. Civ. Pro. 26(b)(3). Because the privilege covers all documents prepared in anticipation of litigation, there is no requirement that factual material be disclosed. Norwood v. FAA, 993 F.2d 570 (6th Cir. 1993); Nadler v. United States Dep't of Justice, 955 F.2d 1479 (11th Cir. 1992); Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987). Cf. FTC v. Grolier, Inc., 462 U.S. 19 (1983) (Brennan, J., concurring) ("[N]othing in either FOIA or our decisions interpreting it authorizes us to define the coverage of the work product doctrine under Exemption 5 differently from the definition of its coverage that would obtain under Rule 26(b)(3)."). In Grolier, the Supreme Court held that attorney work-product materials are entitled to perpetual Exemption 5 protection.

Note 2: The attorney work product privilege is not limited to civil litigation, but extends to administrative proceedings, see Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 700 (D.D.C. 1983), and to criminal matters as well, see Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983).

b. Exemption 5 has been the subject of a good deal of Supreme Court consideration and many of the cases have involved the deliberative process privilege. The goal of the deliberative process privilege is to

encourage frank and open communication between a subordinate and a superior. The theory behind the privilege is that if the subordinate's advice is revealed, associates may be reluctant to be candid and frank. Typical deliberative matter includes recommendations, proposals, suggestions, comments and advice. Facts are not normally deliberative and are not protected under this privilege, unless their disclosure would expose the agency's decisionmaking process. See, e.g., Dudman Communications Corp. v. Dep't of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987) (protecting factual draft of history on grounds that comparing it to final official history would reveal editorial judgments). In some cases, it is difficult to determine whether particular information is factual or evaluative. See, e.g., Quarles v. Dep't of the Navy, 893 F.2d 390 (D.C. Cir. 1990) (protecting construction cost estimates which court characterized as "elastic facts"); Army Times Publishing Co. v. Department of the Air Force, No. 90-1383 (D.D.C. Feb. 28, 1995) (aggregate responses to survey questions concerning leadership and morale held factual rather than deliberative).

Requests for agency records are a type of access authorized under section (a)(3) of the Freedom of Information Act. Sometimes requesters assert that agencies have an affirmative duty to make agency records available either under sections (a)(1) or (a)(2) of the Act. The relationship between "final opinions" under section (a)(2) and Exemption 5 was resolved by the Supreme Court in the case of NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). The Court also addressed the extent to which Exemption 5 shields memoranda claimed to be part of the deliberative process.

National Labor Relations Board v.
Sears, Roebuck & Co.
421 U.S. 132 (1975)
[Most footnotes omitted.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The National Labor Relations Board (the Board) and its General Counsel seek to set aside an order of the United States District Court directing disclosure to respondent, Sears, Roebuck & Co. (Sears), pursuant to the Freedom of Information Act, 5 U.S.C. §552 (Act), of certain memoranda, known as "Advice Memoranda" and "Appeals Memoranda," and

related documents generated by the Office of the General Counsel in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints.

. . . .

Sears claims, and the courts below ruled, that the memoranda sought are expressions of legal and policy decisions already adopted by the agency and constitute "final opinions" and "instructions to staff that affect a member of the public," both categories being expressly disclosable under §552(a)(2) of the Act, pursuant to its purposes to prevent the creation of "secret law." In any event, Sears claims, the memoranda are nonexempt "identifiable records" which must be disclosed under §552(a)(3). The General Counsel, on the other hand, claims that the memoranda sought here are not final opinions under §552(a)(2) and that even if they are "identifiable records" otherwise disclosable under §552(a)(3), they are exempt under §552(b), principally as "intra-agency" communications under §552(b)(5) (Exemption 5), made in the course of formulating agency decisions on legal and policy matters.

. . . .

III

It is clear, and the General Counsel concedes, that Appeals and Advice Memoranda are at the least "identifiable records" which must be disclosed on demand, unless they fall within one of the Act's exempt categories. It is also clear that, if the Memoranda do fall within one of the Act's exempt categories, our inquiry is at an end for the Act "does not apply" to such documents. Thus our inquiry, strictly speaking, must be into the scope of the exemptions which the General Counsel claims to be applicable -- principally Exemption 5 relating to "intra-agency memoranda." The General Counsel also concedes, however, and we hold for the reasons set forth below, that Exemption 5 does not apply to any document which falls within the meaning of the phrase "final opinion . . . made in the adjudication of cases." 5 USC §

552(a)(2)(A). The General Counsel argues, therefore, as he must, that no Advice or Appeals Memorandum is a final opinion made in the adjudication of a case and that all are "intra-agency" memoranda within the coverage of Exemption 5. He bases this argument in large measure on what he claims to be his lack of adjudicative authority. It is true that the General Counsel lacks any authority finally to adjudicate an unfair labor practice claim in favor of the claimant; but he does possess the authority to adjudicate such a claim against the claimant through his power to decline to file a complaint with the Board. We hold for reasons more fully set forth below that those Advice and Appeals Memoranda which explain decisions by the General Counsel not to file a complaint are "final opinions" made in the adjudication of a case and fall outside the scope of Exemption 5; but that those Advice and Appeals Memoranda which explain decisions by the General Counsel to file a complaint and commence litigation before the Board are not "final opinions" made in the adjudication of a case and do fall within the scope of Exemption 5.

A

. . . The privileges claimed by petitioners to be relevant to this case are (i) the "generally . . . recognized" privilege for "confidential intra-agency advisory opinions . . .," Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958) (Reed, J.), disclosure of which "would be "injurious to the consultative functions of government. . . .' Kaiser Aluminum & Chemical Corp., supra, at 49, 157 F. Supp., at 946," EPA v. Mink, supra, at 86-87 (sometimes referred to as "executive privilege"), and (ii) the attorney-client and attorney work-product privileges generally available to all litigants.

(i)

That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear, S. Rep. No. 813, 9; HR Rep No. 1497, 10; EPA v. Mink,

supra, at 86. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the "decision making processes of government agencies," Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (CA6 1972); Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.C. 1966), see also EPA v. Mink, supra, at 86-87; International Paper Co. v. FPC, 438 F.2d 1349, 1358-1359 (CA2 1971); Kaiser Aluminum & Chemical Corp. v. United States, supra, at 49, 157 F. Supp., at 946; and focus on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena, supra, at 324. The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. S. Rep. No. 813, 9. See also H.R. Rep. No. 1497, p. 10; EPA v. Mink, supra, at 87. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," Ackerley v. Ley, 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969), and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974) (emphasis added).[17]

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury

[17] Our remarks in United States v. Nixon were made in the context of a claim of "executive privilege" resting solely on the Constitution of the United States. No such claim is made here and we do not mean to intimate that any documents involved here are protected by whatever constitutional content the doctrine of executive privilege might have.

to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, e.g., Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960); O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1965); Walled Lake Door Co. v. United States, 31 F.R.D. 258 (E.D. Mich. 1962); Zacher v. United States, 227 F.2d 219, 226 (CA8 1955), cert. denied, 350 U.S. 993 (1956); Clark v. Pearson, 238 F. Supp. 495, 496 (DC 1965); and communications made after the decision and designed to explain it, which are not.[19] Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971); GSA v. Benson, 415 F.2d 878, 881 (CA9 1969); Bannercraft Clothing Co. v. Renegotiation Board, 151 U.S. App. D.C. 174, 466 F.2d 345 (1972), rev'd on other grounds, 415 U.S. 1 (1974); Tennessean

[19] We are aware that the line between predecisional documents and postdecisional documents may not always be a bright one. Indeed, even the prototype of the postdecisional document--the "final opinion"--serves the dual function of explaining the decision just made and providing guides for decisions of similar or analogous cases arising in the future. In its latter function, the opinion is predecisional; and the manner in which it is written may, therefore, affect decisions in later cases. For present purposes it is sufficient to note that final opinions are primarily postdecisional--looking back on and explaining, as they do, a decision already reached or a policy already adopted--and that their disclosure poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions.

Newspapers, Inc. v. FHA, supra. See also S. Rep. No. 1219, 88th Cong., 2d Sess., 7 and 11. This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of postdecisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the "working law" of the agency and have been held by the lower courts to be outside the protection of Exemption 5. [Citations omitted.] Exemption 5, properly construed, calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law ought to be." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967); Note, Freedom of Information Act and the Exemption for Inter-Agency Memoranda, 86 Harv. L. Rev. 1047 (1973).

This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions," "statements of policy which have been adopted by the agency," and "instructions to staff that affect a member of the public," 5 U.S.C. § 552(a)(2), represents a strong congressional aversion to "secret [agency] law," Davis, supra, at 797; and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law." H.R. Rep. No. 1497, p. 7. We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); and with respect at least to "final opinions," which not only invariably explain agency action already taken or an

agency decision already made, but also constitute "final dispositions" of matters by an agency . . . we hold that can never apply.

(ii)

It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law. The Senate Report states that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties," S. Rep. No. 813,p. 2; and the case law clearly makes the attorney's work-product rule of Hickman v. Taylor, 329 U.S. 495 (1947), applicable to Government attorneys in litigation. [Citations omitted.] Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy. [Citations omitted.]

B

Applying these principles to the memoranda sought by Sears, it becomes clear that Exemption 5 does not apply to those Appeals and Advice Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party; but that Exemption 5 does protect from disclosure those Appeals and Advice Memoranda which direct the filing of a complaint and the commencement of litigation before the Board.

(i)

Under the procedures employed by the General Counsel, Advice and Appeals Memoranda are communicated to the Regional Director <u>after</u> the General Counsel, through his Advice and Appeals Branches, has decided whether or not to issue a complaint; and represent an explanation to the Regional Director of a legal or policy decision already adopted by the General Counsel. In the case of decisions <u>not</u> to file a complaint, the

memoranda effect as "final" a "disposition," see discussion, infra, at 158-159, as an administrative decision can--representing, as it does, an unreviewable rejection of the charge filed by the private party. Vaca v. Sipes, 386 U.S. 171 (1967). Disclosure of these memoranda would not intrude on predecisional processes, and protecting them would not improve the quality of agency decisions, since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director who receives them has no decision to make--he is bound to dismiss the charge. . . .

. . . .

> For essentially the same reasons, these memoranda are "final opinions" made in the "adjudication of cases" which must be indexed pursuant to 5 U.S.C. § 552(a)(2)(A). The decision to dismiss a charge is a decision in a "case" and constitutes an "adjudication". . . .
>
> . . . .
>
> (ii)
>
> Advice and Appeals Memoranda which direct the filing of a complaint, on the other hand, fall within the coverage of Exemption 5. The filing of a complaint does not finally dispose even of the General Counsel's responsibility with respect to the case. The case will be litigated before and decided by the Board; and the General Counsel will have the responsibility of advocating the position of the charging party before the Board. The Memoranda will inexorably contain the General Counsel's theory of the case and may communicate to the Regional Director some litigation strategy or settlement advice. Since the Memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within Exemption 5's protection of an attorney's work product. At the same time, the public's interest in disclosure is substantially reduced by the fact, as pointed out by the ABA Committee, see supra, at 156, that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board; and that the "law" with respect to

these cases will ultimately be made not by the General Counsel but by the Board or the courts.

We recognize that an Advice or Appeals Memorandum directing the filing of a complaint--although representing only a decision that a legal issue is sufficiently in doubt to warrant determination by another body--has many of the characteristics of the documents described in 5 U.S.C. § 552(a)(2). Although not a "final opinion" in the "adjudication" of a "case" because it does not effect a "final disposition," the memorandum does explain a decision already reached by the General Counsel which has real operative effect--it permits litigation before the Board; and we have indicated a reluctance to construe Exemption 5 to protect such documents. Supra, at 153. We do so in this case only because the decisionmaker--the General Counsel--must become a litigating party to the case with respect to which he has made his decision. The attorney's work-product policies which Congress clearly incorporated into Exemption 5 thus come into play and lead us to hold that the Advice and Appeals Memoranda directing the filing of a complaint are exempt whether or not they are, as the District Court held, "instructions to staff that affect a member of the public."

C

Petitioners assert that the District Court erred in holding that documents incorporated by reference in nonexempt Advice and Appeals Memoranda lose any exemption they might previously have held as "intra-agency" memoranda. We disagree.

The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District

Court's decision below. Thus, we hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Petitioners also assert that the District Court's order erroneously requires it to produce or create explanatory material in those instances in which an Appeals Memorandum refers to the "circumstances of the case." We agree. The Act does not compel agencies to write opinions in cases in which they would not otherwise be required to do so. It only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971). Thus, insofar as the order of the court below requires the agency to create explanatory material, it is baseless. Nor is the agency required to identify, after the fact, those pre-existing documents which contain the "circumstances of the case" to which the opinion may have referred, and which are not identified by the party seeking disclosure.

. . . .

Note 1. The term "executive privilege" is sometimes used, as the Supreme Court did in its opinion in Sears, to describe the deliberative process. However, the Court carefully distinguished this sense of executive privilege from that having a constitutional basis. See footnote 17. A similar distinction was made by the Court in its opinion in EPA v. Mink, 410 U.S. 73 (1973). In commenting on the classification requirements under Exemption 1 as it then existed, the Court observed, "Congress could certainly have provided that the Executive Branch adopt new procedures--subject only to whatever limitation the Executive privilege may be held to impose upon such congressional ordering. Cf. United States v. Reynolds, 345 U.S. 1 (1953)." Id. at 83.

Exemptions 1 and 5, as well as Exemption 7 (which includes protection for confidential sources), reflect Congress' recognition of the existence of "executive privilege." There is some question as to whether these exemptions are coextensive with that concept, or whether executive privilege is broader than its recognition in the Freedom of Information Act. If it does have a constitutional basis, it may provide authority for the President to direct the withholding of records which are not exempt from release under the Act. See United States v. Nixon, 418 U.S. 683 (1974); Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977); Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1020-22 (1975); Note, The Freedom of Information Act: A Seven-Year Assessment, 74 Colum. L. Rev. 895, 930-943 (1974).

Note 2. In some cases, decisionmaking evolves through several bureaucratic levels. Is the decision of each tier of the process a "final opinion" of the agency? When is a "final opinion" final? This issue was addressed in the companion case to Sears, Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975). See also Bureau of National Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (agency recommendations to OMB concerning development of proposed legislation are predecisional).

Note 3. Is a contracting officer's written decision to award a contract a "final opinion" when the unsuccessful bidder files a pre-award protest to the GAO? See Shermco Industries, Inc. v. Secretary of the United States Air Force, 613 F.2d 1314 (5th Cir. 1980) and Audio Technical Service v. Dep't of Army, 487 F. Supp. 779 (D.D.C. 1979).

c. Does Exemption 5 permit delayed disclosure of intra-agency memoranda if immediate release would undermine agency policy? While this argument was rejected by the Supreme Court in the following case, another privilege under Exemption 5 was identified as permitting withholding. A trade secret or commercial information privilege was recognized by the Court for information generated within the Government.

Federal Open Market Committee of the
Federal Reserve System v. Merrill,
443 U.S. 340 (1979)
[Most footnotes omitted.]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Federal Open Market Committee has a practice, authorized by regulation, 12 CFR § 271.5 (1978) of withholding certain monetary policy directives from the public during the month they are in effect. At the end of the month, the directives are published in full in the Federal Register. The United States Court of Appeals for the District of Columbia Circuit held that this practice violates the Freedom of Information Act, 5 U.S.C. § 552. 565 F.2d 778 (1977). We granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy. 436 U.S. 917 (1978).

I

Open market operations--the purchase and sale of government securities in the domestic securities market--are the most important monetary policy instrument of the Federal Reserve System. When the Federal Reserve System buys securities in the open market, the payment is ordinarily credited in the reserve account of the seller's bank, increasing the total volume of bank reserves. When the Federal Reserve System sells securities on the open market, the sales price usually is debited in the reserve account of the buyer's bank, decreasing the total volume of reserves. Changes in the volume of bank reserves affect the ability of banks to make loans and investments. This in turn has a substantial impact on interest rates and investment activity in the economy as a whole.

The Federal Open Market Committee (FOMC or Committee), petitioner herein, by statute has exclusive control over the open market operations of the entire Federal Reserve System. . . .

The FOMC meets approximately once a month to review the overall state of the economy and consider the appropriate course of monetary and open market policy. The Committee's principal conclusions are embodied in a statement called the Domestic Policy Directive. The Directive summarizes the economic and monetary background of the FOMC's deliberations and indicates in general terms whether the Committee wishes to follow an expansionary, deflationary, or unchanged monetary policy in the period ahead. . . .

. . . .

. . . The Domestic Policy Directive . . . exists as a document for approximately one month before it makes its first public appearance as part of the Record of Policy Actions. Moreover, by the time the Domestic Policy Directive is released as part of the Record of Policy Actions, it has been supplanted by a new Directive and is no longer the current and effective policy of the FOMC.

II

Respondent, when this action was instituted in May 1975, was a law student at Georgetown University Law Center, Washington, D.C. The complaint alleged that he had "developed a strong interest in administrative law and the operation of agencies of the federal government," and had formed a desire to study "the process by which the FOMC regulates the national money supply through the frequent adoption of domestic policy directives."

In pursuit of these professed academic interests, respondent in March 1975, through counsel, filed a request under the Freedom of Information Act (FOIA) seeking the "Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies." The FOMC denied the request, explaining that the Records of Policy Actions, including the

Domestic Policy Directive, were available only on a delayed basis under the policy set forth in 12 CFR § 271.5. An administrative appeal resulted in release of the requested documents, but only because the withholding period by then had expired. Governor Robert C. Holland of the Federal Reserve Board, on behalf of the Committee, wrote to respondent's counsel that the Committee remained firmly committed to what he described as "a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies."

Respondent then instituted this litigation in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against the operation of 12 CFR § 271.5 and the policy of delayed disclosure. . . .

. . . .

At issue here is Exemption 5 of the FOIA, which provides that the affirmative disclosure provisions do not apply to "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." § 552(b)(5). Exemption 5, in other words, applies to documents that are (a) inter-agency or intra-agency memorandums or letters," and (b) consist of material that "would not be available by law to a party . . . in litigation with the agency."

A

There can be little doubt that the FOMC's Domestic Policy Directives constitute "inter-agency or intra-agency memorandums or letters." FOMC is clearly an "agency" as that term is defined in the Administrative Procedure Act. 5 U.S.C. §§ 551(1), 552(e). And the Domestic Policy Directives are essentially the FOMC's written instructions to the Account Manager, a subordinate official of the agency. These instructions, although possibly of interest to members of the public, are binding only upon the Account Manager. The Directives do not establish rules that

govern the adjudication of individual rights, nor do they require particular conduct or forbearance by any member of the public. They are thus "intra-agency memorandums" within the meaning of Exemption 5.

B

Whether the Domestic Policy Directives "would not be available by law to a party . . . in litigation with the agency" presents a more difficult question. The House Report states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not "routinely be disclosed to a private party through the discovery process in litigation with the agency. . . ." H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). EPA v. Mink, 410 U.S. 73, 86-87 (1973), recognized that one class of intra-agency memoranda shielded by Exemption 5 are agency reports and working papers subject to the "executive" privilege for predecisional deliberations. NLRB v. Sears, Roebuck & Co., 321 U.S. 132 (1975), confirmed this interpretation, and further held that Exemption 5 encompasses materials that constitute privileged attorney's work-product. Id., at 154-155.

The FOMC does not contend that the Domestic Policy Directives are protected by either the privilege for predecisional communications or the privilege for attorney's work-product. Its principal argument, instead, is that Exemption 5 confers general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the effectiveness of the agency's policy if released immediately. This general authority exists, according to the FOMC, even if the memoranda in question could be routinely discovered by a party in civil litigation with the agency.

We must reject this analysis. First, since the FOMC does not indicate that the asserted authority to defer disclosure of intra-agency memoranda rests on a privilege enjoyed by the Government in the civil discovery context, its argument is fundamentally at odds with the plain language

of the statute. EPA v. Mink, 410 U.S. 85-86; NLRB v. Sears, Roebuck & Co., 421 U.S., at 149. In addition, the Committee's argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard. H.R. Rep. No. 1497, supra, at 5, 9; S. Rep. No. 813, supra, at 3, 5, 8; EPA v. Mink, 410 U.S., at 78-80.

The FOMC argues, in the alternative, that there are several civil discovery privileges, in addition to the privileges for predecisional communications and attorney work-product, that would allow a district court to delay discovery of documents such as the Domestic Policy Directives until they are no longer operative. The Committee contends that Exemption 5 incorporates each of these privileges, and that it thus shields the Directives from a requirement of immediate disclosure.

Preliminarily, we note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 254 n.12 (1978) (Powell, J., concurring in part and dissenting in part). There are, to be sure, statements in our cases construing Exemption 5 that imply as much. See, e.g., Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context."). Heretofore, however, this Court has recognized only two privileges in Exemption 5, and, as NLRB v. Sears, Roebuck & Co., 421 U.S., at 150-154, emphasized, both these privileges are expressly mentioned in

the legislative history of that Exemption. Moreover, material that may be subject to some other discovery privilege may also be exempt from disclosure under one of the other eight exemptions of FOIA, particularly Exemptions 1, 4, 6, and 7. We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption. Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

The most plausible of the three privileges asserted by the FOMC[17] is based on Fed. Rule Civ. Proc. 26(c)(7), which provides that a district court, "for good cause shown," may order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."[18] The

---

[17]The two other privileges advanced by the FOMC are a privilege for "official government information" whose disclosure would be harmful to the public interest, see Machin v. Zuchert, 114 U.S. App. D.C. 355, 338, 316 F.2d 336, 339, cert. denied, 375 U.S. 896 (1963), and a privilege based on Fed. Rule Civ. Proc. 26(c)(2), which permits a court to order that discovery "may be had only on specified terms and conditions, including a designation of the time or place." In light of our disposition of this case, we do not consider whether either asserted privilege is incorporated in Exemption 5.

[18]The full text reads:

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the

(continued...)

Committee argues that the Domestic Policy Directives constitute "confidential . . . commercial information," at least during the month in which they provide guidance to the Account Manager, and that they therefore would be privileged from civil discovery during this period.

The federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. See, e.g., E.I. du Pont de Nemours Powder Co. v. Mosland, 244 U.S. 100, 103 (1917). The Federal Rules of Civil Procedure provide similar qualified protection for trade secrets and confidential commercial information in the civil discovery context. Fed. Rule Civ. Proc. 26(c)(7), which replaced former Rule 30(b) in 1970, was intended in this respect to "reflect existing law." Advisory Committee's Notes on Fed. Rule Civ. Proc. 26, 28 U.S.C. App., p. 444. The Federal Rules, of course, are fully applicable to the United States as a party. See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958); 4 J. Moore's Federal Practice ¶ 26.61[2], p. 26-263. And we see no reason why the Government could not, in an appropriate case, obtain a protective order under Rule 26(c)(7).

To be sure, the House and Senate Reports do not provide the same unequivocal support for an Exemption 5 privilege for "confidential . . . commercial information" as they do for the executive and attorney work product privileges. Nevertheless, we think that the House Report, when read in conjunction with the hearings conducted by the relevant House and Senate Committees, can fairly be read as authorizing at least a limited form of Exemption 5 protection for "confidential . . . commercial information."

---

[18](...continued)
following: . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]" Fed. Rule Civ. Proc. 26(c)(7).

In hearings that preceded the enactment of the FOIA, various agencies complained that the original Senate bill, which did not include the present Exemption 5, failed to provide sufficient protection for confidential commercial information and other information about government business transactions. . . .

After the hearings were completed, Congress amended the provision that ultimately became Exemption 5 to provide for nondisclosure of materials that "would not be available by law to a party . . . in litigation with the agency." The House Report . . . explained that one purpose of the revised Exemption 5 was to protect internal agency deliberations and thereby ensure "full and frank exchange of opinions" within an agency. It then added, significantly:

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate secrecy (emphasis added). Ibid.

In light of the complaints registered by the agencies about premature disclosure of information relating to government contracts, we think it is reasonable to infer that the House Report, in referring to "information . . . generated [in] the process of awarding a contract," specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.

This conclusion is reinforced by consideration of the differences between commercial information generated in the process of awarding a contract, and the type of material protected by executive privilege. The purpose of the privilege for predecisional deliberations is to insure that a decision-maker will receive the unimpeded advice of his

associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinion within the agency. The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

We are further convinced that recognition of an Exemption 5 privilege for confidential commercial information generated in the process of awarding a contract would not substantially duplicate any other FOIA exemption. The closest possibility is Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Exemption 4, however, is limited to information "obtained from a person," that is, to information obtained outside the Government. See 5 U.S.C. § 551(2). The privilege for confidential information about Government contracts recognized by the House Report, in contrast, is necessarily confined to information generated by the Federal Government itself.

We accordingly conclude that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract.[23]

---

[23] Our conclusion that the Domestic Policy Directives are at least potentially eligible for protection under (continued...)

C

The only remaining questions are whether the Domestic Policy Directives constitute confidential commercial information of the sort given qualified protection by Exemption 5, and if so, whether they would in fact be privileged in civil discovery. Although the analogy is not exact, we think that the Domestic Policy Directives and associated tolerance ranges are substantially similar to confidential commercial information generated in the process of awarding a contract. During the month that the Directives provide guidance to the Account Manager, they are surely confidential, and the information is commercial in nature because it relates to the buying and selling of securities on the open market. Moreover, the Directive and associated tolerance ranges are generated in

---

[23](...continued)
Exemption 5 does not conflict with the District Court's finding that the Directives are "statements of general policy . . . formulated and adopted by the agency," which must be "currently published" in the Federal Register pursuant to 5 U.S.C. § 552(a)(1). 413 F. Supp., at 504-505. It is true that in NLRB v. Sears, Roebuck & Co., supra, we noted that there is an obvious relationship between Exemption 5, and the affirmative portion of the FOIA which requires the prompt disclosure and indexing of final opinions and statements of policy that have been adopted by the agency. 5 U.S.C. § 552(a)(2). We held that, with respect to final opinions, Exemption 5 can never apply; with respect to other documents covered by 5 U.S.C. § 552(a)(2), we said that we would be "reluctant" to hold that the Exemption 5 privilege would ever apply. 421 U.S., at 153-154. These observations, however, were made in the course of a discussion of the privilege for predecisional communications. It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges. In this respect, we note that Sears itself held that a memorandum subject to the affirmative disclosure requirement of § 552(a)(2) was nevertheless shielded from disclosure under Exemption 5 because it contained privileged attorney's work product. 421 U.S., at 160.

the course of providing on-going direction to the Account Manager in the execution of large-scale transactions in government securities; they are, in this sense, the Government's by-sell order to its broker.

. . . .

Under the circumstances, we do not consider whether, or to what extent, the Domestic Policy Directives would in fact be afforded protection in civil discovery. That determination must await the development of a proper record. If the District Court on remand concludes that the Directives would be afforded protection, then it should also consider whether the operative portions of the Domestic Policy Directives can feasibly be segregated from the purely descriptive materials therein, and the latter made subject to disclosure or publication without delay. See EPA v. Mink, 410 U.S., at 91.

The judgment of the Court of Appeals is therefore vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Note: The "commercial privilege" recognized in Merrill has been relied upon to protect certain cost data used by the Army to prepare its bid in a "contracting out" setting. Morrison-Knudson Co. v. Dep't of the Army, 595 F. Supp. 352 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C. Cir. 1985) (table cite). Detailed guidance explaining which categories of documents in this process should be disclosed and which should be withheld is found in AR 5-20, para. 4-6e.

d. Another governmental privilege permitting withholding under Exemption 5 involves certain confidential witness statements which are then used by the government to formulate policy. This privilege recognizes the fact that some information, including factual data, would be unavailable to the government in its decisionmaking process unless an assurance of confidentiality were made. This narrow privilege has been almost exclusively limited to military aircraft accident investigations (safety investigations). The

Supreme Court recognized this privilege within Exemption 5 in the following case.

United States v. Weber Aircraft Corp.
465 U.S. 792 (1984)
[most footnotes omitted]

OPINION OF THE COURT

Justice Stevens delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 USC § 552 (1982 ed.) requires federal agencies to disclose records that do not fall into one of nine exempt categories. The question presented is whether confidential statements obtained during an Air Force investigation of an air crash are protected from disclosure by Exemption 5, which exempts "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."

I

On October 9, 1973, the engine of an Air Force F-106B aircraft failed in flight. Captain Richard Hoover, the pilot, was severely injured when he ejected from the plane. Under Air Force regulations, the incident was a significant air crash that required two separate investigations: a "collateral investigation" and a "safety investigation."

The collateral investigation is conducted "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes." Witnesses in a collateral investigation testify under oath and generally are protected by the procedural safeguards that are applicable in other formal hearings. The record of the collateral investigation is public.

The "safety investigation" is quite different. It is conducted by a specially appointed tribunal which prepares a report that is intended for "the sole purpose of

taking corrective action in the interest of accident prevention." To encourage witnesses to speak fully and frankly, they are not sworn and receive an assurance that their statements will not be used for any purpose other than accident prevention. Air Force regulations contain a general prohibition against the release of safety investigation reports and their attachments, subject to an exception which allows the Judge Advocate General to release specific categories of "factual information" and "nonpersonal evidence."[7]

After the collateral and safety investigations had been completed, Captain Hoover filed a damages action against various entities responsible for the design and manufacture of his plane's ejection equipment. During pretrial discovery in that litigation, two of the parties (respondents Weber and Mills) sought discovery of all Air Force investigative reports pertaining to the accident. The Air Force released the entire record of the collateral investigation, as well as certain factual portions of the safety investigation, but it refused to release the confidential portions of the safety investigation.

Confidential statements made to air crash safety investigators were held to be privileged with respect to pretrial discovery

---

[7] AF Reg. 127-4 ¶ 19(a)(4) (Jan. 1, 1973) states: "Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused."

over 20 years ago. Machin v. Zukert, 114 U.S. App. D.C. 335, 316 F.2d 336, cert. denied 375 U.S. 896 (1963). That holding effectively prevented respondents from obtaining the pretrial discovery they sought--specifically the unsworn statements given by Captain Hoover and by the airman who had rigged and maintained his parachute equipment. Respondents therefore filed requests for those statements under the FOIA, and when the Air Force refused production, they commenced this action.

In the District Court the Government filed an affidavit executed by the General responsible for Air Force safety investigations, explaining that the material that had been withheld contained "conclusions, speculations, findings and recommendations made by the Aircraft Mishap Investigators" as well as "testimony presented by witnesses under a pledge of confidentiality." App 38. The affidavit explained why the General believed that the national security would be adversely affected by the disclosure of such material.[11] The District Court held that the

---

[11] "[T]he release of the withheld portions of the Aircraft Mishap Investigation for litigation purposes would be harmful to our national security. The strength of the United States Air Force, upon which our national security is greatly dependent, is seriously affected by the number of major aircraft accidents which occur. The successful flight safety program of the United States Air Force has contributed greatly to the continuously decreasing rate of such accidents. The effectiveness of this program depends to a large extent upon our ability to obtain full and candid information on the cause of each aircraft accident. Much of the information received from persons giving testimony in the course of an aircraft mishap investigation is conjecture, speculation and opinion. Such full and frank disclosure is not only encouraged but is imperative to a successful flight safety program. Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion

(continued...)

material at issue would not be available by law to a party other than an agency in litigation with an agency, and hence need not be disclosed by virtue of Exemption 5. The Court of Appeals reversed. It agreed that the requested documents were "intra-agency memorandums" within the meaning of Exemption 5, and that they were protected from civil discovery under the Machin privilege. It held, however, that the statutory phrase "would not be available by law" did not encompass every civil discovery privilege but rather reached only those privileges explicitly recognized in the legislative history of FOIA. It read that history as accepting an executive privilege for pre-decisional documents containing advice, opinions or recommendations of government agents, but as not extending to the Machin civil discovery privilege for official government information. It accordingly remanded the case with directions to disclose the factual portions of the witnesses' statements.

II

The plain language of the statute itself, as construed by our prior decisions, is sufficient to resolve the question presented. The statements of the two witnesses are

---

[11](...continued)
concerning all the circumstances surrounding an accident. Witnesses are encouraged to express personal criticisms concerning the accident.

. . . . . .

"If aircraft mishap investigators were unable to give such assurances, or if it were felt that such promises were hollow, testimony and input from witnesses and from manufacturers in many instances would be less than factual and a determination of the exact cause factors of accidents would be jeopardized. This would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident. This privilege, properly accorded to the described portions of an United States Air Force Mishap Report of Investigation, including those portions reflecting the deliberations of the Investigating Board, is the very foundation of a successful Air Force flight safety program." App 38-39.

unquestionably "intra-agency memorandums or letters"[13] and, since the Machin privilege normally protects them from discovery in civil litigation, they "would not be available by law to a party other than [the Air Force] in litigation with [the Air Force]."

Last Term, in FTC v. Grolier Inc., 462 U.S. 19 (1983), we held that Exemption 5 simply incorporates civil discovery privileges: "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." Id. at 26. Thus, since the Machin privilege is well recognized in the case law as precluding routine disclosure of the statements, the statements are covered by Exemption 5.

Grolier was consistent with our prior cases. For example, Grolier itself relied on Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), which Grolier quoted on the scope of Exemption 5: "Exemption 5 incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context." 462 U.S. at 26-27 (emphasis added in Grolier) (quoting 421 U.S. at 184). Similarly, in NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), we wrote: "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency." Id. at 148.[16] In FOMC v. Merrill, 443 U.S. 340 (1979), we wrote: "The House Report [on the FOIA] states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not be 'routinely

---

[13] Weber contends that "intra-agency memorandums or letters" cannot include statements made by civilians to Air Force personnel. Whatever the merits of this assertion, it is irrelevant to this case since the material at issue here includes only statements made by Air Force personnel.

[16] See also id., at 149, 44 L Ed 2d 29, 95 S Ct 1504 (footnote omitted) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.").

disclosed to a private party through the discovery process in litigation with the agency. . . .'" Id. at 353 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966)). And in EPA v. Mink, 410 U.S. 73 (1973), the Court observed: "This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency." Id. at 86.

Respondents read Merrill as limiting the scope of Exemption 5 to privileges explicitly identified by Congress in the legislative history of the FOIA. But in Merrill we were confronted with a claimed exemption that was not clearly covered by a recognized pretrial discovery privilege. We held that Exemption 5 protected the Federal Open Market Committee's Domestic Policy Directives although it was not entirely clear that they fell within any recognized civil discovery privilege because statements in the legislative history supported an inference that Congress intended to recognize such a privilege. See 443 U.S. at 357-360. Thus, the holding of Merrill was that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the Exemption--not that all privileges not mentioned are excluded. Moreover, the Merrill dictum upon which respondents rely merely indicates "that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." Id. at 354. It is one thing to say that recognition under Exemption 5 of a novel privilege, or one that has found less than universal acceptance, might not fall within Exemption 5 if not discussed in its legislative history. It is quite another to say that the Machin privilege, which has been well-settled for some two decades, need be viewed with the same degree of skepticism.[18] In any event, the

---

[18] Moreover, in the Merrill dictum we added: "We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption." Id. at 355. Respondents do not explain how incorporation of the Machin privilege into (continued...)

Merrill dictum concludes only that "a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution." Id. at 355. The claim of privilege sustained in Machin was denominated as one of executive privilege. See 114 U.S. App. D.C. at 337, 316 F.2d at 338. Hence the dictum is of little aid to respondents.

Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. See Baldridge v. Shapiro, 455 U.S. 345, 360, n.14 (1982); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143, n.10 (1975); Renegotiation Board v. Bannercraft Co., 415 U.S. 1 (1973). We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.[20]

We therefore simply interpret Exemption 5 to mean what it says. The judgment of the Court of Appeals is reversed.

---

[18](...continued)
Exemption 5 would substantially duplicate another exemption. The relevance of the Merrill dictum is further reduced by the fact that in Merrill the Court explicitly reserved the question whether the Machin privilege falls within Exemption 5. See id. at 355-356, n.17. Thus Merrill could hardly control the question we face today.

[20] Respondents also argue that their need for the requested material is great and that it would be unfair to expect them to defend the litigation brought against them by Captain Hoover without access to it. We answered this argument in Grolier, noting that the fact that in particular litigation a party's particularized showing of need may on occasion justify discovery of privileged material in order to avoid unfairness does not mean that such material is routinely discoverable and hence outside the scope of Exemption 5. See 462 U.S. at 27-28. Respondents must make their claim of particularized need in their litigation with Captain Hoover, since it is not a claim under the FOIA.

Note. Two cases involving Inspector General reports have upheld the withholding of the conclusions, recommendations, and "confidential" witness statements contained in those reports. See American Federation of Government Employees v. Department of the Army, 441 F. Supp. 1308 (D.D.C. 1977) and Ahearn v. Department of the Army, 580 F. Supp. 1405 (D. Mass.), supplemental decision, 583 F. Supp. 1123 (D. Mass. 1984). The supplemental decision in Ahearn relied explicitly upon the Supreme Court's reasoning in Weber Aircraft, see infra p. 2-68. For a recent decision applying traditional deliberative process privilege principles to an Inspector General's report, see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552 (1st Cir. 1992) (upholding nondisclosure of IG's conclusions as to whether allegations were substantiated or unsubstantiated, findings of fact, and final recommendations).

2.6 Exemption 6: Personnel, Medical and Similar Files.

This exemption permits the withholding of all information about individuals in "personnel, medical and similar files" if its disclosure "would constitute a clearly unwarranted invasion of personal privacy." If a privacy interest exists, then the rights of the individual are balanced against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989); Department of the Air Force v. Rose, 425 U.S. 352 (1976). This exemption under FOIA is consistent with the Privacy Act. The relationship between the Freedom of Information Act and the Privacy Act is discussed in Chapter 4.

2.7 Exemption 7: Records or Information Compiled for Law Enforcement Purposes.

The Freedom of Information Reform Act of 1986 substantially broadened protection of sensitive law enforcement documents by amending Exemption 7 and by creating exclusions (see subchapter 2-8). The discussions appearing below in subparts a. and b. reflect the state of the law prior to the 1986 reforms. These discussions remain valid except as amended by the Reform Act. The reforms were summarized by the United States Department of Justice in its FOIA Update (Fall 1986) as follows:

-- The threshold language of Exemption 7 is broadened to encompass both "records or information compiled for law enforcement purposes," a formulation which also drops the former requirement that the records be "investigatory" in character.

-- The exemption's harm standard is considerably lessened, from "would" to "could reasonably be expected to," under Exemption 7(A) (protecting ongoing proceedings), Exemption 7(C) (personal privacy), Exemption 7(D) (law enforcement sources) and Exemption 7(F) (physical safety).

-- Exemption 7(D) is reworded to expressly provide a greater range of source protection.

-- Exemption 7(E) is expanded to cover prosecutorial techniques and law enforcement guidelines.

-- Exemption 7(F) is broadened to extend its protection to any individual.

a. The Attorney General's 1975 Memorandum discusses the changes made in Exemption 7 by the 1974 amendments.

Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (February 1975)

I-B. CHANGES IN EXEMPTION 7 (INVESTIGATORY LAW ENFORCEMENT RECORDS)

INTRODUCTION

The 1974 Amendments to the Freedom of Information Act substantially altered the exemption concerning investigatory material compiled for law enforcement purposes. Prior to the amendments, the Act permitted the

withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The 1974 Amendments substitute the term "records" for "files," and prescribe that the withholding of such records be based upon one or more of six specified types of harm. The revised exemption now reads:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

There follows a discussion of the phrase "investigatory records compiled for law enforcement purposes," the six bases for withholding investigatory material, and the implementation of the amended provision.

THE MEANING OF "INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES"

A series of court decisions had construed the prior provision as exempting any material contained in a file properly designated as an investigatory file compiled for law enforcement purposes. The primary purpose of Senator Hart's amendment to revise exemption 7 was to overturn the result of those decisions and to require consideration of the

particular document and the need to withhold it. (See, e.g., 120 Cong. Rec. S 9329-30 (May 30, 1974).)

Because of the change from "files" to "records" and the provision concerning reasonably segregable portions of records (see Part I-C, below), the particular documents must ordinarily be examined. The threshold questions are whether the requested material is "investigatory" and whether it was compiled for law enforcement purposes." These terms were not defined in the original Act and are not defined in the Act as amended.

"Investigatory records" are those which reflect or result from investigative efforts. The latter may include not merely activities in which agencies take the initiative, but also the receipt of complaints or other communications indicating possible violations of the law, where such receipt is part of an overall program to prevent, detect or counteract such violations, or leads to such an effort in the particular case.

Under the original Act, "law enforcement" was construed administratively and by the courts as applying to the enforcement of law not only through criminal prosecutions, but also through civil and regulatory proceedings, so that investigations by agencies with no criminal law enforcement responsibilities were included. The legislative history of the 1974 Amendments indicates that no change in this basic concept was contemplated. (See, e.g., Conf. Rept. p. 13.)

"Law enforcement" includes not merely the detection and punishment of law violation, but also its prevention. Thus, lawful national security intelligence investigations are covered by the exemption, as are background security investigations and personnel investigations of applicants for Government jobs under Executive Order 10450. (Cf. Conf. Rept. p. 13.) On the other hand, not every type of governmental information-gathering qualifies. Records of more general information-gathering activities (e.g., reporting forms submitted by a regulated industry or by recipients of Federal grants) developed in order to monitor, generally or in particular cases, the effectiveness of existing programs and to determine whether changes may be appropriate, should not be

considered "compiled for law enforcement purposes" except where the purpose for which the records are held and used by the agency becomes substantially violation-oriented, i.e., becomes re-focused on preventing, discovering or applying sanctions against noncompliance with federal statutes or regulations. Records generated for such purposes as determining the need for new regulations or preparing statistical reports are not "for law enforcement purposes."

THE SIX BASES FOR INVOKING EXEMPTION 7

Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. If not, the material must be released despite its character as an investigatory record compiled for law enforcement purposes, and (generally speaking) even when the requester is currently involved in civil or criminal proceedings with the Government. (Of course exemptions other than exemption 7 may be applicable, or restrictions upon disclosure other than those expressly set forth in the Freedom of Information Act--for example, the prohibition against disclosing the transcript of grant jury proceedings, Rule 6 of the Federal Rules of Criminal Procedure.)

The six bases of nondisclosure set forth in 5 U.S.C. 552(b)(7) (A)-(F) may be explained as follows:

(A) INTERFERENCE WITH ENFORCEMENT

Under clause 552(b)(7)(A), nondisclosure is justified to the extent that production of the records would "interfere with enforcement proceedings." This clause is derived, without change, from Senator Hart's amendment.

The term "enforcement proceedings" is not defined, but it seems clear that its scope corresponds generally to that of "law enforcement purposes," covering criminal, civil and administrative proceedings. Moreover, in explaining this clause of his amendment, Senator Hart made clear he

considered proceedings to be "interfered with" when investigations preliminary to them are interfered with. He used the term "enforcement procedures" as synonymous with "enforcement proceedings" to describe the over-all coverage of the clause. (120 Cong. Rec. S 9330 (May 30, 1974).) Thus, records of a pending investigation of an applicant for a Government job would be withholdable under clause (A) to the extent that their production would interfere with the investigation.

Normally, clause (A) will apply only to investigatory records relating to law enforcement efforts which are still active or in prospect--sometimes administratively characterized as records in an "open" investigatory file. But this will not always be the case. There may be situations (e.g., a large conspiracy) where, because of the close relationship between the subject of a closed file and the subject of an open file, release of material from the former would interfere with the active proceeding. Also, material within a closed file of one agency may bear directly upon active proceedings of another agency, Federal or State.

The meaning of "interfere" depends upon the particular facts. (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) One example of interference when litigation is pending or in prospect is harm to the Government's case through the premature release of information not possessed by known or potential adverse parties. Ibid. Regarding investigations, interference would be created by a release which might alert the subject to the existence of the investigation, or which would "in any other way" threaten the ability to conduct the investigation. (120 Cong. Rec. S 9337 (May 30, 1974) (letter of Senator Hart).) The legislative history indicates that, while the 7th exemption as it previously stood was to be narrowed by changing "files" to "records" and specifying six bases for asserting the exemption, these new bases themselves were to be construed in a flexible manner. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) This applies to clause (A) and may properly be considered in determining the meaning of "interfere."

(B) DEPRIVATION OF RIGHT TO FAIR TRIAL OR ADJUDICATION

Clause (B) permits withholding to the extent that production would "deprive a person of a right to a fair trial or an impartial adjudication." This provision also came, without change, from Senator Hart's amendment; no specific explanation of it is contained in the legislative history.

A fundamental difference between clause (A) and clause (B) is that, while the former is intended primarily to protect governmental functions, clause (B) protects the rights of private persons. "Person" is defined in the Administrative Procedure Act (APA), of which the Freedom of Information Act is a part, to include corporations and other organizations as well as individuals. (5 U.S.C. 551(2).) The term "trial" is undefined, but would normally be thought to apply to judicial proceedings, both civil and criminal, in Federal and State courts. "Adjudication" is defined in the APA to mean the procedure by which Federal agencies formulate decisions in U.S.C. 551(7); see also 5 U.S.C. 551(4), (6), (9), and (12). It is unlikely, however, that this definition was intended to apply here, since there is no apparent reason why Federal ratemaking or, for that matter, the most important state administrative proceedings should have been thought undeserving of any protection in contrast to informal and relatively inconsequential determinations that may qualify as Federal "adjudication" technically speaking (e.g., approval or denial of an application for a small grant for a cultural demonstration trip.) It will be seen elsewhere as well that the drafting of these Amendments apparently does not presume the APA definition of "adjudication." (See Part II-B, pp. 19-20 below.) It would seem best to interpret the word in this clause to refer to structured, relatively formal, quasi-judicial administrative determinations in both State and Federal agencies, in which the decision is rendered upon a consideration of statutorily or administratively defined standards.

Clause (B) would typically be applicable when requested material would cause prejudicial publicity in advance of a criminal

trial, or a civil case tried to a jury. The provision is obviously aimed at more than just inflammation of jurors, however, since juries do not sit in administrative proceedings. In some circumstances, the release of damaging and unevaluated information may threaten to distort administrative judgment in pending cases, or release may confer an unfair advantage upon one party to an adversary proceeding.

(C) INVASION OF PRIVACY

Clause (C) exempts law enforcement investigatory records to the extent that their production would "constitute an unwarranted invasion of personal privacy." The comparable provision in Senator Hart's amendment referred to "clearly unwarranted" invasions, but "clearly" was deleted by the Conference Committee.

Except for the omission of "clearly," the language of clause (C) is the same as that contained in the original Act for the sixth exemption, the exemption for personnel, medical and similar files. Thus, in determining the meaning of clause (C), it is appropriate to consider the body of court decisions regarding the latter--bearing in mind, of course, that the deletion of "clearly" renders the Government's burden somewhat lighter under the new provisions. (See, e.g., 120 Cong. Rec. H. 10003 (Oct. 7, 1974) (letter of chairman of conferees).) In applying clause (C), it will also be necessary to take account of the Privacy Act of 1974, Public Law 93-579, which takes effect in September 1975.

The phrase "personal privacy" pertains to the privacy interests of individuals. Unlike clause (B), clause (C) does not seem applicable to corporations or other entities. The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any [other] person mentioned in the requested file." (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) In appropriate situations, clause (C) also protects relatives or descendants of such persons.

While neither the legislative history nor the terms of the Act and the 1974 Amendments comprehensively specify what information about an individual may be deemed to involve a privacy interest, cases under the sixth exemption have recognized, for example, that a person's home address can qualify. It is thus clear that the privacy interest does not extend only to types of information that people generally do not make public. Rather, in the present context it must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family.

When the facts indicate an invasion of privacy under clause (C), but there is substantial uncertainty whether such invasion is "unwarranted," a balancing process may be in order, in which the agency would consider whether the individual's rights are outweighed by the public's interest in having the material available. (Cf. Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), and Wine Hobby U.S.A., Inc. v. United States Bureau of Alcohol, Tobacco and Firearms, 502 F.2d 133 (3d Cir. 1974) (sixth exemption cases).)

The Conference Report states (p. 13) that "disclosure of information about a person to that person does not constitute an invasion of his privacy." It must be noted, however, that records concerning one individual may contain information affecting the privacy interests of others. Of course, when information otherwise exempt under clause (C) is sought by a requester claiming to be the subject of the information, the agency may require appropriate verification of identity.

(D) DISCLOSURE OF CONFIDENTIAL SOURCES OR INFORMATION PROVIDED BY SUCH SOURCES

Clause (D), which was substantially broadened by the Conference Committee, exempts material the production of which would:

> disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source.

The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement investigatory record, civil or criminal. (Conf. Rept. p. 13.) The term "confidential source" refers not only to paid informants but to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." Ibid. In DOJ v. Landano, 508 U.S. ___, 113 S. Ct. 2014 (1993), the Supreme Court rejected a Government attempt to establish that it would be presumptively proper to withhold the name, address, and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of law. The Court stated that while there may be narrowly defined circumstances where the nature of the crime or the source's relation to the crime may support an implied assurance of confidentiality, there is no presumption that a source providing information to the FBI in the course of a criminal investigation is confidential. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test, for purposes of the provision, is whether he was a confidential source with respect to the particular information requested, not whether all connection between him and the agency is entirely unknown.

The second part of clause (D) deals with information provided by a confidential source. Generally speaking, with respect to civil matters, such information may not be treated as exempt on the basis of clause (D), except to the extent that its disclosure would reveal the identity of the confidential source. However, with respect to criminal investigations conducted by a "criminal law enforcement authority" and lawful national security intelligence investigations conducted

by any agency, any confidential information furnished only by a confidential source is, by that fact alone, exempt. (See, e.g., 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).)

According to the Conference Report (p. 13), "criminal law enforcement authority" is to be narrowly construed and includes the FBI and "similar investigative authorities." It would appear, then, that "criminal law enforcement authority" is limited to agencies--or agency components--whose primary function is the prevention or investigation of violations of criminal statutes (including the Uniform Code of Military Justice), or the apprehension of alleged criminals. There may be situations in which a criminal law enforcement authority, e.g., the FBI or a State authority obtains confidential information from a confidential source in the course of a criminal investigation and then provides a copy to another Federal agency. In the event that a Freedom of Information Act request is directed to the latter agency, nondisclosure based on the second part of clause (D) is proper, regardless of whether the requested agency is itself a "criminal law enforcement authority." What determines the issue is the character of the agency that "compiled" the record.

With respect to that portion of the second part of clause (D) dealing with national security intelligence investigations, the Conference Report states (p. 13) that it applies not only to such investigations conducted by criminal law enforcement authorities but to those conducted by other agencies as well. According to the report, "national security" is to be strictly construed and refers to "military security, national defense, or foreign policy"; and "intelligence" is intended to apply to "positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by [authorized] governmental units * * *." Ibid.

A further qualification contained in this second part of clause (D) is that the confidential information must have been furnished "only by the confidential source." In administering the Act, it is proper to consider this requirement as having been met

if, after reasonable review of the records, there is no reason to believe that identical information was received from another source.

(E) DISCLOSURE OF TECHNIQUES AND PROCEDURES

Clause (E), derived without change from Senator Hart's amendment, exempts records to the extent that release would "disclose investigative techniques and procedures."

The legislative history indicates that this exemption does not apply to routine techniques or procedures which are generally known outside the Government. (See, e.g., Conf. Rept. p. 12.) For example, the exemption does not protect the disclosure of such procedures as ballistics tests and fingerprinting, though it would shield new developments or refinements in those procedures. (Of course, the results of such generally known procedures may be exempt on another ground.) Administrative staff manuals and instructions, covered by 5 U.S.C. 552(a)(2), are not generally protected by this clause (Conf. Rept. p. 13), although the exempt status of material otherwise covered by clause (E) is not affected by its inclusion in such a manual or instruction.

(F) ENDANGERING LAW ENFORCEMENT PERSONNEL

Clause (F), which was added by the Conference Committee, exempts material whose disclosure would "endanger the life or physical safety of law enforcement personnel." (See, e.g., 120 Cong. Rec. II 10003-04 (Oct. 7, 1974) (letter of chairman of conferees).) The legislative record contains little discussion of this provision.

Clause (F) might apply, for example, to information which would reveal the identity of undercover agents, State or Federal, working on such matters as narcotics, organized crime, terrorism, or espionage. It is unclear whether the phrase "law enforcement personnel" means that the endangered individual must be technically an "employee" of a law enforcement organization; arguably it does not. It is clear, however, that the language of clause

(F) cannot be stretched to protect the safety of the families of law enforcement personnel or the safety of other persons. Nonetheless, it is safe to proceed on the assumption that Congress did not intend to require the release of any investigatory records which would pose a threat to the life or physical safety of any person; perhaps clause (A) (interference with law enforcement) would be liberally construed to cover a request which involves such a threat.

IMPLEMENTATION OF EXEMPTION 7

The prior discussion deals with the grounds for nondisclosure that are specified in amended section 552(b)(7). Application of these grounds by agency personnel within the available time limits will often present great difficulty, especially when the request pertains to a large file. One means by which the agency might seek to assist its personnel--and the public--is the development of guidelines regarding the manner of applying the exemption 7 clauses to standard categories of investigatory records in its files.

The general policy underlying the seventh exemption is maximum public access to requested records, consistent with the legitimate interests of law enforcement agencies and affected persons. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) A central issue which must be faced in every case is the type of showing needed to establish that disclosure "would" lead to one of the consequences enumerated in clauses (A) through (F). The President and some opponents of the bill voiced concern that "would" connoted a degree of certainty which in most cases it would be impossible to establish. (See Weekly Compilation of Presidential Documents 1318 (1974); 120 Cong. Rec. S 19814 (Nov. 21. 1974) (Senator Hruska); 120 Cong. Rec. S 19818 (Nov. 21, 1974) (Senator Thurmond).) The bill's proponents, including the sponsor of the amendment, did not accept the interpretation that would result in such a strict standard. (See, e.g., 120 Cong. Rec. II 10865 (Nov. 20, 1974) (Congressman Moorhead); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) This legislative

history suggests that denial can be based upon a reasonable possibility, in view of the circumstances that one of the six enumerated consequences would result from disclosure.

A practical problem which can be predicted is that agency personnel will sometimes be uncertain whether they have sufficient information to make the necessary determination as to the likelihood of one of the six consequences justifying nondisclosure. This raises the question whether it is necessary to go beyond the records themselves and in effect to conduct an independent investigation to determine, for example, what privacy or confidentiality interests are involved. This question cannot be answered in the abstract, for its resolution will depend substantially upon the particular circumstances. Since the six clauses in the exemption are to be interpreted in a flexible manner, see p. 8 above, it should usually be sufficient to rely upon conclusions which--taking due account of such factors as the age of the records and the character of law violation involved--can reasonably be drawn from the records themselves.

It is clear that implementation of the amended exemption 7 will frequently involve a substantial administrative burden. It was not, however, the intent or the expectation of the Congress that this burden would be excessive. (See, e.g., 120 Cong. Rec. S 19808 (Nov. 21, 1974) (Senator Kennedy); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) If, therefore, a law enforcement agency (the category of agencies principally affected) regularly finds that its application of these provisions involves an effort so substantial as to interfere with its necessary law enforcement functions, it should carefully re-examine the manner in which it is interpreting or applying them. Needless to say, burden is no excuse for intentionally disregarding or slighting the requirements of the law, and, where necessary, additional resources should be sought or provided to achieve full compliance.

---

b. Much of the post-amendment Exemption 7 litigation has involved attempts to obtain witness statements obtained by agencies during their investigations. As pointed out by the authors of a note in the American Criminal Law Review, "it may be risky to generalize from the labor relations setting to the criminal context." Note, The Freedom of Information Act--A Potential Alternative to Conventional Criminal Discovery, 14 Am. Crim. L. Rev. 73, 116 (1976). In the following case, the Supreme Court permitted the National Labor Relations Board to withhold pre-hearing statements of prospective witness upon a generalized showing of "interference" with enforcement proceedings under Exemption 7(A).

National Labor Relations Board v.
Robbins Tire and Rubber Company,
437 U.S. 214, 57 L. Ed. 2d 159 (1978)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether the Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires the National Labor Relations Board to disclose, prior to its hearing on an unfair labor practice complaint, statements of witnesses whom the Board intends to call at the hearing. Resolution of this question depends on whether production of the material prior to the hearing would "interfere with enforcement proceedings" within the meaning of Exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A).

. . . .

II

We have had several occasions recently to consider the history and purposes of the original Freedom of Information Act of 1966. See EPA v. Mink, 410 U.S. 73, 79-80 (1973); Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Department of the Air Force v. Rose, 425 U.S. 352 (1976). As we have repeatedly emphasized, "the Act is broadly conceived," EPA v. Mink, supra, at 80, and its "basic policy" in is favor of

disclosure, Dep't of Air Force v. Rose, supra, at 361. In 5 U.S.C. § 552(b), Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. But unless the requested material falls within one of these nine statutory exemptions. FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.

Exemption 7 as originally enacted permitted nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 80 Stat. 251 (1966). In 1974, this exemption was rewritten to permit the nondisclosure of "investigatory records compiled for law enforcement purposes," but only to the extent that producing such records would involve one of six specified dangers. The first of these, with which we are here concerned, is that production of the records would "interfere with enforcement proceedings."

The Board contends that the original language of Exemption 7 was expressly designed to protect existing NLRB policy forbidding disclosure of statements of prospective witnesses until after they had testified at unfair labor practice hearings. In its view, the 1974 Amendments preserved Congress' original intent to protect witness statements in unfair labor practice proceedings from premature disclosure, and were directed primarily at case law that had applied Exemption 7 too broadly to cover any material, regardless of its nature, in an investigatory file compiled for law enforcement purpose. The Board urges that a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure while the hearing is pending.

Respondent disagrees with the Board's analysis of the 1974 Amendments. It argues that the legislative history conclusively demonstrates that the determination of whether disclosure of any material would "interfere with enforcement proceedings" must be made on an individual, case-by-case basis. While

respondent agrees that the statements sought here are "investigatory files compiled for law enforcement purposes," and that they are related to an imminent enforcement proceeding, it argues that the Board's failure to make a specific factual showing that their release would interfere with this proceeding defeats the Board's Exemption (7) claim.

A

The starting point of our analysis is with the language and structure of the statute. We can find little support in the language of the statute itself for respondent's view that determinations of "interference" under Exemption 7(A) can be made only on a case-by-case basis. Indeed, the literal language of Exemption 7 as a whole tends to suggest that the contrary is true. The Exemption applies to:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

There is a readily apparent difference between subdivision (A) and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases--"a person," "an unwarranted

invasion," "a confidential source"--and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

Respondent points to other provisions of FOIA in support of its interpretation. It suggests that because FOIA expressly provides for disclosure of segregable portions of records and for in camera review of documents, and because the statute places the burden of justifying nondisclosure on the Government, 5 U.S.C. §§ 552(a)(4)(B), (b), the Act necessarily contemplates that the Board must specifically demonstrate in each case that disclosure of the particular witnesses' statement would interfere with a pending enforcement proceeding. We cannot agree. The in camera review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case. Similarly, although the segregability provision requires that nonexempt portions of documents be released, it does not speak to the prior question of what material is exempt. Finally, the mere fact that the burden is on the Government to justify nondisclosure does not, in our view, aid the inquiry as to what kind of burden the Government bears.

We thus agree with the parties that resolution of the question cannot be achieved through resort to the language of the statute alone. Accordingly, we now turn to an examination of the legislative history.

. . . .

. . . We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings."

III

The remaining question is whether the Board has met its burden of demonstrating that disclosure of the potential witnesses' statements at this time "would interfere with enforcement proceedings." A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA. Although reasonable arguments can be made on both sides of this issue, for the reasons that follow we conclude that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing.

Historically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case. While the NLRB's discovery policy has been criticized, the Board's position that § 6 of the NLRA, 29 U.S.C. § 156, commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts. A profound alteration in the Board's trial strategy in unfair labor practice cases would thus be effectuated if the Board were required, in every case in which witnesses' statements were sought under FOIA prior to an unfair labor practice proceeding, to make a particularized showing that release of these statements would interfere with the proceeding.

Not only would this change the substantive discovery rules, but it would do so through mechanisms likely to cause substantial delays in the adjudication of unfair labor practice charges. In addition to having a duty under FOIA to provide public access to its processes, the NLRB is charged with the duty of effectively investigating and prosecuting violations of the labor laws. See 29 U.S.C. §§ 160, 161. To meet its latter duty, the Board can be expected to continue to

claim exemptions with regard to prehearing FOIA discovery requests, and numerous court contests will thereby ensue. Unlike ordinary discovery contests, where rulings are generally not appealable until the conclusion of the proceedings, an agency's denial of a FOIA request is immediately reviewable in the District Court, and the District Court's decision can then be reviewed in the Court of Appeals. The potential for delay and for restructuring of the NLRB's routine adjudications of unfair labor practice charges from requests like respondent's is thus not insubstantial. See n.17, supra.

In the absence of clear congressional direction to the contrary, we should be hesitant under ordinary circumstances to interpret an ambiguous statute to create such dislocations. Not only is such direction lacking, but Congress in 1966 was particularly concerned that premature production of witnesses' statements in NLRB proceedings would adversely affect that agency's ability to prosecute violations of the NLRA, and, as indicated above, the legislative history of the 1974 Amendments affords no basis for concluding that Congress at that time intended to create any radical departure from prior, court-approved Board practice. See supra, at 224-234. Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind of "interference with enforcement proceedings" that Exemption 7(A) was designed to avoid.

A

The most obvious risk of "interference" with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. . . .

. . . .

2.8 Exclusions.

The Freedom of Information Reform Act of 1986 created an entirely new mechanism for protecting three very narrow categories of sensitive information. This "exclusion" mechanism expressly authorizes criminal law enforcement agencies to treat these sensitive records as "not subject to the requirements of the [FOIA]." If one of the exclusions applies, the agency simply responds to the FOIA request in the same manner that it does when in fact no records exist. The following discussion is from the Department of Justice's FOIA Update (Fall 1986).

Exclusions

-- Under the new "(c)(1)" exclusion, any agency possessing records of an ongoing criminal investigation or proceeding (covered by Exemption 7(A), as amended) can treat them as not subject to the requirements of the FOIA if "disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings." An agency may do so only where it reasonably believes that the subject of the proceeding is not aware of its pendency, and only so long as that circumstance continues, but it can apply this exclusion even where an investigation involves only "a possible violation of criminal law."
-- Under the "(c)(2)" exclusion, all criminal law enforcement agencies may likewise exclude informant records to resist targeted efforts by third parties to ferret out informants.
-- Under the "(c)(3)" exclusion, the FBI is empowered to exclude records pertaining to foreign intelligence, counterintelligence, or international terrorism whenever the existence of the records is a classified fact.

PART B: THE INDIVIDUAL'S RIGHT OF PRIVACY

CHAPTER 3

INFORMATION GATHERING AND INFORMATION SYSTEMS

3.1 Historical Background of the Privacy Act.

a. The Privacy Act of 1974 was the culmination of many years of public and congressional concern over the threat posed to individual privacy by the Federal Government's increasing acquisition of vast quantities of personal information on American citizens. In the 1960's both houses of Congress held numerous hearings and conducted extensive investigations into all aspects of government information-gathering techniques. This included inquiries into such things as the telephone monitoring activities of Federal agencies, the use of "lie detectors" and other privacy-invading procedures for eliciting information from Federal employees, the maintenance of Federal data banks containing large quantities of personal data on individuals, the use of criminal justice information by Federal agencies, and the military surveillance of American citizens.

Extract
Hearings on S.2318 Before the Subcommittee
on Constitutional Rights of the Senate
Committee on the Judiciary, 93d Cong.,
2d Sess. (1974)

. . . .

TESTIMONY OF ROBERT E. JORDAN III,
FORMER GENERAL COUNSEL OF THE
DEPARTMENT OF THE ARMY

. . . .

I cannot profess to any expertise with respect to military information collection activities prior to 1967. If in fact, as some have charged, there were improper information activities relating to civilians having no discernible connection with military functions or responsibilities, these were matters which didn't come to my attention. My principal area of concern during the 1967-71 period was the relationship between military intelligence

collection and retention activities and the Army's civil disturbance mission.

As this committee is aware, widespread civil disturbances in the mid and late 1960's had become a source of serious concern at the local, State and national level. Major urban disorders had flared; but until July 1967, they had been contained without an escalation of resources beyond the use of the National Guard in its State militia capacity--as in Newark and in Watts. In late July of 1967, however, disorders in Detroit brought the first use of Federal troops to deal with urban riots since 1943. In the spring of 1968, the death of Dr. King triggered disorders in a number of American cities, and required the simultaneous commitment of regular military units in Chicago, Baltimore, and Washington, D.C. I can well remember the frenetic activity surrounding the Detroit operation in 1967, and the multiple operations in 1968. A recurring problem was that there never seemed to be enough reliable and timely information upon which to make judgments concerning the alerting and prepositioning of troops, their actual commitment, the need for bringing in additional units, and timely Federal disengagement as the disorder was brought under control. Furthermore, military commanders had traditionally been indoctrinated with the view that knowledge of "the enemy" is an essential element of military planning and operations. By use of the term "enemy" I don't want to suggest that the military viewed this portion of the American people as the enemy. However there was a short-term problem with the military on one side and some people engaged in lawless acts on the other. Until that period of time ended, until the disorder was brought under control, the people on the other side were essentially the enemy.

Against this background, and with the peculiar visual acuity associated with hindsight, it is easy for me to see how things got out of hand. The hazard was perhaps nowhere as great as with the so-called "computerized data banks" which were created. These systems, filled with a lot of unevaluated "junk" information about individuals and incidents, had an enormous potential for abuse. I am reminded of an

example of potential hazard which was well demonstrated by the Fort Holabird biographical data bank. When we had finally obtained a copy of the biographical data bank printout in the Pentagon--after being assured that no such compilation existed--one of my staff members in the Army General Counsel's office flipped through the listings. I cannot now recall the exact format of the biographical listings, but I do recall that they contained a form of ideological code associated with the individual. For example, the letter "Y" might stand for "anti-U.S. subversive." I recall that in looking at the entries for only surnames beginning with "A" and "B" we found the name of an outstanding Army Special Forces colonel and a major general who was a division commander, each accompanied by an ideological code which cast doubt on his loyalty to the United States. As best we could reconstruct what had happened, both of these men were on subscription lists for one of the antiwar underground newspapers which were then much in vogue. For all that appears, their names could have been put on the list involuntarily, or they could have subscribed in order to develop a better understanding of the antimilitary attitudes prevalent among many young people. In any event, based on such flimsy information as this, both of these men had been assigned an adverse ideological code. It is not hard to conceive such a derogatory bit of information subsequently affecting the careers of the individuals involved, perhaps without their ever knowing of the damage which had occurred.

. . . .

Note. For a comprehensive view of the Privacy Act and the factors which led to its enactment see, Joyce, The Privacy Act: A Sword and a Shield but Sometimes Neither, 99 Mil. L. Rev. 113 (1983).

---

b. Congress was also concerned with the release by the government of personal information about American citizens. The Freedom of Information Act is not an effective guarantee of individual "informational" privacy because it places no restriction on the

disclosure of records, it merely authorizes their withholding. Even though agencies have generally used the Act to deny the public access to personal information, it has not been viewed as a basis for restricting the inter-agency and inter-governmental transfer of information.

c. These concerns, along with others, provided the background for the Privacy Act. Early in 1974, both houses of Congress considered bills which formed the basis of the Act that eventually passed the Congress. Legislation was introduced in the Senate by Senator Sam J. Ervin, Jr., and in the House by Congressman William S. Moorhead. Two separate and divergent measures were passed by these bodies, but the differences were reconciled and Congress passed the Privacy Act in November 1974. It was signed into law by President Ford on the last day of the year and became effective in September 1975. It added section 552a to Title 5 of the United States Code. The Office of Management and Budget was given the responsibility of developing guidelines for federal agencies to follow in implementing the Act. The Act has been implemented by DOD Reg. 5400.11-R, Department of Defense Privacy Program (31 August 1983) and by the Department of the Army in Army Reg. No. 340-21, The Army Privacy Program (5 July 1985) [hereinafter cited as AR 340-21].

The underlying purpose of the Privacy Act is to give citizens more control over the type information collected by the Federal Government and how that information is used. The act accomplishes this in four basic ways. It seeks to establish sound information practices in the federal agencies and requires public notice of all systems of records. It requires that the information contained in these record systems be accurate, complete, relevant, and timely. It provides procedures whereby individuals can inspect and correct inaccuracies in almost all Federal records about themselves. Finally, it limits disclosure of records; requires agencies to keep an accurate accounting of disclosures; and, with certain exceptions, makes these disclosures available to the subject of the record. In the event that the statute is violated there are both criminal sanctions and civil remedies.

d. Notes and Discussion.

Note 1. Unlike the Freedom of Information Act, which applies to anyone making a request (foreign nationals as well as American citizens), the Privacy Act

applies only to American citizens and aliens lawfully admitted for permanent residence.

Note 2. Do the Privacy Act's disclosure restrictions apply to the release of information about deceased personnel? It is the view of the DOD that the Privacy Act does not protect the records of deceased military personnel from disclosure. See Crumpton v. United States, 843 F. Supp. 751 (D.D.C. 1994) (no Privacy Act liability for disclosing records indexed only to name of deceased service member), aff'd on other grounds sub nom. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1018 (1996)). However, the FOIA might in some unusual circumstances allow withholding to protect the privacy of next-of-kin. See Defense Privacy Board Opinion 2; Badhwar v. United States Dep't of the Air Force, 829 F.2d 182 (D.C. Cir. 1987) (disclosure of autopsy reports might "shock the sensibilities of surviving kin").

Note 3. A corporation is not considered an "individual" or "person" for purposes of the Privacy Act. Cell Associates v. National Institute of Health, 579 F.2d 1155 (9th Cir. 1978). There is disagreement whether information about an individual in his entrepreneurial or business capacity, rather than personal capacity, is within the scope of the Privacy Act. OMB Guidelines suggest that entrepreneurial capacity is not covered by the Act. OMB Cir. No. A-108, 40 Fed. Reg. 28947, 28951 (1975). Accord St. Michaels Convalescent Hosp. v. California, 643 F.2d 1369 (9th Cir. 1981); Shermco v. Secretary of the Air Force, 425 F. Supp. 306 (N.D. Tex. 1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir. 1980).

The Act itself makes no distinction whether the information about an individual pertains to personal or business activities. In interpreting the Act, several other district courts have examined and rejected the entrepreneurial distinction. Medadure Corp. v. United States, 490 F. Supp. 1368 (S.D.N.Y. 1980); Florida Medical Ass'n v. Dep't of HEW, 479 F. Supp. 1291 (M.D. Fla. 1979); Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979). These courts take the better approach. OMB is expected to change its position when revised guidelines are published.

3.2 Records and System of Records.

a. The Privacy Act applies only to records and systems of records. It is therefore essential to know what is meant by record or system of records for the purpose of applying the Act. The Act defines record and system of records as follows:

> (4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
>
> (5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;
>
> . . . .

---

b. The Office of Management and Budget guidelines explain more fully the definition of these terms in the Act.

Extract
Privacy Act Implementation, Guidelines and Responsibilities, Office of Management and Budget Circular No. A-108, 40 Fed. Reg. 28947 (1975) [hereinafter cited as Privacy Act Guidelines]

. . . .

Record.--The term "record", as defined for purposes of the Act, means a tangible or documentary record (as opposed to a record contained in someone's memory) and has a broader meaning than the term commonly has when used in connection with record-keeping systems. A "record" means any item of information about an individual that includes an individual identifier. The term was

defined "to assure the intent that a record can include as little as one descriptive item about an individual." (Congressional Record, p. S21818, December 17, 1974 and p. H12246, December 18, 1974).

System of Records. The definition of "system of records" limits the applicability of some of the provisions of the Act to "records" which are maintained by an agency, retrieved by individual identifier (i.e., there is an indexing or retrieval capability using identifying particulars, as discussed above, built into the system), and the agency does, in fact, retrieve records about individuals by reference to some personal identifier.

A system of records for purposes of the Act must meet all of the following three criteria:

It must consist of records. See discussions of "record" (a)(4), above.

It must be "under the control of" an agency.

It must consist of records retrieved by reference to an individual name or some other personal identifier.

The phrase ". . . under the control of any agency . . ." was intended to accomplish two separate purposes: (1) To determine possession and establish accountability; and (2) to separate agency records from records which are maintained personally by employees of an agency but which are not agency records.

The phrase ". . . under the control of any agency . . ." in the definition of "system of records" . . . was intended to assign responsibility to a particular agency to discharge the obligations established by the Privacy Act. An agency is responsible for those systems which are ". . . under the control of" that agency.

The second purpose of the phrase was to distinguish "agency records" from those records which, although in the physical possession of agency employees and used by them in performing official functions, were not considered "agency records." Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be

agency records within the meaning of the Privacy Act. This distinction is embodied, in part, in the phrase "under the control of" an agency as well as in the definition of "record" (5 U.S.C. 552(a)(4)).

An agency shall not classify records, which are controlled and maintained by it, as non-agency records, in order to avoid publishing notices of their existence, prevent access by the individuals to whom they pertain, or otherwise evade the requirements of the act.

The "are retrieved by" criterion implies that the grouping of records under the control of an agency is accessed by the agency by use of a personal identifier; not merely that a capability or potential for retrieval exists. For example, an agency record-keeping system on firms it regulates may contain "records" (i.e., personal information) about officers of the firm incident to evaluating the firm's performance. Even though these are clearly "records" under the control of an agency, they would not be considered part of a system as defined by the Act unless the agency accessed them by reference to a personal identifier (name, etc.). That is, if these hypothetical "records" are never retrieved except by reference to company identifier or some other nonpersonal indexing scheme (e.g., type of firm) they are not a part of a system of records.

Considerable latitude is left to the agency in defining the scope or grouping of records which constitute a system. Conceivably all the "records" for a particular program can be considered a single system or the agency may consider it appropriate to segment a system by function or geographic unit and treat each segment as a "system".

. . . .

Implementation of the Privacy Act of 1974, Supplementary Guidance, Office of Management and Budget, 40 Fed. Reg. 56741 (1975)

1. Definition of System of Records (5 U.S.C. 552a(a)(5)). On page 28952, third column, after line 27, add:

"Following are several examples of the use of the term 'system of records':

"Telephone directories. Agency telephone directories are typically derived from files (e.g., locator cards) which are, themselves, systems of records. For example, agency personnel records may be used to produce a telephone directory which is distributed to personnel of the agency and may be made available to the public pursuant to 5 U.S.C. 552a(b) (1) and (2), (intra-agency and public disclosure, respectively). In this case the directory could be a disclosure from the system of records and, thus, would not be a separate system. On the other hand, a separate directory system would be a system of records if it contains personal information. A telephone directory, in this context, is a list of names, titles, addresses, telephone numbers, and organizational designations. An agency should not utilize this distinction to avoid the requirements of the Act including the requirement to report the existence of systems of records which it maintains.

"Mailing lists. Whether or not a mailing list is a system of records depends on whether the agency keeps the list as a separate system. Mailing lists derived from records compiled for other purposes (e.g., licensing) could be considered disclosures from that system and would not be systems of records. If the system from which the list is produced is a system of records, the decision on the disclosability of the list would have to be made in terms of subsection (b) (conditions of disclosure) and subsection (n) (the sale or rental of mailing lists). A mailing list may, in some instances, be a stand-alone system (e.g., subscription lists) and could be a system of records subject to the Act if the list is maintained separately by the agency, it consists of records (i.e., contains personal information), and information is retrieved by reference to name or some other identifying particular.

"Libraries. Standard bibliographic materials maintained in agency libraries such as library indexes, Who's Who Volumes and similar materials are not considered to be

systems of records. This is not to suggest that all published material is, by virtue of that fact, not subject to the Act. Collections of newspaper clippings or other published matter about an individual maintained other than in a conventional reference library would normally be a system of records."

---

c. Congress wanted to prevent Federal agencies from maintaining secret systems of records. As originally enacted, the Privacy Act required each agency to publish annually in the Federal Register notice of the existence of each system of records that it maintained. The Congressional Reports Elimination Act of 1982 amended the Privacy Act to require public notice only "upon the establishment or revision" of a system of records. Additionally, agencies must give advanced notice to Congress and OMB prior to establishing or altering a system of records. Army rules governing the publication of systems notices are at AR 340-21, para. 4-6. A criminal penalty applies to the willful maintenance of a "system of records" without publishing the required notice.

d. Notes and Discussion.

Note 1. Is a commander's or supervisor's notebook containing personal information about members of his command or office a system of records for purposes of the Privacy Act? See Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982); Kalmin v. Dep't of Navy, 605 F. Supp. 1492 (D.D.C. 1985); Thompson v. Dep't of Transportation, 547 F. Supp. 274 (S.D. Fla. 1982); Defense Privacy Board Opinion 38; DAJA-AL 1976/4866; DAJA-AL 1976/3752.

Note 2. Is a unit roster a system of records?

Note 3. How does the Privacy Act affect court-martial proceedings? See Defense Privacy Board Opinion 32; DAJA-AL 1977/3899.

Note 4. When the government contracts for the operation of a system of records, it is required to apply the requirements of the Privacy Act to the contractor. 5 U.S.C. § 552a(m); AR 340-21, para. 4-8. A GAO report found that federal contractors often failed to meet their responsibilities under the Privacy Act, GAO Report LCD-78-224, Nov. 27, 1978.

3.3 Access, Amendment, and Judicial Review.

a. The Privacy Act requires that individuals be given access to records pertaining to them which are contained in systems of records. Copies of records must be furnished individuals upon request. Similarly, individuals are entitled to request amendment of records which they contend are not accurate, relevant, timely, or complete. If an agency refuses to amend a record, the individual concerned is entitled to file a statement disagreeing with the agency's refusal and to have it included with the record. The only clear restriction on access to records is a provision which states that the Privacy Act does not grant an individual access to information compiled in reasonable anticipation of a civil action. 5 U.S.C. § 552a(d)(5). Agencies may also establish special procedures for the release of an individual's medical and psychological records to him. 5 U.S.C. § 552a(f)(3). However, such "special procedures" were struck down in Benavides v. United States Bureau of Prisons, 995 F.2d 269 (D.C. Cir. 1993), which held that a "regulation that expressly contemplates that the requesting individual may never see certain medical records [as a result of the discretion of physician designated by the inmate] is simply not a special procedure for disclosure by that person." The procedures for obtaining access to and amendment of records are contained in chapter 2 of AR 340-21. Agency heads may exempt certain records from various provisions of the Privacy Act, including the access and amendment provisions. Records which are properly classified, certain investigatory records, and certain testing and examination material are examples of the types of records which may be exempted. 5 U.S.C. §§ 552a(j) and (k).

Note. The Army has taken the position that amendment of a record which is allegedly inaccurate can be accomplished under the Privacy Act only if it is claimed that the record is <u>factually</u> inaccurate (as opposed to reflecting an inaccurate judgment). For example, the judgment of a rating official cannot be amended under the Privacy Act. AR 340-21, para. 2-10a. <u>See</u> Hewitt v. Grabicki, 596 F. Supp. 297 (E.D. Wash. 1984); Turner v. Dep't of Army, 447 F. Supp. 1207 (D.D.C. 1978), <u>aff'd</u>, 593 F.2d 1372 (D.C. Cir. 1979).

b. In some instances under the Privacy Act an agency may exempt a system of records (or a portion thereof) from access by individuals in accordance with

the general or specific exemptions (subsection (j) or (k)); or deny a request for access to records compiled in reasonable anticipation of a civil action (subsection (d)(5)). See AR 340-21, ch. 5.

(1) General exemptions.

The general exemptions apply only to the Central Intelligence Agency and criminal law enforcement agencies. The records held by these agencies can be exempt from more provisions of the act than those maintained by other agencies. However, even the systems of these agencies are subject to many of the act's basic provisions: (1) the existence and characteristics of all record systems must be publicly reported; (2) subject to specified exceptions, no personal records can be disclosed to other agencies or persons without the prior consent of the individual to whom the record pertains; (3) all disclosure must be accurately accounted for; (4) records which are disclosed must be accurate, relevant, up-to-date, and complete; and (5) no records describing how an individual exercises his first amendment rights can be maintained unless such maintenance is authorized by statute or by the individual to whom it pertains or unless it is relevant to and within the scope of an authorized law enforcement activity.

General exemptions are referred to as (j) (1) and (j) (2) in accordance with their designations in the act.

Exemption (j) (1): Files maintained by the CIA--Exemption (j) (1) covers records "maintained by the Central Intelligence Agency." This exemption permits the head of the Central Intelligence Agency to exclude certain systems of records within the agency from many of the Act's requirements. The provisions from which the systems can be exempted are primarily those permitting individual access. Congress permitted the exemption of these records from access because CIA files often contain highly sensitive information regarding national security.

Exemption (j) (2): Files maintained by Federal criminal law enforcement agencies--Exemption (j) (2) covers records "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or

parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."

This exemption permits the Attorney General to exclude criminal justice systems of records of the Department of Justice from many of the Act's requirements. It also permits the heads of other agencies which have criminal law enforcement components (e.g. - CID) to exclude their criminal justice systems of records.

(2) Specific exemptions.

There are seven specific exemptions which apply to all agencies. Under specified circumstances, agency heads are permitted to exclude certain record systems from the access and amendment provisions of the Act. However, even exempted systems are subject to many of the Act's requirements. In addition to the provisions listed under General Exemptions (which apply to all record systems), a record system that falls under any one of the seven specific exemptions (listed below) is subject to the following requirements: (1) information that might be used to deny a person a right, benefit, or privilege must, whenever possible, be collected directly from the individual; (2) individuals asked to supply information must be informed of the authority for collecting it, the purposes to which it will be put, and whether or not the imparting of it is voluntary or mandatory; (3) individuals must be notified when records concerning them are disclosed in accordance with a compulsory legal process, such as a court subpoena; (4) agencies must notify persons or agencies who have previously received information about an individual of any corrections or disputes over the accuracy of the information; (5) and all records must be accurate, relevant, up-to-date, and complete.

Record systems which fall within the seven exempt categories are subject to the civil remedies provisions of the Act. Therefore, if an agency denies access to a

record in an exempt record system or refuses to amend a record in accordance with a request, the requester can contest these actions in court. A person can also bring suit against the agency if he has been denied a right, benefit, or privilege as a result of records which have been improperly maintained. These remedies are not available under the general exemptions.

Specific exemptions are referred to as (k) (1), (k) (2), etc., in accordance with their designations in the Act.

Exemption (k) (1): Classified documents concerning national defense and foreign policy--Exemption (k) (1) covers records "subject to the provisions of section 552(b) (1) of this title."

This refers to the first exemption of the Freedom of Information Act which excepts from disclosure records "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Exemption (k) (2): Investigatory material compiled for law enforcement purposes.--Exemption (k) (2) pertains to "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section: Provided, however, that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

This applies to investigatory materials compiled for law enforcement purposes by agencies whose principal function is other than criminal law enforcement. Included are such items as files maintained by the Internal Revenue Service concerning taxpayers who are delinquent in filing Federal tax returns, investigatory reports of the Federal Deposit Insurance Corporation regarding banking irregularities, and files maintained

by the Securities Exchange Commission on individuals who are being investigated by the agency.

Exemption (k) (3): Secret Service intelligence files.--Exemption (k) (3) covers records "maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18."

This exemption pertains to files held by the Secret Service that are necessary to insure that safety of the President and other individuals under Secret Service protection.

Exemption (k) (4): Files used solely for statistical purpose.--Exemption (k) (4) applies to records "required by statute to be maintained and used solely as statistical records."

This includes such items as Internal Revenue Services files regarding the income of selected individuals used in computing national income averages, and records on births and deaths maintained by the Department of Health and Human Services for compiling vital statistics.

Exemption (k) (5): Investigatory material used in making decisions concerning Federal employment, military service, Federal contracts, and security clearances.--Exemption (k) (5) relates to "investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

This exemption applies only to investigatory records which would reveal the identity of a confidential source. Since it should not be customary for agencies to grant pledges of confidentiality in collecting information concerning employment, Federal contracts, and security clearances, in most instances these records would be available.

Exemption (k) (6): Testing or examination material used solely for employment purposes.--Exemption (k) (6) covers "testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process."

This provision permits agencies to withhold information concerning the testing process that would give an individual an unfair competitive advantage. It applies solely to information that would reveal test questions and answers or testing procedures.

Exemption (k) (7): Evaluation material used in making decisions regarding promotions in the armed services.--Exemption (k) (7) pertains to "evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

For a case involving the Air Force's use of confidential evaluations of senior officers, see May v. Department of Air Force, 777 F.2d 1012 (5th Cir. 1985) (denial of access under subsection (k)(7) upheld).

(3) Materials compiled in reasonable anticipation of civil litigation.

Extract
DOD Privacy Review Board
Policy Guidance on Release/
Disclosure of Information Under
the Privacy Act
(HQDA Ltr. 340-77-4, 17 Jan. 1977)

. . . .

Section (d) (5) of the Privacy Act specifically denies authority for individuals to have access to any information compiled in reasonable anticipation of a civil action or proceeding. Therefore, not only is an attorney's "work product" protected from access but other information which is not routinely released but is compiled in

reasonable anticipation of litigation is protected. Once "work product" is prepared in reasonable anticipation of litigation, section (d)(5) would continue to protect the material regardless of whether litigation is instituted, completed or dropped.

The determination as to whether material is prepared in anticipation of litigation must be made on an ad hoc basis for each document in question. In making this determination, all circumstances must be considered including the intent of the author at the time the document was prepared.

. . . .

Unlike the general and specific exemptions, section (d)(5) is self-executing and does not depend on implementing agency regulations. Smiertka v. IRS, 447 F. Supp. 221 (D.D.C. 1978).

c. What is the relationship between the Privacy Act and the Freedom of Information Act concerning requests from individuals for their own records? The Privacy Act provides that if a record is exempt from release under FOIA but accessible under the Privacy Act, the individual subject of the record is clearly entitled to access. FOIA exemptions cannot be used to withhold information under the Privacy Act. 5 U.S.C. § 552a(t)(1).

A more difficult case arises when the record is exempt from access under the Privacy Act but apparently releasable under FOIA. The Fifth and Seventh Circuits have held that the information is not releasable. Painter v. FBI, 615 F.2d 689 (5th Cir. 1980); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). The rationale supporting the denial of access was that the statutes must be read together. Congress could not have intended to deny access to the individual under the Privacy Act and yet release the same information to the general public under FOIA. To avoid this anomaly, the courts held that the Privacy Act falls within FOIA Exemption (b)(3).

A split was created between the circuits when the District of Columbia and Third Circuits held that the Privacy Act was not an Exemption (b)(3) statute under FOIA. Porter v. Department of Justice, 717 F.2d 787 (3d

Cir. 1983); Greentree v. Customs Serv., 674 F.2d 74 (D.C. Cir. 1982). These courts found that the respective exemptions under the two statutes differ in purpose and therefore in scope. Additionally, the courts did not believe that Congress intended for the Privacy Act to close existing avenues of access under FOIA but rather to give the individual the cumulative access rights under both statutes.

The Supreme Court agreed to settle the split. Shapiro v. Drug Enforcement Admin., 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984); Provenzano v. Department of Justice, 717 F.2d 799 (3d Cir.), reh'g denied, 722 F.2d 36 (1983), cert. granted, 466 U.S. 926 (1984). Before arguments were heard in the cases, however, Congress resolved the issue. The Privacy Act was amended to state that the Act is not a FOIA Exemption (b)(3) statute. Section 2(c), PL 98-477, 98 Stat. 2209 (codified at what is now 5 USC § 552a(t)(2)). This amendment is consistent with existing Army policy. See AR 25-55, paragraphs 1-301b and 1-503; AR 340-21, paragraph 2-3. The circuit court judgments in Shapiro and Provenzano were subsequently vacated and remanded. 469 U.S. 14 (1984). Therefore, the subjects of records within a system of records are entitled to the cumulative access rights provided by both statutes.

d. Access and Amendment Time Limits.

(1) Access to Records (AR 340-21, paras. 2-2 and 2-9).

(a) Official receiving request must acknowledge receipt within 10 working days.

(b) Official granting request must release the records within 30 working days.

(c) Official believing request should be denied must send request to Access & Amendment Refusal Authority within 5 working days and notify individual of the referral.

(d) Access & Amendment Refusal Authority denying access must, within 30 working days, notify individual and advise him of appeal rights. Requesters have 60 calendar days to appeal.

(2) Amendment of Records (5 U.S.C. § 552a(d) and AR 340-21, para. 2-11).

(a) Official receiving request for amendment will acknowledge receipt within 10 working days.

(b) Official deciding amendment is not justified must forward to Access & Amendment Refusal Authority within 5 working days and notify the requester of the referral.

(c) Official making correction should advise the individual within 30 days of his request.

(d) Access & Amendment Refusal Authority receiving appeal must forward it to DA Privacy Review Board within 5 working days.

(e) DA Privacy Review Board will take action on an appeal within 30 working days.

e. An agency's final denial of access to or refusal of amendment of an individual's record gives rise to a right to obtain a de novo review of the agency's decision in federal district court. In addition, if an agency fails to maintain records in a manner which insures fairness, and as a result some determination is made which is adverse to the individual, he may sue the agency. Finally, an agency may be sued if it fails to comply with any provision of the Privacy Act or rule promulgated pursuant thereto, resulting in an adverse effect upon an individual. If in the latter two cases the agency's action is found to be intentional or willful, the individual is entitled to recover actual damages from the United States, but in no event less than $1,000. 5 U.S.C. § 552a(g).

f. Notes and Discussion.

Note 1. An individual must exhaust administrative remedies within the agency in access and amendment cases before pursuing judicial relief under the Privacy Act. See, e.g., Quinn v. Stone, 978 F.2d 126 (3d Cir. 1992).

Note 2. An individual may be "collaterally estopped" from pursuing a judicial remedy under the Privacy Act where he has previously litigated substantially the same issue in a non-Privacy Act action. Douglas v. Agricultural Stabilization & Conservation Serv., 33 F.3d 784 (7th Cir. 1994).

Note 3. For violations of its provisions the Privacy Act provides two remedies: civil suit against the offending federal agency and criminal penalties against the offending official. The only court of appeals to address the issue has held that the Privacy Act "does not limit the remedial rights of persons to pursue whatever remedies they may have under the [Federal Tort Claims Act]" for privacy violations consisting of record disclosures. See O'Donnell v. United States, 891 F.2d 1079 (3d Cir. 1989). Three district courts, however, have held that the Privacy Act's remedies preclude an action against individual employees for damages under the Constitution in a Bivens suit. See Williams v. VA, 879 F. Supp. 578 (E.D. Va. 1995); Mangino v. Department of the Army, No. 90-2067, 1994 WL 477260 (D. Kan. Aug. 24, 1994); Mittleman v. United States Treasury, 773 F. Supp. 442 (D.D.C. 1991).

3.4 Collection and Maintenance of Information.

a. The Privacy Act contains several substantive requirements concerning the collection and maintenance of information.

(1) The first requirement is that each agency maintain only "such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order. . . ." 5 U.S.C. § 552a(e)(1). The OMB Guidelines explain this provision.

Extract
Privacy Act Guidelines at 28960

. . . .

> A key objective of the Act is to reduce the amount of personal information collected by Federal agencies to reduce the risk of intentionally or inadvertently improper use of personal data. In simplest terms, information not collected about an individual cannot be misused. The Act recognizes, however, that agencies need to maintain information about individuals to discharge their responsibility effectively.
>
> Agencies can derive authority to collect information about individuals in one of two ways:

By the Constitution, a statute, or Executive order explicitly authorizing or directing the maintenance of a system of records; e.g., the Constitution and title 13 of the United States Code with respect to the Census.

By the Constitution, a statute, or Executive order authorizing or directing the agency to perform a function, the discharging of which requires the maintenance of a system of records.

Each agency shall, with respect to each system of records which it maintains or proposes to maintain, identify the specific provision in law which authorizes that activity. The authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful. Agencies shall review the nature of the information which they maintain in their systems of records to assure that it is, in fact, "relevant and necessary".

. . . .

---

(2) The second requirement of the Act is that agencies "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). First Amendment rights include, but are not limited to religious and political beliefs, freedom of speech and of the press, and freedom of assembly and petition.

Examples of statutes which authorize the collection of information regarding First Amendment activity are the Immigration and Naturalization Act, which makes the possibility of religious or political persecution relevant to a stay of deportation, and the Ethics in Government Act.

There are many examples of situations in which an individual can authorize the collection of information regarding the exercise of First Amendment rights, e.g., a member of the armed forces may indicate a religious preference so that, if seriously injured or killed while

on duty, the proper clergyman can be called. The individual may also volunteer such information and if he does so, the agency is not precluded from accepting and retaining it if it is relevant and necessary to accomplish an agency purpose. Thus, if an applicant for political appointment should list his political affiliation, association memberships, and religious activities, the agency may retain this as part of his application file or include it in an official biography. Similarly, if an individual volunteers information on civic or religious activities in order to enhance his chances of receiving a benefit, such as clemency, the agency may consider information thus volunteered. However, nothing in the request for information should in any way suggest that information on an individual's First Amendment activities is required.

In the discussions on the floor of the House regarding the authority to maintain such records for law enforcement purposes, it was stated that the objective of the law enforcement qualification on the general prohibition was "to make certain that political and religious activities are not used as a cover for illegal or subversive activities." However, it was agreed that "no file would be kept of persons who are merely exercising their constitutional rights . . ." and that in accepting this qualification "there was no intention to interfere with First Amendment rights" (Congressional Record, November 20, 1974, H10892 and November 21, 1974, H10952). For a judicial interpretation of the scope of the law enforcement exception see Patterson v. FBI, 893 F.2d 595 (3d Cir.), cert. denied, 498 U.S. 812 (1990).

(3) The Privacy Act requires federal departments and agencies to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. . . ." 5 U.S.C. § 552a(e)(2).

Extract
Privacy Act Guidelines at 28961

. . . .

This provision stems from a concern that individuals may be denied benefits, or that other adverse determinations affecting them may be made by Federal agencies on the basis of information obtained from third party

> sources which could be erroneous, outdated, irrelevant, or biased. This provision establishes the requirement that decisions under Federal programs which affect an individual should be made on the basis of information supplied by that individual for the purpose of making those determinations but recognizes the practical limitations on this by qualifying the requirement with the words "to the extent practicable."
>
> . . . .

Examples of practical considerations which permit the collection of information from third parties are listed in AR 340-21, para. 4-1d.

(4) When asked to supply information to a federal department or agency, an individual must be advised of certain matters under the Privacy Act. 5 U.S.C. § 552a(e)(3). When personal information will become part of a system of records, AR 340-21, para. 4-2, requires the individual be notified of the following:

(a) The authority for requesting disclosure.

(b) The principal purpose or purposes for which the information is to be used.

(c) The routine uses to be made of the information.

(d) Whether furnishing the information is mandatory or voluntary.

(e) The effects on the individual, if any, of not providing all or any part of the information.

The term "routine use" is defined in 5 U.S.C. § 552a(a)(7) and AR 340-21, glossary.

(5) An agency must maintain records used to make determinations about individuals with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination. § 552a(e)(5).

b. Notes and Discussion.

Note 1. A Privacy Act statement is required when information is obtained from third party sources. Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981). See AR 340-21, para. 4-2a.

Note 2. If furnishing the information is mandatory, the Privacy Act warning does not have to give notice of any specific criminal penalty that could be imposed for refusal to provide the information. United States v. Bressler, 772 F.2d 287 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986).

Note 3. Must a chaplain give a Privacy Act warning before collecting information from the church congregation?

CHAPTER 4

GOVERNMENT DISCLOSURE OF PERSONAL INFORMATION

4.1 General Rule.

As a general rule, no agency can "disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). There are 12 exceptions to this prohibition.

4.2 Disclosure Within the Agency. 5 U.S.C. § 552a(b)(1).

a. Many of the exceptions to the disclosure prohibition are important to permit the ordinary day-to-day operations of the military departments as well as other federal departments and agencies. One of the more important of these is Exception 1 which permits disclosure of a record from a system of records "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." (5 U.S.C. § 552a(b)(1).)

b. This exception is explained more fully in the Office of Management and Budget guidelines.

Extract
Privacy Act Guidelines at 28954

. . . .

Disclosure within the Agency. Subsection (b)(1) "To those offices and employees of the agency which maintains the record who have a need for the record in the performance of their duties;"

This provision is based on a "need to know" concept. See also definition of "agency," (a)(1). It is recognized that agency personnel require access to records to discharge their duties. In discussing the conditions of disclosure provision generally, the House Committee said that "it is not the Committee's intent to impede the orderly conduct of government or delay services performed in the interests of the individual.

Under the conditional disclosure provisions of the bill, 'routine' transfers will be permitted without the necessity of prior written consent. . . .

This discussion suggests that some constraints on the transfer of records within the agency were intended irrespective of the definition of agency. Minimally, the recipient officer or employee must have an official "need to know." The language would also seem to imply that the use should be generally related to the purpose for which the record is maintained.

Movement of records between personnel of different agencies may in some instances be viewed as intra-agency disclosures if that movement is in connection with an inter-agency support agreement. For example, the payroll records compiled by Agency A to support Agency B in a cross-service arrangement are, arguably, being maintained by Agency A as if it were an employee of Agency B. While such transfers would meet the criteria both for intra-agency disclosure and "routine use," they should be treated as intra-agency disclosure for purposes of the accounting requirements (e)(1). In this case, however, Agency B would remain responsible and liable for the maintenance of such records in conformance with the Act.

It should be noted that the conditions of disclosure language makes no specific provision for disclosures expressly required by law other than 5 U.S.C. 552. Such disclosures, which are in effect congressionally-mandated "routine uses," should still be established as "routine uses" pursuant to subsections (e)(11) and (e)(4)(D). This is not to suggest that a "routine use" must be specifically prescribed in law.

. . . .

---

c. Notes and Discussion.

Note 1. The Department of Defense is considered a single agency for purposes of this exception. DOD Reg. No. 5400.11-R, ch. 4, paras. A2 & B1 (31 August 1983). See AR 340-21, para. 3-1a.

Note 2. Would a defense counsel's request for the personnel files of prospective prosecution witnesses and court members fall within this exception? See DAJA-AL 1977/3889.

Note 3. For a detailed analysis of the need to know requirement and its legislative history, see Parks v. IRS, 618 F.2d 677 (10th Cir. 1980).

4.3 Information Required to be Disclosed by the Freedom of Information Act. 5 U.S.C. § 552a(b)(2).

a. The Privacy Act was designed to be consistent with the Freedom of Information Act. Hence, a major exception to the disclosure prohibition above is the disclosure of information from a system of records when such disclosure is required by the Freedom of Information Act.

Extract
Privacy Act Guidelines at 28954

. . . .

Disclosure to the Public. Subsection (b)(2) "Required under section 552 of this title;" Subsection (b)(2) is intended "to preserve the status quo as interpreted by the courts regarding the disclosure of personal information" to the public under the Freedom of Information Act (Congressional Record p. S21817, December 17, 1974 and p. H12244, December 18, 1974). It absolves the agency of any obligation to obtain the consent of an individual before disclosing a record about him or her to a member of the public to whom the agency is required to disclose such information under the Freedom of Information Act and permits an agency to withhold a record about an individual from a member of the public only to the extent that it is permitted to do so under 552(b). Given the use of the term "required", agencies may not voluntarily make public any record which they are not required to release (i.e., those that they are permitted to withhold) without the consent of the individual unless that disclosure is permitted under one of the other portions of this subsection.

. . . .

b. The question then becomes: "What information must be released under the Freedom of Information Act?" The answer is: "All recorded information which is not exempt from release under the FOIA." Information contained in a "system of records" may be exempt from release to the public under one or more of the exemptions discussed in Chapter 2 of this casebook. Generally, however, information contained in systems of records will be exempt from release to the public (if it is exempt from release at all) under Exemption 6 or 7(c) of the FOIA. As noted in the Privacy Act Guidelines, if the information is exempt from release under the FOIA, the Privacy Act prohibits the agency from disclosing it except in accordance with the terms of the Privacy Act. To put it another way, the Privacy Act removes any discretion an agency would otherwise have to disclose to the public information which is exempt from release under the FOIA. For an example of the Supreme Court applying this analysis, see DOD v. FLRA, 114 S. Ct. 1006, 1011-12 (1994).

c. Exemption 6 of the Freedom of Information Act provides that the FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court has addressed the meaning of this exemption.

Department of the Air Force v. Rose
425 U.S. 352 (1976)

[The facts of this case are set forth in paragraph 2.2 of this casebook.]
[Most footnotes omitted]

. . . .

Additional questions are involved in the determination whether Exemption 6 exempts the case summaries from mandatory disclosure as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The first question is whether the clause "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" modifies "personnel and

medical files" or only "similar files." The Agency argues that Exemption 6 distinguishes "personnel" from "similar" files, exempting all "personnel files" but only those "similar files" whose disclosure constitutes "a clearly unwarranted invasion of personal privacy," and that the case summaries sought here are "personnel files." On this reading, if it is determined that the case summaries are "personnel files," the Agency argues that judicial inquiry is at an end, and that the Court of Appeals therefore erred in remanding for determination whether disclosure after redaction would constitute "a clearly unwarranted invasion of personal privacy."

The Agency did not argue its suggested distinction between "personnel" and "similar" files to either the District Court or the Court of Appeals, and the opinions of both courts treat Exemption 6 as making no distinction between "personnel" and "similar" files in the application of the "clearly unwarranted invasion of personal privacy" requirement. The District Court held that "it is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of the sixth exemption." Petition for Certiorari, at 31A. The Court of Appeals stated, "We are dealing here with 'personnel' or 'similar' files. But the key words, of course, are 'a clearly unwarranted invasion of personal privacy' . . . ." 495 F.2d, at 266.

We agree with these views, for we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files. Judicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in "personnel" or "similar" files. See, e.g., Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135 (CA3 1974); Rural Housing Alliance v. Department of Agriculture, 162 U.S. App. D.C., 122, 126, 498 F.2d 73, 77 (1974); Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973); Getman v. NLRB, 146 U.S. App. D.C. 209, 213, 450 F.2d

670, 674 (1971). Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by the Agency in "personnel" files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for "clearly unwarranted" invasions of personal privacy.

Both House and Senate Reports can only be read as disclosing a congressional purpose to eschew a blanket exemption for "personnel . . . and similar files" and to require a balancing of interests in either case. Thus the House Report states, H.R. Rep. No. 1497, p. 11, "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." Similarly, the Senate Report, S. Rep. No. 813, p. 9, states, "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interest between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." Plainly Congress did not itself strike the balance as to "personnel files" and confine the Courts to striking the balance only as to "similar files." To the contrary, Congress enunciated a single policy, to be enforced in both cases by the courts, "that will involve a balancing" of the private and public interests. This was the conclusion of the Court of Appeals of the District of Columbia Circuit as to medical files, and that conclusion is equally applicable to personnel files:

> "Exemption 6 of the Act covers '. . . medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' Where a purely medical file is withheld under authority of Exemption 6, it will be for the District Court ultimately to determine any dispute as to whether that exemption was properly invoked." Ackerly v. Ley, 137 U.S. App. D.C. 133, 136-137, n. 3, 420 F.2d 1336, 1339-1340, n. 3 (1969) (ellipsis in original).

See also Wine Hobby USA, Inc. v. IRS, supra at 135.

> Congress' recent action in amending the Freedom of Information Act to make explicit its agreement with judicial decisions requiring the disclosure of nonexempt portions of otherwise exempt files is consistent with this conclusion. Thus, § 552(b) . . . now provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." And § 552(a)(4)(B) was added explicitly to authorize in camera inspection of matter claimed to be exempt "to determine whether such records or any part thereof shall be withheld." (Emphasis supplied.) The Senate Report accompanying this legislation explains, without distinguishing "personnel and medical files" from "similar files," that its effect is to require courts
>
> > "to look beneath the label on a file or record when the withholding of information is challenged. . . . [W]here files are involved [courts will] have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply." S. Rep. No. 93-854, p. 32 (1974).

The remarks of Senator Kennedy, a principal sponsor of the amendments, make the matter even clearer.

> "For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'" 120 Cong. Rec. 17018.

In so specifying, Congress confirmed what had perhaps been only less clear earlier. For the Senate and House Reports on the Bill enacted in 1966 noted specifically that Health, Education, and Welfare files, Selective Service files, or Veterans' Administration files, which as the Agency here recognizes were clearly included within the congressional conception of "personnel files," were nevertheless intended to be subject to mandatory disclosure in redacted form if privacy could be sufficiently protected. As the House Report states, H.R. Rep. No. 1497, p. 11, "The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." Similarly, the Senate Report emphasized, S. Rep. No. 813, p. 9, "For example, health, welfare, and selective service records are highly personal to the person involved yet facts concerning the award of a pension or benefit should be disclosed to the public."

Moreover, even if we were to agree that "personnel files" are wholly exempt from any disclosure under Exemption 6, it is clear that the case summaries sought here lack the attributes of "personnel files" as commonly understood. Two attributes of the case summaries require that they be characterized as "similar files." First, they relate to the discipline of cadet personnel, and while even Air Force Regulations themselves show that this single factor is insufficient to characterize the summaries as "personnel files," it supports the conclusion that they are "similar." Second, and most

significantly, the disclosure of these summaries implicates similar privacy values; for as said by the Court of Appeals, 495 F.2d, at 267, "identification of disciplined cadets--a possible consequence of even anonymous disclosure--could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." See generally, e.g., Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135-137 (CA3 1974); Rural Housing Alliance v. Department of Agriculture, 162 U.S. App. D.C. 122, 125-126, 498 F.2d 73, 76-77 (1974); Robles v. EPA, 484 F.2d 843, 845-846 (CA4 1973). But these summaries, collected only in the Honor and Ethics Code Reading Files and the Academy's Honor Records, do not contain the "vast amounts of personal data," S. Rep. No. 813, p. 9, which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance. Moreover, access to these files is not drastically limited, as is customarily true of personnel files, only to supervisory personnel directly involved with the individual (apart from the personnel department itself), frequently thus excluding even the individual himself. On the contrary, the case summaries name no names except in guilty cases, are widely disseminated for examination by fellow cadets, contain no facts except such as pertain to the alleged violation of the Honor of Ethics Codes, and are justified by the Academy solely for their value as an educational and instructional tool the better to train military officers for discharge of their important and exacting functions. Documents treated by the Agency in such a manner cannot reasonably be claimed to be within the common and congressional meaning of what constitutes a "personnel file" within Exemption 6.

The Agency argues secondly that, even taking the case summaries as files to which the "clearly unwarranted invasion of personal privacy" qualification applies, the Court of Appeals nevertheless improperly ordered the

Agency to produce the case summaries in the District Court for an in camera examination to eliminate information that could result in identifying cadets involved in Honor or Ethics Code violations. The argument is, in substance, that the recognition by the Court of Appeals of "the harm that might result to the cadets from disclosure" itself demonstrates "[t]he ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports . . . ." Brief for Petitioners 17-18.

This contention has no merit. First, the argument implies that Congress barred disclosure in any case in which the conclusion could not be guaranteed that disclosure would not trigger recollection of identity in any person whatever. But this ignores Congress' limitation of the exemption to cases of "clearly unwarranted" invasions of personal privacy. Second, Congress vested the courts with the responsibility ultimately to determine "de novo" any dispute as to whether the exemption was properly invoked in order to constrain agencies from withholding nonexempt matters. No court has yet seen the case histories, and the Court of Appeals was therefore correct in holding that the function of examination must be discharged in the first instance by the District Court. Ackerly v. Ley, [supra]; Rural Housing Alliance v. Department of Agriculture, supra.

In striking the balance whether to order disclosure of all or part of the case summaries, the District Court, in determining whether disclosure will entail a "clearly unwarranted" invasion of personal privacy, may properly discount its probability in light of Academy tradition to keep identities confidential within the Academy.[19] Respondents

---

[19]The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities. The House Report explains that the exemption was intended to exclude files "the disclosure of which might harm the individual . . . [or] detailed Government records on an individual which can be identified as applying to that individual. . . ."

sought only such disclosure as was consistent with this tradition. Their request for access to summaries "with personal references or other identifying information deleted," respected the confidentiality interests embodied in Exemption 6. As the Court of Appeals recognized, however, what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy staff, with other aspects of his career at the Academy. Despite the summaries' distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline. And the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial. We nevertheless conclude that consideration of the policies underlying the Freedom of Information Act, to open public business to public view when no "clearly unwarranted" invasion of privacy will result, requires affirmance of the holding of the Court of Appeals, 495 F.2d, at 267, that although ". . . no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty," it sufficed to protect privacy at this stage in these proceedings by enjoining the District Court, id., at 268, that if in its opinion deletion of personal references and other identifying information "is not sufficient to safeguard privacy, then the summaries should not be disclosed to [respondents]." We hold, therefore, in agreement with the Court of

---

H.R. Rep. No. 1497, p. 11 (emphasis supplied). And the Senate Report states that the balance to be drawn under Exemption 6's "clearly unwarranted invasion of personal privacy" clause is one between "the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, p. 9 (emphasis supplied)

Appeals, "that the in camera procedure [ordered] will further the statutory goal of Exemption Six: a workable compromise between individual rights 'and the preservation of public rights to Government information.'" Id., at 269.

To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts, EPA v. Mink 410 U.S. at 79; S. Rep. No. 813, p. 5; H.R. Rep. No. 1497, p. 2. Moreover, we repeat, Exemption 6 does not protect against disclosure every incidental invasion of privacy--only such disclosures as constitute "clearly unwarranted" invasions of personal privacy.

Affirmed.

---

d. Courts that addressed issues under Exemption 6 and 7(C) have often had difficulty in balancing of the individuals privacy interest against the public interest in disclosure. In 1989, the Supreme Court extended FOIA privacy protection more broadly than any of the courts of appeals:

United States Department of Justice v.
Reporters Committee for Freedom of the Press
489 U.S. 749 (1989)
[footnotes omitted]

Justice STEVENS delivered the opinion of the Court.

The Federal Bureau of Investigation (FBI) has accumulated and maintains criminal identification records, sometimes referred to as "rap sheets," on over 24 million persons. The question presented by this case is whether the disclosure of the contents of the contents of such a file to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy"

within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (1982 ed., Supp. IV).

. . . .

Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited. Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap sheet may be available upon request in that jurisdiction. That possibility, however, is present in only three States. All of the other 47 States place substantial restrictions on the availability of criminal-history summaries even though individual events in those summaries are matters of public record. Moreover, even in Florida, Wisconsin, and Oklahoma, the publicly available summaries may not include information about out-of-state arrests or convictions.

. . . .

III

This case arises out of requests made by a CBS news correspondent and the Reporters Committee for Freedom of the Press (respondents) for information covering the criminal records of four members of the Medico family. The Pennsylvania Crime Commission had identified the family's company, Medico Industries, as a legitimate business dominated by organized crime figures. Moreover, the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.

The FOIA requests sought disclosure of any arrests, indictments, acquittals, convictions, and sentences of any of the four Medicos. Although the FBI originally denied the requests, it provided the requested data concerning three of the Medicos after their deaths. In their complaint in the District Court, respondents sought the rap sheet for

the fourth, Charles Medico (Medico), insofar as it contained "matters of public record." App. 33.

. . . .

IV

Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the "practical obscurity" of the rap sheets, against the public interest in their release.

The preliminary question is whether Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of "personal privacy" interest that Congress intended Exemption 7(C) to protect. As we have pointed out before, "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interest. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-877, 51 L.Ed.2d 64 (1977) (footnotes omitted). Here, the former interest, "avoiding disclosure of personal matters," is implicated. Because events summarized in a rap sheet have been previously disclosed to the public, respondents contend that Medico's privacy interest in avoiding disclosure of a federal compilation of these events approached zero. We reject respondents' cramped notion of personal privacy.

To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. According to Webster's initial definition, information may be classified as "private" if

it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. Indeed, if the summaries were "freely available", there would be no reason to invoke the FOIA to obtain access to the information they contain. Granted, in many contexts the fact that information is not freely available is no reason to exempt that information from a statute generally requiring its dissemination. But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

. . . .

Also supporting our conclusion that a strong privacy interest inheres in the nondisclosure of compiled computerized information is the Privacy Act, codified at 5 U.S.C. § 552a (1982 ed. and Supp. IV). The Privacy Act was passed in 1974 largely out of concern over "the impact of computer data banks on individual privacy." H.R. Rep No. 93-1416, p.7 (1974). The Privacy Act provides generally that "[n]o agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b) (1982 ed., Supp. IV). Although the Privacy Act contains a variety of exceptions to this rule,

including an Exemption for information required to be disclosed under the FOIA, see 5 U.S.C. § 552a(b)(2), Congress' basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer.

. . . .

In addition to the common-law and dictionary understanding, the basic difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public. Most apposite for present purposes is our decision in Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). New York University law students sought Air Force Honor and Ethics Code case summaries for a Law Review project on military discipline. The Academy had already publicly posted these summaries on 40 squadron bulletin boards, usually with identifying names redacted (names were posted for cadets who were found guilty and who left the Academy), and with instructions that cadets should read the summaries only if necessary. Although the opinion dealt with Exemption 6's exception for "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and our opinion today deals with Exemption 7(C), much of our discussion in Rose is applicable here. We explained that the FOIA permits release of a segregable portion of a record with other portions deleted, and that in camera inspection was proper to determine whether parts of a record could be released while keeping other parts secret. See id., at 373-377, 96 S.Ct., at 1604-1607; 5 U.S.C.§§ 552(b) and (a)(4)(B) (1982 ed. and Supp. IV). We emphasized the FOIA's segregability and in camera provisions in order to explain that the case summaries, with identifying names redacted, were generally disclosable.

. . . .

[W]e doubly stressed the importance of the privacy interest implicated by disclosure of the case summaries. First: We praised the Academy's tradition of protecting personal privacy through redaction of names from the case summaries. But even with names redacted, subjects of such summaries can often be identified through other, disclosed information. So, second: Even though the summaries, with only names redacted, had once been public, we recognized the potential invasion of privacy through later recognition of identifying details, and approved the Court of Appeals' rule permitting the District Court to delete "other identifying information" in order to safeguard this privacy interest. If a cadet has a privacy interest in past discipline that was once public but may have been "wholly forgotten," the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.

. . . .

In sum, the fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974). The privacy interest in a rap sheet is substantial. The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains the age of 80, when the FBI's rap sheets are discarded.

. . . .

V

Exemption 7(C), by its terms, permits an agency to withhold a document only when

revelation "could reasonably be expected to constitute an unwarranted invasion of personal privacy." We must next address what factors might warrant an invasion of the interest described in Part IV, supra.

Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus, although the subject of a presentence report can waive a privilege that might defeat a third party's access to that report, United States Department of Justice v. Julian, 486 U.S. ___, ___, 108 S.Ct. 1606, ___, 100 L.Ed.2d 1 (1988), and although the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public, see supra, at 1471, the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer. As we have repeatedly stated, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975); see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221, 98 S.Ct. 2311, 2317, 57 L.Ed.2d 159 (19780; FBI v. Abramson, 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982). As Professor Davis explained: "The Act's sole concern is with what must be made public or not made public."

Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Department of the Air Force v. Rose, 425 U.S., at 372, 96 S.Ct., at 1604,

rather than on the particular purpose for which the document is being requested. In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). In his dissent in that case, Justice Douglas characterized the philosophy of the statute by quoting this comment by Henry Steele Commanger:

> "'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.'" Id. at 105, 93, S.Ct., at 845 (quoting from The New York Review of Books, Oct. 5, 1972, p. 7) (emphasis added).

This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" Department of the Air Force v. Rose, 425 U.S., at 360-361, 96 S.Ct., at 1599 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case - and presumably in the typical case in which one private citizen is seeking information about another - the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

The point is illustrated by our decision in Rose, supra. As discussed earlier, we held that the FOIA required the United States Air

Force to honor a request for in camera submission of disciplinary-hearing summaries maintained in the Academy's Honors and Ethics Code reading files. The summaries obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were an appropriate subject of a FOIA request. All parties, however, agreed that the files should be redacted by deleting information that would identify the particular cadets to whom the summaries related. The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a "clearly unwarranted" invasion of individual privacy. If, instead of seeking information about the Academy's own conduct, the requests had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in Rose would have been inapplicable. In fact, we explicitly recognized that "the basic purpose of the [FOIA is] to open agency action to the light of public scrutiny." Id., at 372, 96 S.Ct. at 1604.

Respondents argue that there is a two-fold public interest in learning about Medico's past arrests or convictions: He allegedly had improper dealings with a corrupt Congressman and he is an officer of a corporation with defense contracts. But if Medico has, in fact, been arrested or convicted of certain crimes, that information would neither aggravate nor mitigate his allegedly improper relationship with the Congressman; more specifically, it would tell us nothing directly about the character of the Congressman's behavior. Nor would it tell us anything about the conduct of the Department of Defense (DOD) in awarding one or more contracts to the Medico Company. Arguably a FOIA request to the DOD for records relating to those contracts, or for documents describing the agency's procedures, if any, for determining whether officers of a prospective contractor have criminal records, would constitute an appropriate request for

"official information." Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

What we have said should make clear that the public interest in the release of any rap sheet on Medico that may exist is not the type of interest protected by the FOIA. Medico may or may not be one of the 24 million persons for whom the FBI has a rap sheet. If respondents are entitled to have the FBI tell them what it knows about Medico's criminal history, any other member of the public is entitled to the same disclosure - whether for writing a news story, for deciding whether or not to employ Medico, to rent a house to him, to extend credit to him, or simply to confirm or deny a suspicion. There is, unquestionably, some public interest in providing interested citizens with answers to their questions about Medico. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve.

. . . .

VI

Both the general requirement that a court "shall determine the matter de novo" and the specific reference to an "unwarranted" invasion of privacy in Exemption 7(C) indicate that a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect. Although

both sides agree that such a balance must be undertaken, how such a balance should be done is in dispute. The Court of Appeals majority expressed concern about assigning federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interest and the public interest in the disclosure of criminal-history information without providing those judges standards to assist in performing that task. Our cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction. The point is well illustrated by both the majority and dissenting opinions in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978).

In Robbins, the majority held that Exemption 7(A), which protects from disclosure law-enforcement records or information that "could reasonably be expected to interfere with enforcement proceedings," applied to statements of witnesses whom the National Labor Relations Board (NLRB or Board) intended to call at an unfair-labor-practice hearing. Although we noted that the language of Exemptions 7(B), (C), and (D), seems to contemplate a case-by-case showing "that the factors made relevant by the statute are present in each distinct situation," id., at 223, 98 S.Ct., at 2318; see id., at 234, 98 S.Ct., at 2323, we concluded that Exemption 7(A) "appears to contemplate that certain generic determinations might be made." Id., at 224, 98 S.Ct. at 2318. Thus, our ruling encompassed the entire category of NLRB witness statements, and a concurring opinion pointed out that the category embraced enforcement proceedings by other agencies as well. See id., at 243, 98 S.Ct., at 2327 (STEVENS, J., concurring). In his partial dissent, Justice Powell endorsed the Court's "generic" approach to the issue, id., at 244, 98 S.Ct. at 2328; he agreed that "the congressional requirement of a specific showing of harm does not prevent determinations of likely harm with respect to prehearing release of particular categories of documents." Id., at 249, 98 S.Ct., at 2330.

In his view, however, the exempt category should have been limited to statements of witnesses who were currently employed by the respondent. To be sure, the majority opinion in Robbins noted that the phrases "'a person,'" "'an unwarranted invasion,'" and "'a confidential source,'" in Exemptions 7(B), (C), and (D), respectively, seem to imply a need for an individualized showing in every case (whereas the plural "'enforcement proceedings'" in Exemption 7(A) implies a categorical determination). See id., at 223-224, 98 S.Ct. at 2318. But since only an Exemption 7(A) question was presented in Robbins, we conclude today, upon closer inspection of Exemption 7(C), that for an appropriate class of law-enforcement records or information a categorical balance may be undertaken there as well.

. . . .

In FTC v. Grolier Inc., 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983), we also supported categorical balancing. Respondent sought FTC documents concerning an investigation of a subsidiary. At issue were seven documents that would normally be exempt from disclosure under Exemption 5, which 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." 5 U.S.C. § 552(b)(5). The Court of Appeals held that four of the documents "could not be withheld on the basis of the work-product rule unless the Commission could show that 'litigation related to the terminated action exists or potentially exists.'" 462 U.S. at 22,103 S.Ct., at 2212. We reversed, concluding that even if in some instances civil-discovery rules would permit such disclosure, "[s]uch materials are ... not 'routinely' or 'normally' available to parties in litigation and hence are exempt under Exemption 5." Id., at 27, 103 S.Ct., at 2214. We added that "[t]his result, by establishing a discrete category of exempt information, implements the congressional intent to provide 'workable' rules.... Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by

means of workable rules be furthered." Id., at 27-28, 103 S.Ct., at 2214-2215 (emphasis added).

Finally: The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. See Parts IV and V, supra. Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided. Accordingly, we hold as a categorical matter that a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." The judgement of the Court of Appeals is reversed.

. . . .

---

e. Notes and Discussion.

Note 1. Remember that the first step in analyzing an Exemption 6 problem is to determine whether there is a cognizable privacy interest in the data at issue. See Hopkins v. Dep't of the Navy, Civil No 84-1868 (D.D.C. Feb 5, 1985) (disclosure ordered because court found no privacy interest in name, rank, and duty station of military personnel assigned to Quantico; fact that requester was a commercial life insurance salesman irrelevant); National W. Life Ins. Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (same for names and duty addresses of Postal Service employees).

Note 2. Should the same rule apply to name and duty addresses of service members assigned to units that are sensitive, routinely deployable, or in foreign territories? DoD reg. 5400.7-R, para 3-200, Number 6b. (IO1, 30 Sept. 1991), provides that "the release of lists of DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy." See, e.g., Hudson v. Dep't of the Army, Civil No. 86-114 (D.D.C. Jan. 29, 1987) ("We would have to be blind in order to deny that the information [names and unit address of service members who have registered vehicles overseas] could be used by terrorists and their supporters in targeting servicemen and women, locating sensitive units, carbombing attacks, and general harassment of United States military personnel."), aff'd, 926 F.2d 1215 (D.C. Cir. 1991) (table cite); Falzone v. Dep't of the Navy, Civil No. 85-3862 (D.D.C. Nov. 21, 1986) ("The potential for threats and terrorist attacks against servicemen stationed at Quantico is small in contrast to the officers whose names and addresses are being withheld here -- officers stationed overseas or with classified, sensitive or deployable units.")

Note 3. DoD Reg. 5400.7-R, para 3-200, has been revised to reflect the Supreme Court's holding that the requester's identity and purpose must be disregarded in making a FOIA disclosure determination. This aspect of Reporters Committee effectively overruled the line of cases which held that a requester's particular circumstances and intention to serve a public interest through its use of the information was considered in the balancing process. See, e.g., Getman v. NLRB, 450 F.2d 670, 674-77 (D.C. Cir. 1971) (holding that labor law professor would serve public interest if given access to employee name-and-address list for empirical study of union election process); Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977) (organization serving retired, disabled military officers held entitled to names and addresses of such personnel), aff'd, 574 F.2d 636 (D.C. Cir. 1979) (table cite). In National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (upholding nondisclosure of names and addresses of federal annuitants to organization that promotes their interests), cert.denied, 494 U.S. 1078 (1990), the D.C. Circuit's first post-Reporters Committee Exemption 6 case, both Getman and Disabled Officer's Ass'n were expressly disapproved.

Note 4. The Supreme Court's narrowing of the relevant "public interest" in Reporters Committee to the FOIA's "core purpose" of "shed[ing] light on an agency's performance of its statutory duties" or informing its citizens about "what their government is up to" will certainly limit the amount of information about individuals that an agency is required to release under the FOIA. Can you think of any circumstance, in the military context, that a disclosure of personal information could serve a "socially useful purpose," but not satisfy the "core purpose" public interest?

Note 5. Recently the Supreme Court was asked to reconsider the "public interest" test it set down in Reporters Committee. In DOD v. FLRA, 114 S. Ct. 1006 (1994), the FLRA sought disclosure of the names and home addresses of all employees within a bargaining unit so that the union could better communicate with the employees in aid of its collective-bargaining responsibilities. The Court recognized that the union was entitled to such information under 5 U.S.C. § 7101(a), "unless otherwise prohibited by law," but noted that the Privacy Act, 5 U.S.C. § 552a(b)(2), prohibited such a disclosure unless required by the FOIA. It summarized this threshold determination by stating that "although this case requires us to follow a somewhat convoluted path of statutory cross-references, its proper resolution depends upon a discrete inquiry: whether disclosure of the home addresses 'would constitute a clearly unwarranted invasion of [the] personal privacy' of bargaining unit employees within the meaning of the FOIA." In holding that the names linked with their respective home addresses were protected under Exemption 6, the Supreme Court flatly rejected the FLRA's attempt to expand the Reporters Committee public interest test to effectuate the purpose of other statutes, in this case 5 U.S.C. § 7101(a) (congressional finding that "labor organizations and collective bargaining in the civil service are in the public interest").

Note 6. In Department of State v. Washington Post Co., 456 U.S. 595 (1982) the Court reversed a series of cases from the D.C. Circuit by giving the phrase "similar files" a broad interpretation. Similar files are any files which contain information about particular individuals and are not limited to files containing intimate details or highly personal information. See also New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc) (voice recording of the Challenger shuttle crew constituted a "similar file" since the tape portrays the crew's individual voices).

Note 7. Recall that Exception 2 permits the release of information when "FOIA requires release." What if information would have to be disclosed if a FOIA request were received, but no FOIA request was in fact received? As an example, if you receive a telephonic request for a copy of an Article 15 just imposed on the deputy commanding general for misappropriation of government property, do you release it? One court would label this a wrongful disclosure. Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984). The court pointed out that the statute allows release only when FOIA "requires" disclosure (i.e. - when you have received a proper FOIA request), not when FOIA would merely "permit" disclosure. Bartel leads to ridiculous results and is not in keeping with the spirit of voluntary disclosure envisioned by FOIA. Because of a bad set of facts, DOJ decided not to seek certiorari. Compare Bartel with Cochran v. United States, 770 F.2d 949 (11th Cir. 1985) (standing oral request from media is sufficient) and Jafari v. Dept. of the Navy, 728 F.2d 247, 249-50 (4th Cir. 1984) (oral request from civilian employer for dates reservist absent from drill is sufficient). Note that even under Bartel, it may be possible to disclose certain types of information "traditionally released by an agency to the public" in the absence of a FOIA request. See 725 F.2d at 1413 (dictum). Such information would include name, rank, date of rank, gross salary, duty assignments, office telephone number, source of commission, promotion sequence number, awards and decorations, educational level, and duty status in most circumstances. See para. 3-3a(1), AR 340-21 (5 July 1985).

4.4 Disclosure for a "Routine Use." 5 U.S.C. § 552a(b)(3).

a. Exception 3 to the disclosure prohibition permits disclosure of a record from a system of records for a routine use as described in the system notice. The Act defines routine use as: "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." All system notices contain a description of the routine use of the records.

b. Besides each individual system notice containing a routine use description, the Department of the Army has published blanket or general routine uses that apply to all systems of records. AR 340-21, para. 3-2.

c. Notes and discussion.

Note 1. Routine uses are construed narrowly by the courts. See Krohn v. DOJ, No. 78-1536 (D.D.C. Mar. 15, 1984) (routine use permitting disclosure during litigation held to be too broad and subject to abuse), modified, Nov. 29, 1984.

Note 2. Under the categorical exclusion found at paragraph 3-2d of AR 340-21 (5 July 1985), how do you process a congressional request for a record from a system of records?

The following guidance was given by the Office of Management and Budget for preparing the routine use for congressional inquiries:

> Implementation of the Privacy Act of 1974, Supplementary Guidance, Office of Management and Budget, 40 Fed. Reg. 56741 (1975)
>
> To assure that implementation of the Act does not have the unintended effect of denying individuals the benefit of congressional assistance which they request, it is recommended that each agency establish the following as a routine use for all of its systems, consistent with subsections (a)(7) and (e)(11) of the Act:
>
> > Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.
>
> The operation of this routine use will obviate the need for the written consent of the individual in every case where an individual requests assistance of the Member which would entail a disclosure of information pertaining to the individual.
>
> In those cases where the congressional inquiry indicates that the request is being made on behalf of a person other than the individual whose record is to be disclosed, the agency should advise the congressional office that the written consent of the subject of the record is required. The agency should not contact the subject unless the congressional office requests it to do so.

In addition to the routine use, agencies can, of course, respond to many congressional requests for assistance on behalf of individuals without disclosing personal information which would fall within the Privacy Act, e.g., a congressional inquiry concerning a missing Social Security check can be answered by the agency by stating the reason for the delay.

Personal information can be disclosed in response to a congressional inquiry without written consent or operation of a routine use--

If the information would be required to be disclosed under the Freedom of Information Act (Subsection (b)(2));

If the Member requests that the response go directly to the individual to whom the record pertains;

In "compelling circumstances affecting the health or safety of an individual * * *" (Subsection (b)(8)); or

To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof * * *"(Subsection (b)(9)).

The routine use recommended above and disclosure thereunder are, of course, subject to the 30 day prior notice requirement of the Act (Subsection (e)(11)). . . . Furthermore, when the congressional inquiry indicates that the request is being made on the basis of a written request from the individual to whom the record pertains, consent can be inferred even if the constituent letter is not provided to the agency.

"<u>This standard for implied consent does not apply to other than congressional inquiries</u>."

Note 3. In Swenson v. Postal Service, 890 F.2d 1075 (9th Cir. 1989), the court ruled that the agency's congressional assistance routine use was not a valid basis for a disclosure of EEO information which was not at all responsive to the constituent's inquiry to her congressman.

4.5 Miscellaneous Authorized Disclosures.

a. Exception 4--disclosure to the Bureau of Census. 5 U.S.C.§ 552a(b)(4).

b. Exception 5--disclosure for statistical research. 5 U.S.C.§ 552a(b)(5).

c. Exception 6--disclosure to the National Archives. 5 U.S.C.§ 552a(b)(6).

d. Exception 7--disclosure for law enforcement purposes. 5 U.S.C. § 552a(b)(7).

Extract
Privacy Act Guidelines at 28955

. . . .

Disclosure for Law Enforcement Purposes. Subsection (b)(7) "To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought:"

An agency may, upon receipt of a written request, disclose a record to another agency or unit of State or local government for a civil or criminal law enforcement for a civil or criminal law enforcement activity. The request must specify--

The law enforcement purpose for which the record is requested; and

The particular record requested.

Blanket requests for all records pertaining to an individual are not permitted. Agencies or other entities seeking disclosure may, of course, seek a court order as a basis for disclosure. See subsection (b)(11).

A record may also be disclosed to a law enforcement agency at the initiative of the agency which maintains the record when a violation of law is suspected; provided, that such disclosure has been established in advance as a "routine use" and that misconduct

is related to the purposes for which the records are maintained. . . . This usage was explicitly addressed by Congressman Moorhead in explaining the House bill, on the floor of the House:

> It should be noted that the "routine use" exception is in addition to the exception provided for dissemination for law enforcement activity under subsection (b)(7) of the bill. Thus a requested record may be disseminated under either the "routine use" exception, the "law enforcement" exception, or both sections, depending on the circumstances of the case. (Congressional Record November 21, 1974, p. H10962.)

In that same discussion, additional guidance was provided on the term "head of the agency" as that term is used in this subsection ((b)):

> The words "head of the agency" deserve elaboration. The committee recognizes that the heads of Government departments cannot be expected to personally request each of the thousands of records which may properly be disseminated under this subsection. If that were required, such officials could not perform their other duties, and in many cases, they could not even perform record requesting duties alone. Such duties may be delegated, like other duties, to other officials, when absolutely necessary but never below a section chief, and this is what is contemplated by subsection (b)(7). The Attorney General, for example, will have the power to delegate the authority to request the thousands of records which may be required for the operation of the Justice Department under this section.

It should be noted that this usage is somewhat at variance with the use of the term "agency head" in subsections (j), and (k), rules and exemptions, where delegations to this extent are neither necessary nor appropriate.

This subsection permits disclosures for law enforcement purposes only to governmental agencies "within or under the control of the United States." Disclosures to foreign (as well as to State and local) law enforcement agencies may, when appropriate, be established as "routine uses."

Records in law enforcement systems may also be disclosed for law enforcement purposes when that disclosure has properly been established as a "routine use"; e.g., statutorily authorized responses to properly made queries to the National Driver Register; transfer by a law enforcement agency of protective intelligence information to the Secret Service.

Note: For release under exception 7, the request from the law enforcement agency must be in writing. Doe v. Naval Air Station, Pensacola, 768 F.2d 1229 (11th Cir. 1985) (telephonic request is not sufficient).

e. Exception 8--disclosure to a person under emergency circumstances. 5 U.S.C. § 552a(b)(8).

f. Exception 9--disclosure to Congress. 5 U.S.C. § 552a(b)(9). This contemplates disclosure only to either House of Congress as a body or to any committee, joint committee, or subcommittee thereof. This exception does not authorize release to individual Members of Congress. But see discussion at para. 4-4c, supra (disclosure for a "routine use").

g. Exception 10--disclosure to the Comptroller General. 5 U.S.C.§ 552a(b)(10).

h. Exception 11--disclosure pursuant to the order of a court of competent jurisdiction. 5 U.S.C. §552a(b)(11). The Judge Advocate General has opined that the phrase "court of competent jurisdiction" refers to any state or federal court which has jurisdiction over the case or matter for which the records are requested, and not only to a court which has jurisdiction over the records custodian personally. DAJA-AL 1975/4685. A subpoena duces tecum issued by the clerk of court is not sufficient--the element of judicial review is missing. Bruce v. United States, 621 F.2d 914 (8th Cir. 1980); Stiles v. Atlanta Gas Light Co. 453 F. Supp. 798 (N.D. Ga. 1978). See Defense Privacy Board Opinion 34.

Note: A federal grand jury subpoena does not qualify as a court order either. Doe v. diGenova, 779 F.2d 74 (D.C. Cir. 1985) (excellent discussion of the difference between "court order" and "judicial process").

i. Exception 12 - disclosure to a consumer reporting agency of an individual's unsatisfied indebtedness to the United States. 5 U.S.C.§ 552a(b)(12). This exception was added by the Debt Collection Act of 1982. Prior to disclosure, the government must afford the individual due process. See 31 U.S.C. § 3711(f).

4.6 Accounting for Disclosures.

a. The Privacy Act requires that when information is disclosed from a system of records that a record of the date, nature and purpose of each disclosure and the name and address of the person or agency to whom it was made must be kept for at least five years or the life of the record, whichever is longer. The accounting requirement does not apply, however, to disclosures within the agency and to disclosures required under the Freedom of Information Act. All other disclosures, even those made with the individual's written consent, must be accounted for. Except for disclosures made under the "law enforcement" provision discussed in para. 4-5d, above, the accounting must be made available to the individual named in the record at his request. If a record is corrected or is disputed by the individual to whom it pertains, such correction or notation of dispute must be forwarded to any person or agency to which an accountable disclosure was made. 5 U.S.C. § 552a(c).

b. The Act also requires that agencies make reasonable efforts to assure that records are accurate, complete, timely, and relevant prior to disclosing them to any person other than a federal department or agency. This requirement does not apply to disclosure required by the Freedom of Information Act. 5 U.S.C. § 552a(e)(6).

c. Finally, the Privacy Act requires that efforts be made to notify an individual when a record pertaining to him is made available under compulsory legal process. 5 U.S.C. § 552a(e)(8).

The Freedom of Information Act
5 U.S.C. §552, As Amended By
The Freedom of Information Reform Act of 1986
Public Law No. 99-570, §§1801-1804

§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying ~~a uniform~~ the schedule of fees applicable to ~~all constituent units of such agency.~~ the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such

Cont'd on next page

Cont'd from preceding page

schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. ~~Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.~~

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

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

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.] Repealed. Pub. L. No. 98-620, §402(2), 98 Stat. 3335, 3357 (1984).

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative

Cont'd on next page

A-2

Cont'd from preceding page

schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. ~~Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.~~

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

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

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.] Repealed. Pub. L. No. 98-620, §402(2), 98 Stat. 3335, 3357 (1984).

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative

Cont'd on next page

Cont'd from preceding page

authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

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

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

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having a substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) ~~investigatory~~ records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ~~would~~ (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, ~~confidential~~ information furnished ~~only~~ by ~~the~~ a confidential source, (E) would disclose ~~investigative~~ techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of ~~law enforcement personnel~~ any individual;

Cont'd on next page

Cont'd from preceding page

(8) 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; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c)(1) 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 or proceeding 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.

(2) 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 this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

~~(c)~~ (d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

~~(d)~~ (e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

~~(e)~~ (f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

* * * * *

Section 1804. Effective Dates [not to be codified].

(a) The amendments made by section 1802 [the modification of Exemption 7 and the addition of the new subsection (c)] shall be effective on the date of enactment of this Act [October 27, 1986], and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

(b)(1) The amendments made by section 1803 [the new fee and fee waiver provisions] shall be effective 180 days after the date of the enactment of this Act [April 25, 1987], except that regulations to implement such amendments shall be promulgated by such 180th day.

(2) The amendments made by section 1803 shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.

Headquarters
Department of the Army
Washington, DC
10 January 1990

APPENDIX B

*Army Regulation 25–55

Effective 9 February 1990

Information Management: Records Management

The Department of the Army Freedom of Information Act Program

This UPDATE printing publishes a new Army regulation.

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

MILTON H. HAMILTON
Administrative Assistant to the Secretary of the Army

Summary. This regulation updates the Freedom of Information Act Program in accordance with the Freedom of Information Reform Act of 1986. The Reform Act required agency promulgation of regulations specifying a uniform schedule of fees and guidelines for determining waiver or reduction of such fees. The regulation conforms with the Office of Management and Budget's (OMB's) Uniform Freedom of Information Act Fee Schedule and Guidelines and is published pursuant to the Freedom of Information Reform Act of 1986 (PL 99–570, 5 USC 552(B)); section 954 of the National Defense Authorization Act for fiscal year 1987 (PL 99–661, 10 USC 2328), as amended by the Defense Technical Corrections Act of 1987 (PL 100–26). It includes all of DOD 5400.7–R dated July 1989 except for appendixes E and F. Army implementing instructions are in boldface type.

Applicability. This regulation applies to the Active Army, the Army National Guard, the U.S. Army Reserve, and organizations for which the Department of the Army is the Executive Agent.

HQDA Information Model Process. This regulation supports Process #17, Manage Information, of the March 1987 Revalidated HQDA Information Model.

Internal control systems. This regulation is subject to the requirements of AR 11–2. It contains internal control provisions and a checklist for conducting internal control reviews.

Supplementation. Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval from HQDA (SAIS–PS), WASH DC 20310–0107.

Interim changes. Interim changes to this regulation are not official unless they are authenticated by the Administrative Assistant to the Secretary of the Army. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested improvements. The proponent agency of this regulation is the Director of Information Systems for Command, Control, Communications, and Computers (DISC4). Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) or in DA Form 2028 format, if they are transmitted electronically, directly to HQDA (SAIS–PS), WASH DC 20310–0107.

Distribution. Distribution of this publication is made in accordance with DA Form 12–09–E, block number 3276, intended for command levels B, C, and D for Active Army, ARNG, and USAR.

Contents (Listed by paragraph number)

Chapter I
General Provisions

Section 1
References
References • 1–100
References (Army) • 1–100.1

Section 2
Purpose and Applicability
Purpose • 1–200
Applicability • 1–201

Section 3
DoD Public Information
Public Information • 1–300
Control System • 1–301

Section 4
Definitions
Definitions • 1–400
FOIA Request • 1–401
Agency Record • 1–402
DoD Component • 1–403
Initial Denial Authority • 1–404
Appellate Authority • 1–405
Administrative Appeal • 1–406
Law Enforcement Investigation • 1–407

Section 5
Policy
Compliance with the FOIA • 1–500
Openness with the Public • 1–501
Avoidance of Procedural Obstacles • 1–502
Prompt Action on Requests • 1–503
Use of Exemptions • 1–504
Public Domain • 1–505
Creating a Record • 1–506
Description of Requested Record • 1–507
Referrals • 1–508
Authentication • 1–509
Unified and Specified Commands • 1–510
Records Management • 1–511

Chapter II
FOIA Reading Rooms

Section 1
Requirements
Reading Room • 2–100
Material Availability • 2–101

Section 2
Indexes
"(a)(2)" Materials • 2–200
Other Materials • 2–201

*This regulation supersedes AR 340–17, 1 October 1982 and rescinds DA Form 4835–R, April 1982.

Chapter III
Exemptions

Section 1
General Provisions
General • 3–100
Jeopardy of Government Interest • 3–101

Section 2
Exemptions
FOIA Exemptions • 3–200

Chapter IV
For Official Use Only

Section 1
General Provisions
General • 4–100
Prior FOUO Application • 4–101
Historical Papers • 4–102
Time to Mark Records • 4–103
Distribution Statement • 4–104

Section 2
Markings
Location of Markings • 4–200

Section 3
Dissemination and Transmission
Release and Transmission Procedures • 4–300
Transporting FOUO Information • 4–301
Electrically Transmitted Messages • 4–302
Telephone usage • 4–303

Section 4
Safeguarding FOUO Information
During Duty Hours • 4–400
During Nonduty Hours • 4–401

Section 5
Termination, Disposal and Unauthorized Disclosures
Termination • 4–500
Disposal • 4–501
Unauthorized Disclosure • 4–502

Chapter V
Release and Processing Procedures

Section 1
General Provisions
Public Information • 5–100
Requests from Private Parties • 5–101
Requests from Government Officials • 5–102
Privileged Release to Officials • 5–103
Required coordination • 5–104

Section 2
Initial Determinations
Initial Denial Authority • 5–200
Reasons for Not Releasing a Record • 5–201
Denial Tests • 5–202
Reasonably Segregable Portions • 5–203
Response to Requester • 5–204
Extension of Time • 5–205
Misdirected Requests • 5–206
Records of Non-U.S. Government Source • 5–207
File of Initial Denials • 5–208
Special Mail Services • 5–209
Receipt Accounts • 5–210

Section 3
Appeals
General • 5–300
Time of Receipt • 5–301
Time Limits • 5–302
Delay in Responding to an Appeal • 5–303
Response to the Requester • 5–304
Consultation • 5–305

Section 4
Judicial Actions
General • 5–400
Jurisdiction • 5–401
Burden of Proof • 5–402
Actions by the Court • 5–403
Non-United States Government Source Information • 5–404
Litigation Status Sheet • 5–405

Chapter VI
Fee Schedule

Section 1
General Provisions
Authorities • 6–100
Application • 6–101
Fee Restrictions • 6–102
Fee Waivers • 6–103
Fee Assessment • 6–104
Aggregating Requests • 6–105
Effect of the Debt Collection Act of 1982 (P.L. 97–365) • 6–106
Computation of Fees • 6–107

Section 2
Collection of Fees and Fee Rates
Collection of Fees • 6–200
Search Time • 6–201
Duplication • 6–202
Review Time • 6–203
Audiovisual Documentary Materials • 6–204
Other Records • 6–205
Costs for Special Services • 6–206

Section 3
Collection of Fees and Fee Rates for Technical Data
Fees for Technical Data • 6–300

Chapter VII
Reports

Section 1
Reports Control
General • 7–100

Section 2
Annual Report
Reporting Time • 7–200
Annual Report Content • 7–201
Annual Report Format • 7–202
Annual Report Worksheet • 7–203

Chapter VIII
Education and Training

Section 1
Responsibility and Purpose
Responsibility • 8–100
Purpose • 8–101
Scope and Principles • 8–102
Implementation • 8–103
Uniformity of Legal Interpretation • 8–104

Internal Control Review Checklists

Appendixes

A. Unified Commands—Processing Procedures for FOI Appeals

B. Addressing FOIA Requests

C. Litigation Status Sheet

D. Other Reason Categories

E. DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost" ***(Removed)***

F. DD Form 2086–1, "Record of Freedom of Information (FOI) Processing Cost for Technical Data" **(Removed)**

G. DoD Freedom of Information Act Program Components

Glossary

Index

Chapter 1
General Provisions

Section 1
References

1–100 References

(a) Title 5, United States Code, Section 552.

(b) DoD Directive 5400.7, "DoD Freedom of Information Act Program," May 13, 1988.

(c) Public Law 86–36, "National Security Information Exemption."

(d) DoD Directive 5400.11, "Department of Defense Privacy Program," June 9, 1982.

(e) DoD 5400.11–R, "Department of Defense Privacy Program," August 1983, authorized by DoD Directive 5400.11, June 9, 1982.

(f) DoD Directive 5100.3, "Support of the Headquarters of Unified, Specified and Subordinate Commands," November 1, 1988.

(g) Title 5, United States Code, Section 551, "Administrative Procedures Act."

(h) DoD 5200.1–R, "DoD Information Security Program Regulation," January 1987, authorized by DoD Directive 5200.1, June 7, 1982.

(i) Title 35, United States Code, Section 181–188, "Patent Secrecy."

(j) Title 42, United States Code, Section 2162, "Restricted Data and Formerly Restricted Data."

(k) Title 18, United States Code, Section 798, "Communication Intelligence."

(l) Title 18, United States Code, Section 3500, "The Jencks Act."

(m) DoD Directive 5230.24, "Distribution Statements on Technical Documents," March 18, 1987.

(n) DoD Directive 5400.4, "Provision of Information to Congress," January 30, 1978.

(o) DoD Directive 7650.1, "General Accounting Office Access to Records," August 26, 1982.

(p) ACP–121 (United States Supplement 1).

(q) Title 44, United States Code, Chapter 33, "Disposal of Records."

(r) DoD Instruction 7230.7, "User Charges," January 29, 1985.

(s) DoD Directive 5000.11, "Data Elements and Data Codes Standardization Program," December 7, 1964.

(t) DoD Directive 7750.5, "Management and Control of Information Requirements," August 7, 1986.

(u) DoD Instruction 5000.22, "Guide to Estimating Costs of Information Requirements," October 17, 1974.

(v) DoD 7220.9–M, "Department of Defense Accounting Manual," October 1983, authorized by DoD Instruction 7220.9, October 22, 1981.

(w) DoD Directive 5230.25, "Withholding of Unclassified Technical Data From Public Disclosure," November 6, 1984.

(x) DoD Directive 5230.9, "Clearance of DoD Information for Public Release," April 2, 1982.

(y) DoD Directive 7650.2, "General Accounting Office Audits and Reports," July 19, 1985.

(z) Title 10, United States Code, Section 2328, "Release of Technical Data."

(aa) Title 10, United States Code, Section 130, "Authority to Withhold from Public Disclosure Certain Technical Data."

(bb) Title 10, United States Code, Section 2320–2321, "Rights in Technical Data."

(cc) Title 10, United States Code, Section 1102, "Confidentiality of Medical Quality Records: Qualified Immunity Participants."

(dd) DoD Federal Acquisition Regulation Supplement (DFARS), Subpart 27.4, "Technical Data, Other Data, Computer Software and Copyrights," May 18, 1987.

(ee) Executive Order 12600, "Predisclosure Procedures for Confidential Commercial Information," June 23, 1987.

(ff) Title 31, United States Code, Section 3717.

(gg) Title 5, United States Code, Section 552a, as amended, "The Privacy Act of 1974."

(hh) DoD 5000.12–M, "DoD Manual for Standard Data Elements," October 1986, authorized by DoD Instruction 5000.12, April 27, 1965.

(ii) DoD Instruction 5400.10, "OSD Implementation of DoD Freedom of Information Act Program," August 20, 1981.

(jj) Title 32, Code of Federal Regulations, Part 518.

1–100.1 References (Army)

a. Required publications.

(1) AR 1–20 (Legislative Liaison) (cited in paras 4–300 and 5–103)

(2) AR 20–1 (Inspector General Activities and Procedures) (cited in paras 1–201, 5–200, and app B)

(3) AR 25–1 (The Army Information Resources Management Program) (cited in paras 1–200 and 1–511)

(4) AR 25–9 (Army Data Management and Standards Program) (cited in para 7–200)

(5) AR 25–400–2 (The Modern Army Recordkeeping System (MARKS)) (cited in paras 1–511, 4–501, 5–208, and app B)

(6) AR 27–20 (Claims) (cited in paras 1–201 and 5–101)

(7) AR 36–2 (Processing Internal and External Audit Reports and Follow-up on Findings and Recommendations) (cited in para 1–201)

(8) AR 40–66 (Medical Record and Quality Assurance Administration) (cited in para 1–201)

(9) AR 40–400 (Patient Administration) (cited in para 1–201)

(10) AR 105–31 (Record Communications) (cited in para 4–302)

(11) AR 195–2 (Criminal Investigation Activities) (cited in paras 1–201 and 5–103)

(12) AR 340–21 (The Army Privacy Program) (cited in paras 1–503, 3–200, 5–101, and 5–103)

(13) AR 360–5 (Public Information) (cited in paras 1–201 and 5–101)

(14) AR 380–5 (Department of the Army Information Security Program) (cited in paras 1–201, 3–200, 5–100, and 5–103)

(15) AR 530–1 (Operations Security (OPSEC)) (cited in paras 1–501 and 5–100)

(16) AR 600–85 (Alcohol and Drug Abuse Prevention and Control Program) (cited in paras 1–201 and 5–101)

b. Related publications. **A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.**

(1) AR 5–3 (Installation Management and Organization)

(2) AR 10–series (Organization and Functions)

(3) AR 25–3 (Army Life Cycle Management of Information Systems)

(4) AR 27–10 (Military Justice)

(5) AR 27–40 (Litigation)

(6) AR 27–60 (Patents, Inventions, and Copyrights)

(7) AR 60–20 (Army and Air Force Exchange Service (AAFES) Operating Policies) (AFR 147–14)

(8) AR 70–31 (Standards for Technical Reporting)

(9) AR 190–45 (Military Police Law Enforcement Reporting)

(10) AR 380–10 (Department of the Army Policy for Disclosure of Information, Visits, and Accreditation of Foreign Nationals (U))

(11) AR 381–45 (Investigative Records Repository (IRR))

(12) AR 385–40 (Accident Reporting and Records)

(13) AR 640–10 (Individual Military Personnel Records)

(14) DA Pam 25–30 (Consolidated Index of Army Publications and Blank Forms)

(15) DA Pam 25–51 (The Army Privacy Program—Systems Notices and Exemption Rules)

(16) DA Pam 385–95 (Aircraft Accident Investigation and Reporting)

(17) DoD 4500.11–PH (Defense Privacy Board Advisory Opinions)

(18) Title 10, United States Code, Section 128, "Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information"

c. Prescribed forms.

(1) DA Form 4948-R (Freedom of Information Act (FOIA/ Operations Security) (OPSEC) Desktop Guide) (prescribed in paras 1-501 and 5-100)

(2) DA Label 87 (For Official Use Only Cover Sheet) (prescribed in para 4-301 and 4-400)

(3) DD Form 2086 (Record of Freedom of Information (FOI) Processing Cost) (prescribed in para 6-104)

(4) DD Form 2086-1 (Record of Freedom of Information (FOI) Processing Cost for Technical Data) (prescribed in para 6-300a)

Section 2
Purpose and Applicability

1-200 Purpose

The purpose of this Regulation is to provide policies and procedures for the Department of Defense (DoD) implementation of the Freedom of Information Act and DoD Directive 5400.7 (references (a) and (b)) and to promote uniformity in the DoD Freedom of Information Act (FOIA) Program. **This Army regulation implements provisions for access and release of information from all Army information systems (automated and manual) in support of the Information Resources Management Program (AR 25-1).**

1-201 Applicability

a. This Regulation applies to the Office of the Secretary of Defense (OSD), which includes for the purpose of this Regulation the Joint Staff, Unified Commands, the Military Departments, the Defense Agencies, and the DoD Field Activities (hereafter referred to as "DoD Components"), and takes precedence over all Component regulations that supplement the DoD FOIA Program. A list of DoD Components is at enclosure 1 **(app G)**.

b. The National Security Agency records are subject to the provisions of this Regulation, only to the extent the records are not exempt under Public Law 86-36 (reference (c)).

c. This AR applies to—

(1) Active Army.

(2) Army National Guard.

(3) U.S. Army Reserve.

(4) Organizations for which the Department of the Army (DA) is the Executive Agent.

***d.* This regulation governs written FOIA requests from members of the public. It does not preclude release of personnel or other records to agencies or individuals in the Federal Government for use in official work. Paragraph 5-103*a* gives procedures for release of personnel information to Government agencies outside DOD.**

***e.* Soldiers and civilian employees of the Department of the Army may, as private citizens, request DA or other agencies' records under the FOIA. They must prepare requests at their own expense and on their own time. They may not use Government equipment, supplies, or postage to prepare personal FOIA requests. It is not necessary for soldiers or civilian employees to go through the chain of command to request information under the FOIA.**

***f.* Requests for DA records processed under the FOIA may be denied only in accordance with the FOIA (5 USC 552(b)), as implemented by this regulation. Guidance on the applicability of the FOIA is also found in the Federal Acquisition Regulation (FAR) and in the Federal Personnel Manual (FPM).**

***g.* Release of some records may also be affected by the programs that created them. They are discussed in the following regulations:**

(1) AR 20-1 (Inspector General reports).

(2) AR 27-10 (military justice).

(3) AR 27-20 (claims reports).

(4) AR 27-60 (patents, inventions, and copyrights).

(5) AR 27-40 (litigation: release of information and appearance of witnesses).

(6) AR 36-2 (GAO audits).

(7) AR 40-66 and AR 40-400 (medical records).

(8) AR 70-31 (technical reports).

(9) AR 20-1, AR 385-40, and DA Pam 385-95 (aircraft accident investigations).

(10) AR 195-2 (criminal investigation activities).

(11) AR 190-45 (Military Police records and reports).

(12) AR 360-5 (Army public affairs: public information, general policies on release of information to the public).

(13) AR 380-10 (release of information on foreign nationals).

(14) AR 381-45 (U.S. Army Intelligence and Security Command investigation files).

(15) AR 385-40 (safety reports and records).

(16) AR 600-85 (alcohol and drug abuse records).

(17) AR 640-10 (military personnel records).

(18) AR 690 series, FPM Supplement 293-31; FPM chapters 293, 294, and 339 (civilian personnel records).

(19) AR 380-5 and DOD 5200.1-R (national security classified information).

(20) Federal Acquisition Regulation (FAR), DOD Federal Acquisition Regulation Supplement (DFARS), and the Army Federal Acquisition Regulation Supplement (AFARS) (procurement matters).

(21) AR 380-5, paragraph 7-101*e* (policies and procedures for allowing persons outside the Executive Branch to do unofficial historical research in classified Army records).

Section 3
DoD Public Information

1-300 Public Information

The public has a right to information concerning the activities of its Government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A DoD record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall be withheld only when it is exempt from mandatory public disclosure under the FOIA. In the event a requested record is exempt under the FOIA, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by the release of the record. (See para 3-101 for clarification.) In order that the public may have timely information concerning DoD activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request **unless the requested records are in a system of records; such records in a system of records will not be released absent a written request under the FOIA, unless otherwise releasable under the Privacy Act.** Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other members of the public for information should continue to be honored through appropriate means even though the request does not qualify under FOIA requirements.

1-301 Control System

a. A request for records that invokes the FOIA shall enter a formal control system designed to ensure compliance with the FOIA. A release determination must be made and the requester informed within the time limits specified in this Regulation. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this Regulation or under the Privacy Act (reference (gg)), when the request is from the subject of the records requested (see paragraph 1-503), **and the records requested are in a system of records.**

***b.* A request under the Privacy Act of 1974 (5 USC 552a) for access to records should also be processed as a FOIA request. If any part of the requested material is to be denied, the substantive**

provisions of both the Privacy Act and the Freedom of Information Act must be considered. Any withholding of information from a system of records must be justified under an exemption in each act.

Section 4
Definitions

1–400 Definitions
As used in this Regulation, the following terms and meanings shall be applicable.

1–401 FOIA Request
A written request for DoD records, made by a member of the public, that either explicitly or implicitly invokes the FOIA, DoD Directive 5400.7 (reference (b)), this Regulation, or DoD Component supplementing regulations or instructions. **This regulation is the Department of the Army's supplementing regulation.**

1–402 Agency Record
a. The products of data compilation, regardless of physical form or characteristics, made or received by a DoD Component in connection with the transaction of public business and preserved by a DoD Component primarily as evidence of the organization, policies, functions, decisions, or procedures of the DoD Component.

b. The following are not included within the definition of the word "record":

1. Library and museum material made, acquired, and preserved solely for reference or exhibition.

2. Objects or articles, such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles and equipment, whatever their historical value, or value as evidence.

3. Commercially exploitable resources and administrative tools by which records are created, stored, and retrieved, including but not limited to:

(i) Maps, charts, map compilation manuscripts, map research materials and data if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of a DoD Component.

(ii) Computer software, if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of a DoD Component. (This does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software).

4. Unaltered publications and processed documents, such as regulations, manuals, maps, charts, and related geophysical materials, that are available to the public through an established distribution system with or without charges.

5. Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

6. Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

7. Information stored within a computer for which there is no existing computer program or printout. **Within the Department of the Army, information stored in a computer for which there is no existing software program to extract the information or a printout of the information.**

c. A record must exist and be controlled by the Department of Defense at the time of the request to be considered subject to this Regulation. There is no obligation to create, compile, or obtain a record to satisfy an FOIA request.

1–403 DoD Component
An element of the Department of Defense, as defined in paragraph 1–201 above, authorized to receive and act independently on FOIA requests. A DoD Component has its own initial denial authority (IDA) or appellate authority, and general counsel. **The Department of the Army is a DOD Component.**

1–404 Initial Denial Authority (IDA)
An official who has been granted authority by the head of a DoD Component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure. **The Department of the Army's Initial Denial Authorities are designated in paragraph 5–200*d*.**

1–405 Appellate Authority
The Head of the DoD Component or the Component head's designee having jurisdiction of this purpose over the record. **The Department of the Army's appellate authority is the Office of General Counsel.**

1–406 Administrative Appeal
A request by a member of the general public, made under the FOIA, asking the appellate authority of a DoD Component to reverse an IDA decision to withhold all or part of a requested record or to deny a request for waiver or reduction of fees.

1–407 Law Enforcement Investigation
An investigation conducted by a command or agency for law enforcement purposes relating to crime, waste, or fraud or for national security reasons. Such investigations may include gathering evidence for criminal prosecutions and for civil or regulatory proceedings.

Section 5
Policy

1–500 Compliance with the FOIA
DoD personnel are expected to comply with the provisions of the FOIA and this Regulation in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust.

1–501 Openness with the Public
The Department of Defense shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not specifically exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

a. Operations Security (OPSEC). **DA officials who release records under the FOIA must also consider OPSEC. The Army implementing directive is AR 530–1. Paragraph 5–100 of this regulation gives the procedure for FOIA personnel and the IDA to follow when a FOIA request appears to involve OPSEC.**

b. DA Form 4948–R. **This form lists references and information frequently used for FOIA requests related to OPSEC. Persons who routinely deal with the public (by telephone or letter) on such requests should keep the form on their desks as a guide. DA Form 4948–R (Freedom of Information Act (FOIA)/Operations Security (OPSEC) Desk Top Guide) will be locally reproduced on 8½ × 11-inch paper. A copy for reproduction purposes is located at the back of this regulation. The name and telephone number of the command FOIA/OPSEC adviser will be entered on the form.**

1–502 Avoidance of Procedural Obstacles
DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this Regulation and any supplemental regulations published by the DoD Components.

1–503 Prompt Action on Requests
When a member of the public complies with the procedures established in this Regulation for obtaining DoD records, the request shall receive prompt attention; a reply shall be dispatched within 10 working days, unless a delay is authorized. When a Component

has a significant number of requests, e.g., 10 or more, the requests will be processed in order of receipt. However, this does not preclude a Component from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. Requests by individuals for access to records about themselves are processed under the provisions of the respective Act cited in the request (except as prescribed in para 1–301*a*). Requests that cite *both Acts or neither Act* are processed under both *Acts*, using the fee provisions of the Federal Privacy Act and the time limits of the FOIA. If access is controlled by another Federal statute, follow the provisions of the controlling statute and paragraph 3–200, *Number 3* of this Regulation. For further details, see DoD 5400.11–R (reference (e)). Even though a request that invokes the FOIA is administratively processed under the Privacy Act (reference (gg)) procedures, no record shall be withheld that would be released under FOIA procedures.

a. **The 10-day period prescribed for review of initial requests under the FOIA (5 USC 552(a)(6)) starts only when the request—**

(1) Is in writing.

(2) Reasonably describes the record requested.

(3) Does not fall in a category described in paragraph 1–509, which requires an authentication seal.

(4) Is received by the proper official designated to answer the request (see app B).

(5) Meets the procedural requirements of this regulation. (See para 6–104*b*9.)

b. **All requests should refer explicitly or implicitly to the Freedom of Information Act, to ensure their prompt recognition as FOIA actions. Both the letter of request and the envelope in which it is sent should be clearly marked "FREEDOM OF INFORMATION ACT REQUEST."**

c. **Members of the public who make FOIA requests should carefully follow the guidance in this regulation. They should send requests to the office that has the desired record or to a specific agency FOIA official for referral. The Army Freedom of Information and Privacy Act Division, Information Systems Command–Pentagon, ATTN: ASQNS–OP–F, Room 1146, Hoffman Building I, Alexandria, VA 22331–0301 can supply correct addresses.**

d. **See AR 340–21 for Privacy Act procedures.**

1–504 Use of Exemptions

a. Records that may be withheld under the exemptions outlined in Chapter III of this Regulation shall be made available to the public when it is determined that no governmental interest will be jeopardized by their release. Determination of jeopardy to governmental interest is within the sole discretion of the Component ***(IDA)***, consistent with statutory requirements, security classification requirements, or other requirements of law.

b. **Parts of a requested record may be exempt from disclosure under the FOIA. The proper DA official may delete exempt information and release the remainder to the requester. The proper official also has the discretion under the FOIA to release exempt information; he or she must exercise this discretion in a reasonable manner, within regulations.**

1–505 Public Domain

Nonexempt records released under the authority of this Regulation are considered to be in the public domain. Nonexempt records maintained in a DoD Component's Public Reading Room, or which can be made available in the Public Reading Room within a short time frame (15 minutes or less) are considered to be in the public domain. Exempt records released pursuant to this Regulation or other statutory or regulatory authority, however, may be considered to be in the public domain only when their release constitutes a waiver of the FOIA exemption. When the release does not constitute such a waiver, such as when disclosure is made to a properly constituted advisory committee or to a Congressional Committee, the released records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this Regulation apply if the same individual seeks the records in a private or personal capacity.

1–506 Creating a Record

A record must exist and be in the possession and control of the Department of Defense at the time of the search to be considered subject to this Regulation. Mere possession of a record does not presume departmental control and such records, or identifiable portions thereof, would be referred to the originating Agency for direct response to the requester. There is no obligation to create nor compile a record to satisfy an FOIA request. A DoD Component, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessment for direct search, review (in the case of commercial requesters), and duplication associated with the request shall be in accordance with paragraph 6–101. **Requested records, or portions thereof, may be located at several Army offices. The official receiving the FOIA request will refer it to those other offices for direct reply if—**

a. **The information must be reviewed for release under the FOIA; and**

b. **Assembling the information would interfere materially with DA operations at the site first receiving the request.**

1–507 Description of Requested Record

a. Identification of the record desired is the responsibility of the member of the public who requests a record. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. The Act does not authorize "fishing expeditions." When a DoD Component receives a request that does not "reasonably describe" the requested record, it shall notify the requester of the defect. The defect should be highlighted in a specificity letter, asking the requester to provide the type of information outlined below in subparagraph 1–507, *b.* of this Regulation. Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, Components shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act. **DA officials will reply to unclear requests by letter. The letter will—**

1. **Describe the defects in the request.**

2. **Explain the types of information in *b* below, and ask the requester for such information.**

3. **Explain that no action will be taken on the request until the requester replies to the letter.**

b. The following guidelines are provided to deal with "fishing expedition" requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories.

1. Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

2. Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

c. Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, nonrandom search based on the Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

d. The following guidelines deal with requests for personal records. Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records retrievable by personal identifiers need be searched.

Search for such records may be conducted under Privacy Act procedures. No record may be denied that is releasable under the FOIA.

e. The above guidelines notwithstanding, the decision of the DoD Component concerning reasonableness of description must be based on knowledge of its files. If the description enables DoD Component personnel to locate the record with reasonable effort, the description is adequate.

1–508 Referrals

a. A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other Component confirms that it has the requested record, and this belief can be confirmed by the other DoD Component. In cases where the Component receiving the request has reason to believe that the existence or nonexistence of the record may in itself be classified, that Component will consult the DoD Component having cognizance over the record in question before referring the request. If the DoD Component that is consulted determines that the existence or nonexistence of the record is in itself classified, the requester shall be so notified by the DoD Component originally receiving the request, and no referral shall take place. Otherwise, the request shall be referred to the other DoD Component, and the requester shall be notified of any such referral. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. **Within the Army, referrals will be made directly to offices that may have custody of requested records. If the office receiving the FOIA request does not know where the requested records are located, the request and an explanatory cover letter will be forwarded to The Army Freedom of Information and Privacy Act Division, Information Systems Command, Pentagon, ATTN: ASQNS–OP–F, Room 1146, Hoffman Building I, Alexandria, VA 22331–0301.**

b. Whenever a record or a portion of a record is, after prior consultation, referred to another DoD Component or to a Government agency outside of the Department of Defense for a release determination and direct response, the requester shall be informed of the referral. Referred records shall only be identified to the extent consistent with security requirements.

c. A DoD Component shall refer an FOIA request for a classified record that it holds to another DoD Component or agency outside the Department of Defense, if the record originated in the other DoD Component or outside agency or if the classification is derivative. In this situation, provide the record and a release recommendation on the record with the referral action.

d. A DoD Component may also refer a request for a record that it originated to another DoD Component or agency when the record was created for the use of the other DoD Component or agency. The DoD Component or agency for which the record was created may have an equally valid interest in withholding the record as the DoD Component that created the record. In such situations, provide the record and a release recommendation on the record with the referral action. An example of such a situation is a request for audit reports prepared by the Defense Contract Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor should be at the discretion of the contracting officer. Any FOIA request shall be referred to the appropriate contracting officer and the requester shall be notified of the referral.

e. Within the Department of Defense, a Component shall ordinarily refer an FOIA request for a record that it holds, but that was originated by another DoD Component or that contains substantial information obtained from another DoD Component, to that Component for direct response, after direct coordination and obtaining concurrence from the Component. The requester then shall be notified of such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component.

f. DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA and this Regulation. Those time limits shall begin to run upon receipt of the referral by the official designated to respond.

g. Agencies outside the Department of Defense that are subject to the FOIA:

1. A Component may refer an FOIA request for any record that originated in an agency outside the DoD or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the Component must respond to the request.

2. A DoD Component shall not honor any FOIA request for investigative, intelligence, or any other type of records that are on loan to the Department of Defense for a specific purpose, if the records are restricted from further release and so marked. Such requests shall be referred to the agency that provided the record.

3. Notwithstanding anything to the contrary in paragraph 1–508, a Component shall notify requesters seeking National Security Council (NSC) or White House documents that they should write directly to the NSC or White House for such documents. DoD documents in which the NSC or White House has a concurrent reviewing interest shall be forwarded to the Office of the Assistant Secretary of Defense (Public Affairs)(OASD(PA)), ATTN: Directorate For Freedom of Information and Security Review (DFOISR), which shall effect coordination with the NSC or White House, and return the documents to the originating agency after NSC review and determination. NSC or White House documents discovered in Components' files which are responsive to the FOIA request shall be forwarded to OASD(PA), ATTN: DFOISR, for subsequent coordination with the NSC or White House, and returned to the Component with a release determination.

h. To the extent referrals are consistent with the policies expressed by this paragraph, referrals between offices of the same DoD Component are authorized.

i. On occasion, the Department of Defense receives FOIA requests for Government Accounting Office (GAO) documents containing DoD information, either directly from requesters, or as referrals from the GAO. The GAO is outside the Executive Branch, and as such, all FOIA requests for GAO documents containing DoD information will be processed under the provisions of Security Review or Mandatory Declassification Review (MDR) Directives (references h and x). Requests received in DoD for unclassified GAO reports containing DoD information shall be transferred to the GAO Distribution Center, ATTN: DHISF, P.O. Box 6015, Gaithersburg, MD 20877–1450. Requests received in the Department of Defense for classified GAO documents (or documents unidentifiable as to classification) shall be referred to the GAO, Office of Security and Safety, Washington, DC 20548–0001. After internal review, the GAO shall refer the request and documents to Office of the Inspector General, Department of Defense (OIG, DoD), and that Component shall refer the action to the OASD(PA), ATTN: DFOISR, for processing under Security Review or MDR provisions. (See reference y). **In DA, requests received for GAO documents that contain classified Army information will be handled by the Army Inspector General's Office.**

1–509 Authentication

Records provided under this Regulation shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of $5.20 for each authentication.

1–510 Unified and Specified Commands

a. **The Unified Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3 (reference (f)); it authorizes and requires the Unified Commands to process Freedom of Information (FOI) requests**

in accordance with DoD Directive 5400.7 (reference (b)) and this Regulation. The Unified Commands shall forward directly to the OASD(PA), all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. Procedures to effect this administrative requirement are outlined in Appendix A. **For Army components of unified commands, if the requested records are joint documents, process the FOIA request through unified command channels. If the requested documents are Army-unique, process the FOIA request through Army channels.**

b. The Specified Commands remain under the jurisdiction of the administering Military Department. The Commands shall designate IDAs within their headquarters; however, the appellate authority shall reside with the Military Department.

1-511 Records Management

FOIA records shall be maintained and disposed of in accordance with DoD Component Disposition instructions and schedules. **See AR 25-400-2. AR 25-1 contains Army policy for records management requirements in the life cycle management of information. Information access and release, to include potential electronic access by the public, will be considered during information systems design.**

Chapter II
FOIA Reading Rooms

Section 1
Requirements

2-100 Reading Room

Each Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the materials described below. DoD Components may share reading room facilities if the public is not unduly inconvenienced. The cost of copying shall be imposed on the person requesting the material in accordance with the provisions of Chapter VI of this Regulation. **The Army FOIA Reading Room is operated by The Freedom of Information and Privacy Act Division, Information Systems Command-Pentagon. It is located in Room 1146, Hoffman Building I, 2461 Eisenhower Avenue, Alexandria, VA 22331-0301. It is open from 0800 to 1530, Monday through Friday, except holidays.**

2-101 Material Availability

The FOIA requires that so-called "(a)(2)" materials shall be made available in the FOIA reading room for inspection and copying, unless such materials are published and copies are offered for sale. Identifying details that, if revealed, would create a clearly unwarranted invasion of personal privacy may be deleted from "(a)(2)" materials made available for inspection and copying. In every case, justification for the deletion must be fully explained in writing. However, a DoD Component may publish in the *Federal Register* a description of the basis upon which it will delete identifying details of particular types of documents to avoid clearly unwarranted invasions of privacy. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. So-called "(a)(2)" materials are:

a. Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551 (reference (g)), that may be cited, used, or relied upon as precedents in future adjudications.

b. Statements of policy and interpretations that have been adopted by the agency and are not published in the *Federal Register.*

c. Administrative staff manuals and instructions, or portions thereof, that establish DoD policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DoD Component. Examples of manuals and instructions not normally made available are:

1. Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

2. Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

Section 2
Indexes

2-200 "(a)(2)" Materials

a. Each DoD Component shall maintain in each facility prescribed in paragraph 2-100, above, an index of materials described in paragraph 2-101, above, that are issued, adopted, or promulgated, after July 4, 1967. No "(a)(2)" materials issued, promulgated, or adopted after July 4, 1967 that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this Regulation.

b. Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of "(a)(2)" materials or supplements thereto unless it publishes in the *Federal Register* an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in Chapter VI of this Regulation.

c. Each index of "(a)(2)" materials or supplement thereto shall be arranged topically or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

2-201 Other Materials

a. Any available index of DoD Component material published in the *Federal Register,* such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms. **Army "(a)(2)" materials are published in DA Pam 25-30.**

b. Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, "(a)(1)" materials shall, when feasible, be made available in FOIA reading rooms for inspection and copying. Examples of "(a)(1)" materials are: descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

Chapter III
Exemptions

Section 1
General Provisions

3-100 General

Records that meet the exemption criteria in Section 2 of this Chapter may be withheld from public disclosure and need not be published in the *Federal Register,* made available in a library reading room, or provided in response to an FOIA request.

3–101 Jeopardy of Government Interest

An exempted record, other than those being withheld pursuant to Exemptions 1, 3 or 6, shall be made available upon the request of any individual when, in the judgment of the releasing DoD Component or higher authority, no jeopardy to government interest would be served by release. It is appropriate for DoD Components to use their discretionary authority on a case-by-case basis in the release of given records. If a DoD Component determines that a record requested under the FOIA meets the Exemption 4 withholding criteria set forth in this Regulation, the DoD Component shall not ordinarily exercise its discretionary power to release, absent circumstances in which a compelling public interest will be served by release of that record. Further guidance on this issue may be found at paragraphs 3–200, *Number 4.* and 5–207 of this Regulation.

Section 2
Exemptions

3–200 FOIA Exemptions

The following types of records may be withheld **by the IDA** in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law.

Number 1. Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations, such as DoD 5200.1–R (reference (h)). Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1–R, Section 2–204f., apply. **The procedures in AR 380–5 apply to Army activities. Also, when the confirmation or denial of the existence of responsive records to a FOIA request may, in and of itself, reveal exempt information, an agency may respond to the request by refusing to confirm or deny whether such records exist. Such a response should be used only when clearly warranted.**

Number 2. Those containing or constituting rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or practices of a DoD Component if their release to the public would substantially hinder the effective performance of a significant function of the Department of Defense and they do not impose requirements directly on the general public. Examples include:

a. Those operating rules, guidelines, and manuals for DoD (Army) investigators, inspectors, auditors, or examiners that must remain privileged in order for the DoD Component (Army) to fulfill a legal requirement.

b. Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

c. Lists of DoD personnel names and duty addresses (civilian and military) created primarily for internal, trivial, housekeeping purposes for which there is no legitimate public interest or benefit. This exemption is appropriate when it would impose an administrative burden to process the request, and the requester is not seeking the information for the benefit of the general public (see also paragraph 3–200, *Number 6.b.*).

***d.* Negotiation and bargaining techniques, practices, and limitations.**

Number 3. Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. Examples of statutes are:

a. National Security Agency Information Exemption, P.L. 86–36, Section 6 (reference (c)).

b. Patent Secrecy, 35 U.S.C. 181–188 (reference (i)). Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

c. Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162 (reference (j)).

d. Communication Intelligence, 18 U.S.C. 798 (reference (k)).

e. Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25 (reference (w) and (aa)).

f. Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 U.S.C. 1102 (reference (cc)).

***g.* Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 USC 128.**

Number 4. Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate government interest. Examples include records that contain:

a. Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data.

b. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

c. Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

d. Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

e. Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

f. Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320–2321 and DoD Federal Acquisition Regulation Supplement (DFARS), Subpart 27.4 (references (bb) and (dd)). Technical data developed exclusively with Federal funds may be withheld under exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 (reference (w)) (see subparagraph 3–200, *Number 3.e.*).

Number 5. Except as provided in subparagraphs 3–200, *Number 5.* b. through e., below, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e) (reference (a)) or within or among DoD Components.

a. Examples include:

1. The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions or suggestions.

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

3. Those nonfactual portions of evaluations by DoD Component personnel of contractors and their products.

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

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

6. Records that are exchanged among agency personnel and within and among DoD Components or agencies as part of the preparation for anticipated administrative proceeding by an agency or litigation before any Federal, State, or military court, as well as records that qualify for the attorney-client privilege.

7. Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

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

c. Intra or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through "discovery," and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

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

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

Number 6. Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy.

a. Examples of other files containing personal information similar to that contained in personnel and medical files include:

1. Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

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

b. In determining whether the release of information would result in a "clearly unwarranted invasion of personal privacy," consideration shall be given to the stated or ascertained purpose of the request, **but only to the extent that the purpose of the request assists in determining whether the information requested would shed light on the agency's performance of its duties.** When determining whether a release is "clearly unwarranted," the public interest in satisfying this purpose must be balanced against the sensitivity of the privacy interest being threatened. One example of such is lists of names and duty addresses of DoD personnel (civilian and military) assigned to units that are sensitive, routinely deployable, or stationed in foreign territories. Release of such information could aid in the targeting of DoD employees and their families by terrorists (see also subparagraph 3–200, *Number 2.c.*). This exemption shall not be exercised in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

c. Individuals' personnel, medical, or similar file may be withheld from them or their designated legal representative only to the extent consistent with DoD Directive 5400.11 (reference (d)). **The Army implementing directive is AR 340–21.**

d. A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record.

***e.* Requests for access to or release of records, before appellate review, of courts-martial or special courts-martial involving a bad conduct discharge should be addressed as in appendix B, paragraph 5. This guidance does not preclude furnishing records of a trial to an accused.**

Number 7. Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law. **This exemption also applies to law enforcement investigations such as Inspector General investigations.**

a. This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

1. Could reasonably be expected to interfere with enforcement proceedings.

2. Would deprive a person of the right to a fair trial or to an impartial adjudication.

3. Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record.

***(a)* When the confirmation of the existence of responsive records to a FOIA request could, in and of itself, reveal personally private information, an agency may respond to the request by refusing to confirm or deny whether such records exist. However, such a response, if used at all, must be used consistently, not only when records actually exist that need to be withheld, but also when responding to a request for records that do not exist. Otherwise, a "no records" response when records do not exist and a "refusal to confirm or deny" when records do exist will only confirm to the requester that the records do exist.**

***(b)* A response that refuses to confirm or deny the existence of records that do exist is justified only when there is a cognizable privacy interest at stake and there is insufficient public interest in disclosure to outweigh it. Refusal to confirm or deny should not be used when (1) the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; (2) the person whose personal privacy is in jeopardy is deceased, and the agency is aware of that fact; or (3) the Government has already officially confirmed that the person was or is the subject of a law enforcement investigation.**

4. Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense, a State, local, or foreign agency or authority, or any private institution which furnishes the information on a confidential basis.

5. Could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

6. 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.

7. Could reasonably be expected to endanger the life or physical safety of any individual.

b. Examples include:

1. Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

2. The identity of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense (Army) when no indictment has been obtained nor any civil action filed against them by the United States.

3. Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

c. The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500, reference (l)) is not diminished.

d. When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by DoD Directive 5400.11 (reference (d)). **The Army implementing directive is AR 340–21.**

e. Exclusions. Excluded from the above exemption are the following two situations applicable to the Department of Defense:

1. Whenever a request is made which involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstance continues, treat the records or information as not subject to exemption 7 (the FOIA). In such situation, the response to the requester will state that no records were found.

2. Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to exemption 7 (the FOIA), unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to exemption 7 (the FOIA), the response to the requester will state that no records were found.

Number 8. Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

Number 9. Those containing geological and geophysical information and data (including maps) concerning wells.

Chapter IV
For Official Use Only

Section 1
General Provisions

4–100 General

Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of the reasons cited in FOIA exemptions 2 through 9 shall be considered as being for official use only. *No other material shall be considered or marked "For Official Use Only"* (FOUO), and FOUO is not authorized as an anemic form of classification to protect national security interests.

4–101 Prior FOUO Application

The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release.

4–102 Historical Papers

Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special status apart from the exemptions under the FOIA (reference (a)).

4–103 Time to Mark Records

The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

4–104 Distribution Statement

Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24 (reference (m)) shall bear that statement and shall not be marked FOUO.

Section 2
Markings

4–200 Location of Markings

a. An unclassified document containing FOUO information shall be marked "For Official Use Only" **in bold letters at least 3/16 of an inch high** at the bottom on the outside of the front cover (if any), on the first page, and on the outside of the back cover (if any).

b. Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

c. Within a classified or unclassified document, an individual page that contains FOUO information but no classified information shall be marked "For Official Use Only" at the bottom of the page. **The paragraph(s) containing the "For Official Use Only" information should also be marked with the initials FOUO.**

d. Other records, such as, photographs, films, tapes, or slides, shall be marked "For Official Use Only" or "FOUO" in a manner that ensures that a recipient or viewer is aware of the status of the information therein. **Markings on microform will conform to the requirements of *b* and *c* above. As a minimum, each frame of a microform containing FOUO information will be marked "FOR OFFICIAL USE ONLY" at the bottom center of the appropriate page or frame. Classified or protective markings placed by a software program at both top and bottom of a page or frame of a computer-generated report are acceptable. Storage media (disk packs or magnetic tapes) containing personal information subject to the Privacy Act will be labeled "FOR OFFICAL USE ONLY—Privacy Act Information."**

e. FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer: "This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemptions ..... apply."

***f.* Permanently bound volumes need to be marked only on the outside of the front and back covers, title page, and first and last**

pages. Volumes stapled by office-type hand or electric staples are not considered permanently bound.

Section 3
Dissemination and Transmission

4–300 Release and Transmission Procedures

Until FOUO status is terminated, the release and transmission instructions that follow apply:

a. FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

b. DoD holders of FOUO information are authorized to convey such information to officials in other departments and agencies of the executive and judicial branches to fulfill a government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked "For Official Use Only," and the recipient shall be advised that the information has been exempted from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

c. Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4 (reference (n)). **Army implementing instructions are in paragraph 5–103 and in AR 1–20.** Release to the GAO is governed by DoD Directive 7650.1 (reference (o)). Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

4–301 Transporting FOUO Information

Records containing FOUO information shall be transported in a manner that precludes disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations may be sent by fourth-class mail. **When material marked FOUO is removed from storage, attach DA Label 87 (For Official Use Only Cover Sheet).**

4–302 Electrically Transmitted Messages

Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted in accordance with communications security procedures in ACP–121 (US Supp I) (reference (p)) for FOUO information. **Army follows the procedures in AR 105–31.**

4–303 Telephone usage

FOUO information may be discussed over the telephone lines with DOD and other Government agencies for official purposes.

Section 4
Safeguarding FOUO Information

4–400 During Duty Hours

During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-governmental personnel. **When material marked FOUO is removed from storage, attach DA Label 87.**

4–401 During Nonduty Hours

At the close of business, FOUO records shall be stored so as to preclude unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of P.L. 86–36 (reference (c)) shall meet the safeguards outlined for that group of records. **Army personnel handling National Security Agency (NSA) records will follow NSA instructions on storing and safeguarding those records.**

Section 5
Termination, Disposal and Unauthorized Disclosures

4–500 Termination

The originator or other competent authority, e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

4–501 Disposal

a. Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

b. Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. Chapter 33 (reference (q)), as implemented by DoD Component instructions concerning records disposal. **Army implementing disposition instructions are in AR 25–400–2.**

4–502 Unauthorized Disclosure

The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act (reference (gg)) may also result in criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

Chapter V
Release and Processing Procedures

Section 1
General Provisions

5–100 Public Information

a. Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD or **Department of the Army** record made under the FOIA may be denied only when:

1. The record is subject to one or more of the exemptions in Chapter III of this Regulation, and the Government's interest will be jeopardized by its release.

2. The record has not been described well enough to enable the DoD Component to locate it with a reasonable amount of effort by an employee familiar with the files.

3. The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the DoD Component concerned. When personally identifiable information in a record is requested by the subject of the record or his attorney, notarization of the request may be required.

b. Individuals seeking DoD information should address their FOIA requests to one of the addresses listed in Appendix B.

c. Release of information under the FOIA can have an adverse impact on OPSEC. The Army implementing directive for OPSEC is AR 530–1. It requires that OPSEC points of contact be named for all HQDA staff agencies and for all commands down to battalion level. The FOIA official for the staff agency or command will use DA Form 4948–R to announce the OPSEC/FOIA advisor for the command. Persons named as OPSEC points of contact will be OPSEC/FOIA advisors. Command OPSEC/FOIA advisors should implement the policies and procedures in AR 530–1, consistent with this regulation and with the following considerations:

(1) Documents or parts of documents properly classified in the interest of national security must be protected. Classified documents may be released in response to a FOIA request only under AR 380–5, chapter III. AR 380–5 provides that if parts of a document are not classified and can be segregated with reasonable ease, they may be released, but parts requiring continued protection must be clearly identified.

(2) The release of unclassified documents could violate national security. When this appears possible, OPSEC/FOIA advisors should request a classification evaluation of the document by its proponent under AR 380–5, paragraphs 2–204, 2–600, 2–800, and 2–801. In such cases, other FOIA exemptions (para 3–200) may also apply.

(3) A combination of unclassified documents, or parts of them, could combine to supply information that might violate national security if released. When this appears possible, OPSEC/FOIA advisors should consider classifying the combined information per AR 380–5, paragraph 2–211.

(4) A document or information may not be properly or currently classified when a FOIA request for it is received. In this case, the request may not be denied on the grounds that the document or information is classified except in accordance with Executive Order 12356, Section 1.6(d), and AR 380–5, paragraph 2–204, and with approval of the Army General Counsel.

***d.* OPSEC/FOIA advisors will—**

(1) Advise persons processing FOIA requests on related OPSEC requirements.

(2) Help custodians of requested documents prepare requests for classification evaluations.

(3) Help custodians of requested documents identify the parts of documents that must remain classified under this paragraph and AR 380–5.

***e.* OPSEC/FOIA advisors do not, by their actions, relieve FOIA personnel and custodians processing FOIA requests of their responsibility to protect classified or exempted information.**

5–101 Requests from Private Parties

The provisions of the FOIA are reserved for persons with private interests as opposed to federal or foreign governments seeking information. Requests from private persons will be made in writing, and will clearly show all other addressees within the Federal Government to whom the request was also sent. This procedure will reduce processing time requirements, and ensure better inter and intra-agency coordination. Components are under no obligation to establish procedures to receive hand delivered requests. Foreign governments seeking information from DoD Components should use established official channels for obtaining information. Release of records to individuals under the FOIA is considered public release of information, except as provided for in paragraph 1–505. **DA officials will release the following records, upon request, to the persons specified below, even though these records are exempt from release to the general public. The 10-day limit (para 1–503) applies.**

***a. Medical records.* Commanders or chiefs of medical treatment facilities will release information—**

(1) On the condition of sick or injured patients to the patient's relatives.

(2) That a patient's condition has become critical to the nearest known relative or to the person the patient has named to be informed in an emergency.

(3) That a diagnosis of psychosis has been made to the nearest known relative or to the person named by the patient.

(4) On births, deaths, and cases of communicable diseases to local officials (if required by local laws).

(5) Copies of records of present or former soldiers, dependents, civilian employees, or patients in DA medical facilities will be released to the patient or to the patient's representative on written request. The attending physician can withhold records if he or she thinks that release may injure the patient's mental or physical health; in that case, copies of records will be released to the patient's next of kin or legal representative or to the doctor assuming the patient's treatment. If the patient is adjudged insane, or is dead, the copies will be released, on written request, to the patient's next of kin or legal representative.

(6) Copies of records may be given to a Federal or State hospital or penal institution if the person concerned is an inmate or patient there.

(7) Copies of records or information from them may be given to authorized representatives of certain agencies. The National Academy of Sciences, the National Research Council, and other accredited agencies are eligible to receive such information when they are engaged in cooperative studies, with the approval of The Surgeon General of the Army. However, certain information on drug and alcohol use cannot be released. AR 600–85 covers the Army's alcohol and drug abuse prevention and control program.

(8) Copies of pertinent parts of a patient's records can be furnished to the staff judge advocate or legal officer of the command in connection with the Government's collection of a claim. If proper, the legal officer can release this information to the tortfeasor's insurer without the patient's consent.

NOTE: Information released to third parties under (5), (6), and (7) above must be accompanied by a statement of the conditions of release. The statement will specify that the information not be disclosed to other persons except as privileged communication between doctor and patient.

***b. Military personnel records.* Military personnel records will be released under these conditions:**

(1) DA must provide specific information about a person's military service (statement of military service) in response to a request by that person or with that person's written consent to his or her legal representative.

(2) Papers relating to applications for, designation of beneficiaries under, and allotments to pay premiums for, National Service Life Insurance or Serviceman's Group Life Insurance will be released to the applicant or to the insured. If the insured is adjudged insane (evidence of an insanity judgment must be included) or dies, the records will be released, on request, to designated beneficiaries or to the next of kin.

(3) Copies of DA documents that record the death of a soldier, a dependent, or a civilian employee will be released, on request, to that person's next of kin, life insurance carrier, and legal representative. A person acting on behalf of someone else concerned with the death (e.g., the executor of a will) may also obtain copies by submitting a written request that includes evidence of his or her representative capacity. That representative may give written consent for release to others.

(4) Papers relating to the pay and allowances or allotments of a present or former soldier will be released to the soldier or his or her authorized representative. If the soldier is deceased, these papers will be released to the next of kin or legal representatives.

c. Civilian personnel records. Civilian Personnel Officers (CPOs) with custody of papers relating to the pay and allowances or allotments of current or former civilian employees will release them to the employee or his or her authorized representative. If the employee is dead, these records will be released to the next of kin or legal representative. However, A CPO cannot release statements of witnesses, medical records, or other reports or documents pertaining to compensation for injuries or death of a DA civilian employee (Federal Personnel Manual, chap 294). Only officials listed in paragraph 5–200*d*(18) can release such information.

d. Release of information to the public concerning accused persons before determination of the case. Such release may prejudice the accused's opportunity for a fair and impartial determination of the case. The following procedures apply:

(1) *Information that can be released.* Subject to (2) below, the following information concerning persons accused of an offense may be released by the convening authority to public news agencies or media.

(a) The accused's name, grade or rank, unit, regular assigned duties, and other information as allowed by AR 340–21, paragraph 3–3*a*.

(b) The substance or text of the offense of which the person is accused.

(c) The identity of the apprehending or investigating agency and the length or scope of the investigation before apprehension.

(d) The factual circumstances immediately surrounding the apprehension, including the time and place of apprehension, resistance, or pursuit.

(e) The type and place of custody, if any.

(2) *Information that will not be released.* Before evidence has been presented in open court, subjective observations or any information not incontrovertibly factual will not be released. Background information or information relating to the circumstances of an apprehension may be prejudicial to the best interests of the accused, and will not be released except under (3)*(c)* below, unless it serves a law enforcement function. The following kinds of information will not be released:

(a) Observations or comments on an accused's character and demeanor, including those at the time of apprehension and arrest or during pretrial custody.

(b) Statements, admissions, confessions, or alibis attributable to an accused, or the fact of refusal or failure of the accused to make a statement.

(c) Reference to confidential sources, investigative techniques and procedures, investigator notes, and activity files. This includes reference to fingerprint tests, polygraph examinations, blood tests, firearms identification tests, or similar laboratory tests or examinations.

(d) Statements as to the identity, credibility, or testimony of prospective witnesses.

(e) Statements concerning evidence or argument in the case, whether or not that evidence or argument may be used at the trial.

(f) Any opinion on the accused's guilt.

(g) Any opinion on the possibility of a plea of guilty to the offense charged, or of a plea to a lesser offense.

(3) *Other considerations.*

(a) Photographing or televising the accused. DA personnel should not encourage or volunteer assistance to news media in photographing or televising an accused or suspected person being held or transported in military custody. DA representatives should not make photographs of an accused or suspect available unless a law enforcement function is served. Requests from news media to take photographs during courts-martial are governed by AR 360–5.

(b) Fugitives from justice. This paragraph does not restrict the release of information to enlist public aid in apprehending a fugitive from justice.

(c) Exceptional cases. Permission to release information from military personnel records other than as outlined in *(b)* above to public news agencies or media may be requested from The Judge Advocate General (TJAG). Requests for information from military personnel records other than as outlined in *(b)* above will be processed according to this regulation.

e. Litigation, tort claims, and contract disputes. Release of information or records under this paragraph is subject to the time limitations prescribed in paragraph 5–204. The requester must be advised of the reasons for nonrelease or referral.

(1) *Litigation.*

(a) Each request for a record related to pending litigation involving the United States will be referred to the staff judge advocate or legal officer of the command. He or she will promptly inform the Litigation Division, Office of the Judge Advocate General (OTJAG), of the substance of the request and the content of the record requested. (Mailing address: HQDA (DAJA–LT), WASH DC 20310–2210; telephone, AUTOVON 227–3462 or commercial (202) 697–3462.)

(b) If information is released for use in litigation involving the United States, the official responsible for investigative reports (AR 27–40, para 2–4) must be advised of the release. He or she will note the release in such investigative reports.

(c) Information or records normally exempted from release (i.e., personnel and medical records) may be releasable to the judge or court concerned, for use in litigation to which the United States is not a party. Refer such requests to the local staff judge advocate or legal officer, who will coordinate it with the Litigation Division, OTJAG (*(a)* above).

(2) *Tort claims.*

(a) A claimant or a claimant's attorney may request a record that relates to a pending administrative tort claim filed against the DA. Refer such requests promptly to the claims approving or settlement authority that has monetary jurisdiction over the pending claim. These authorities will follow AR 27–20. The request may concern an incident in which the pending claim is not as large as a potential claim; in such a case, refer the request to the authority that has monetary jurisdiction over the potential claim.

(b) A potential claimant or his or her attorney may request information under circumstances clearly indicating that it will be used to file a tort claim, though none has yet been filed. Refer such requests to the staff judge advocate or legal officer of the command. That authority, when subordinate, will promptly inform the Chief, U.S. Army Claims Service, of the substance of the request and the content of the record. (Mailing address: U.S. Army Claims Service, ATTN: JACS–TCC, Fort George G. Meade, MD 20755–5360; telephone, AUTOVON 923–7860 or commercial (301) 677–7860.)

(c) IDA officials listed in paragraph 5–200*d* who receive requests under *(a)* or *(b)* above will refer them directly to the Chief, U.S. Army Claims Service. They will also advise the requesters of the referral and the basis for it.

(d) The Chief, U.S. Army Claims Service, will process requests according to this regulation and AR 27–20, paragraph 1–10.

(3) *Contract disputes.* Each request for a record that relates to a potential contract dispute or a dispute that has not reached final decision by the contracting officer will be treated as a request for procurement records and not as litigation. However, the officials listed in paragraphs 5–101*a* and 5–200*d* will consider the effect of release on the potential dispute. Those officials may consult with the U.S. Army Legal Services Agency. (Mailing address: U.S. Army Legal Services Agency, ATTN: JALS–CA, Nassif Building, 5611 Columbia Pike, Falls Church, VA 22041–5013; telephone, AUTOVON 289–2023 or commercial (703) 756–2023.) If the request is for a record that relates to a pending contract appeal to the Armed Services Board of Contract Appeals or to a final decision that is still subject to appeal (i.e., 90 days have not lapsed after receipt of the final decision by the contractor), then the request will be—

(a) Treated as involving a contract dispute; and

(b) Referred to the U.S. Army Legal Services Agency. (For address and phone number, see (3) above.)

f. Dissemination of unclassified information concerning physical protection of special nuclear material.

(1) Unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment for the physical protection of special nuclear material, is prohibited under 10 USC 128 and para 3–200, exemption number 3.

(2) This prohibition shall be applied by the Deputy Chief of Staff for Operations and Plans as the IDA, to prohibit the dissemination of any such information only if and to the extent that it is determined that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of—

(a) Illegal production of nuclear weapons; or

(b) Theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(3) In making such a determination, DOD personnel may consider what the likelihood of an illegal production, theft, diversion, or sabotage would be if the information proposed to be prohibited from dissemination were at no time available for dissemination.

(4) DOD personnel shall exercise the foregoing authority to prohibit the dissemination of any information described:

(a) So as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security; and

(b) Upon a determination that the unauthorized dissemination of such information could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of—

1. Illegal production of nuclear weapons; or

2. Theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(5) DOD employees shall not use this authority to withhold information from the appropriate committees of Congress.

g. Release of names and duty addresses.

(1) Requests for release of personnel lists containing names and duty addresses will be denied under Exemption 2 of the FOIA. Coordinate all such requests with the appropriate IDA.

(2) Telephone directories, organizational charts, and/or staff directories published by installations or activities in CONUS and U.S. Territories will be released when requested under FOIA. In all such directories or charts, names of personnel assigned to sensitive units, routinely deployable units, or units stationed in foreign territories will be redacted and denied under Exemption 6 of the FOIA. By DoD policy, the names of general officers (or civilian equivalent) or public affairs officers may be released at any time. The sanitized copy will be redacted by cutting out or masking the names and reproducing the document. The IDA is the U.S. Army Information Systems Command–Pentagon, Freedom of Information and Privacy Act Division, ATTN: ASQNS–OP–F, Room 1146, Hoffman Building I, Alexandria, VA. 22331–0301.

(3) Public Affairs Offices may release information determined to have legitimate news value, such as notices of personnel reassignments to new units or installations within the continental United States, results of selection/promotion boards, school graduations/completions, and awards and similar personal achievements. They may release the names and duty addresses of key officials, if such release is determined to be in the interests of advancing official community relations functions.

5–102 Requests from Government Officials

Requests from officials of Federal, state, or local Governments for DoD Component records shall be honored on an expeditious basis whenever possible. For purposes of determining whether the record or records shall be provided, such officials acting in an individual capacity shall be considered the same as any other requester.

5–103 Privileged Release to Officials

a. Subject to the provisions of DoD Regulation 5200.1–R (reference (h)), and AR 380–5, applicable to classified information, DoD Directive 5400.11 (reference (d)), and AR 340–21, applicable to personal privacy, or other applicable law, records exempt from release under Chapter III, Section 2 of this Regulation may be authenticated and released, in accordance with DoD Component regulations, to officials requesting them on behalf of local, State or Federal governmental bodies, whether legislative, executive, administrative, or judicial, as follows:

1. To Congress, in accordance with DoD Directive 5400.4 (reference (n)). The Army implementing directive is AR 1–20. Commanders or chiefs will notify the Chief of Legislative Liaison of all releases of information to members of Congress or staffs of congressional committees. Organizations that in the normal course of business are required to provide information to Congress may be excepted. Handle requests by members of Congress (or staffs of congressional committees) for inspection of copies of official records as follows:

(a) National security classified records. Follow AR 380–5.

(b) Civilian personnel records. Members of Congress may examine offical personnel folders as permitted by 5 CFR 297.503(i).

(c) Information related to disciplinary action. This subparagraph refers to records of trial by courts-martial; nonjudicial punishment of military personnel under the Uniform Code of Military Justice, Article 15; nonpunitive measures such as administrative reprimands and admonitions; suspensions of civilian employees; and similar documents. If the Department of the Army has not issued specific instructions on the request, the following instructions will apply. Subordinate commanders will not release any information without securing the consent of the proper installation commander. The installation commander may release the information unless the request is for a classified or "For Official Use Only" document. In that case the commander will refer the request promptly to the Chief of Legislative Liaison (see *(d)* below) for action, including the recommendations of the transmitting agency and copies of the requested records with the referral.

(d) Military personnel records. Only HQDA can release information from these records. Custodians will refer all requests from Congress directly and promptly to the Chief of Legislative Liaison, Department of the Army, HQDA (SALL) WASH DC 20310–1600.

(e) Criminal investigation records. Only the Commanding General, U.S. Army Criminal Investigation Command (USACIDC), can release any USACIDC-originated criminal investigation file. For further information, see AR 195–2.

(f) Other exempt records. Commanders or chiefs will refer requests for all other categories of exempt information under paragraph 3–200 directly to the Chief of Legislative Liaison per *(d)* above. They will include a copy of the material requested and, as appropriate, recommendations concerning release or denial.

(g) All other records. The commander or chief with custody of the records will furnish all other information promptly.

2. To the Federal courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

3. To other Federal Agencies, both executive and administrative, as determined by the head of a DoD Component or designee.

(a) Disciplinary actions and criminal investigations. Requests for access to, or information from, the records of disciplinary actions or criminal investigations will be honored if proper credentials are presented. Representatives of the Office of Personnel Management may be given information from personnel files of employees actually employed at organizations or activities. Each such request will be considered on its merits. The information released will be the minimum required in connection with the investigation being conducted.

(b) Other types of requests. All other official requests received by DA elements from agencies of the executive branch (including other military departments) will be honored, if there are no compelling reasons to the contrary. If there are reasons to withhold the records, the requests will be submitted for determination of the propriety of release to the appropriate addresses shown in appendix B.

4. To State and local officials, as determined by the head of a DoD Component or designee.

b. DoD Components shall inform officials receiving records under the provisions of subparagraph 5–103, *a.* that those records are exempt from public release under the FOIA and are privileged. DOD Components shall also advise officials of any special handling instructions.

5–104 Required coordination

Before forwarding a FOIA request to an IDA for action, records custodians will obtain an opinion from their servicing judge advocate concerning the releasability of the requested records. A copy of that legal review, the original FOIA request, two copies of the requested information (with one copy clearly indicating which portions are recommended for withholding, which FOIA exemptions support such withholding, and which portions, if any, have already been released), a copy of the interim response acknowledging receipt and notifying the requester of the referral to the IDA, and a cover letter containing a telephone point of contact will be forwarded to the IDA with the command's recommendation to deny a request in whole or in part.

Section 2
Initial Determinations

5–200 Initial Denial Authority

a. Components shall limit the number of IDAs appointed. In designating its IDAs, a DoD Component shall balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limitations of the FOIA. The DA officials in paragraph *d* below are designated as the Army's only IDAs. Only an IDA, his or her delegate, or the Secretary of the Army can deny FOIA requests for DA records. Each IDA will act on direct and referred requests for records within his or her area of functional responsibility. (See the proper AR in the 10–series for full discussions of these areas; they are outlined in *d* below.) Included are records created or kept within the IDA's area of responsibility; records retired by, or referred to, the IDA's headquarters or office; and records of predecessor organizations. If a request involves the areas of more than one IDA, the IDA to whom the request was originally addressed will normally respond to it; however, the affected IDAs may consult on such requests and agree on responsibility for them. IDAs will complete all required coordination at initial denial level. This includes classified records retired to the National Archives and Records Administration when a mandatory declassification review is necessary.

b. The initial determination of whether to make a record available or grant a fee waiver upon request may be made by any suitable official designated by the DoD Component in published regulations. The presence of the marking "For Official Use Only" does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under this Regulation is applicable and should be invoked. IDAs may delegate all or part of their authority to an office chief or subordinate commander. Such delegations must not slow FOIA actions. If an IDA's delegate denies a FOIA or fee waiver request, the delegate must clearly state that he or she is acting for the IDA and identify the IDA by name and position in the written response to the requester. IDAs will send the names, offices, and telephone numbers of their delegates to the Director of Information Systems for Command, Control, Communications, and Computers. IDAs will keep this information current. (The mailing address is HQDA (SAIS–PS), WASH DC 20310–0107.)

c. The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media. A FOIA release or denial action, appeal, or court review may generate public or press interest. In such case, the IDA (or delegate) should consult the Chief of Public Affairs or the command or organization PAO. The IDA should inform the PAO contacted of the issue and obtain advice and recommendations on handling its public affairs aspect. Any advice or recommendations requested or obtained should be limited to this aspect. Coordination must be completed within the 10-day FOIA response limit. (The point of contact for the Army Chief of Public Affairs is HQDA (SAPA–OSR), WASH DC 20310–1500; telephone, AUTOVON 227–4122 or commercial (202) 697–4122.) If the request involves actual or potential litigation against the United States, release must be coordinated with The Judge Advocate General. (See para 5–101*e*.)

d. The following officials are designated IDAs for the areas of responsibility outlined below:

(1) The Administrative Assistant to the Secretary of the Army is authorized to act for the Secretary of the Army on requests for all records maintained by the Office of the Secretary of the Army and its serviced activities, except those specified in (2) through (6) below, as well as requests requiring the personal attention of the Secretary of the Army.

(2) The Assistant Secretary of the Army (Financial Management) is authorized to act on requests for finance and accounting records.

(3) The Assistant Secretary of the Army (Research, Development, and Acquisition) is authorized to act on requests for procurement records other than those under the purview of the Chief of Engineers and the Commander, U.S. Army Materiel Command.

(4) The Director of Information Systems for Command, Control, Communications, and Computers (DISC4) is authorized to act on requests for records pertaining to the Army Information Resources Management Program (automation, telecommunications, visual information, records management, publications and printing, and libraries).

(5) The Inspector General is authorized to act on requests for all Inspector General records under AR 20–1.

(6) The Auditor General is authorized to act on requests for records relating to audits done by the U.S. Army Audit Agency under AR 10–2. This includes requests for related records developed by the Audit Agency.

(7) The Deputy Chief of Staff for Operations and Plans is authorized to act on requests for records relating to strategy formulation; force development; individual and unit training policy; strategic and tactical command and control systems; nuclear and chemical matters; use of DA forces; and military police records and reports, prisoner confinement, and correctional records.

(8) The Deputy Chief of Staff for Personnel is authorized to act on requests for case summaries, letters of instruction to boards, behavioral science records, general education records, and alcohol and drug prevention and control records. Excluded are individual treatment/test records, which are a responsibility of The Surgeon General.

(9) The Deputy Chief of Staff for Logistics is authorized to act on requests for records relating to DA logistical requirements and determinations, policy concerning materiel maintenance and use, equipment standards, and logistical readiness.

(10) The Chief of Engineers is authorized to act on requests for records involving civil works, military construction, engineer procurement, and ecology; and the records of the U.S. Army Engineer divisions, districts, laboratories, and field operating agencies.

(11) The Surgeon General is authorized to act on requests for medical research and development records, and the medical records of active duty military personnel, dependents, and persons given physical examination or treatment at DA medical facilities, to include alcohol and drug treatment/test records.

(12) The Chief of Chaplains is authorized to act on requests for records involving ecclesiastical relationships, rites performed by DA chaplains, and nonprivileged communications relating to clergy and active duty chaplains' military personnel files.

(13) The Judge Advocate General (TJAG) is authorized to act on requests for records relating to claims, courts-martial, legal services, and similar legal records. TJAG is also authorized to act on requests for records described elsewhere in this regulation, if those records relate to litigation in which the United States has an

interest. In addition, TJAG is authorized to act on requests for records that are not within the functional areas of responsibility of any other IDA.

(14) The Chief, National Guard Bureau, is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and active Army National Guard military personnel, including technician personnel, unless such records clearly fall within another IDA's responsibility. This authority includes, but is not limited to, National Guard organization and training files; plans, operations, and readiness files; policy files; historical files; files relating to National Guard military support, drug interdiction, and civil disturbances; construction, civil works, and ecology records dealing with armories, facilities within the States, ranges, etc.; Equal Opportunity investigative records; aviation program records and financial records dealing with personnel, operation and maintenance, and equipment budgets.

(15) The Chief of Army Reserve is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and reserve component military personnel, and all U.S. Army Reserve (USAR) records, unless such records clearly fall within another IDA's responsibility. Records under the responsibility of the Chief of Army Reserve include records relating to USAR plans, policies, and operations; changes in the organizational status of USAR units; mobilization and demobilization policies; active duty tours; and the Individual Mobilization Augmentation program.

(16) The Commander, United States Army Materiel Command (AMC) is authorized to act on requests for the records of AMC headquarters and its subordinate commands, units, and activities that relate to procurement, logistics, research and development, and supply and maintenance operations.

(17) The Commander, USACIDC, is authorized to act on requests for criminal investigative records of USACIDC headquarters and its subordinate activities. This includes criminal investigation records, investigation-in-progress records, and military police reports that result in criminal investigation reports.

(18) The Commander, United States Total Army Personnel Command, is authorized to act on requests for military personnel files relating to active duty (other than those of reserve and retired personnel) military personnel matters, personnel locator, physical disability determinations, and other military personnel administration records; records relating to military casualty and memorialization activities; heraldic activities; voting; records relating to identification cards; naturalization and citizenship; commercial solicitation; Military Postal Service Agency and Army postal and unofficial mail service; civilian personnel records and other civilian personnel matters; and personnel administration records.

(19) The Commander, United States Army Community and Family Support Center, is authorized to act on requests for records relating to morale, welfare, and recreation activities; nonappropriated funds; child development centers, community life programs, and family action programs; retired activities; club management; Army emergency relief; consumer protection; retiree survival benefits; and records dealing with DA relationships with Social Security, Veterans' Affairs, United Service Organization, U.S. Soldiers' and Airmen's Home, and American Red Cross.

(20) The Commander, United States Army Intelligence and Security Command, is authorized to act on requests for intelligence investigation and security records, foreign scientific and technological information, intelligence training, mapping and geodesy information, ground surveillance records, intelligence threat assessment, and missile intelligence data relating to tactical land warfare systems.

(21) The Commander, U.S. Army Safety Center, is authorized to act on requests for Army safety records.

(22) The General Counsel, Army and Air Force Exchange Service (AAFES), is authorized to act on requests for AAFES records, under AR 60–20/AFR 147–14.

(23) The Commander, Forces Command (FORSCOM), as a specified commander, is authorized to act on requests for specified command records that are unique to FORSCOM under paragraph 1–510.

(24) Special IDA authority for time-event related records may be designated on a case-by-case basis. These will be published in the *Federal Register*. Current information on special delegations may be obtained from the Office of the Director of Information Systems for Command, Control, Communications, and Computers, ATTN: SAIS–PSP, WASH DC 20310–0107.

5–201 Reasons for Not Releasing a Record

There are seven reasons for not complying with a request for a record:

a. The request is transferred to another DoD Component, or to another federal agency.

b. The request is withdrawn by the requester.

c. The information requested is not a record within the meaning of the FOIA and this Regulation.

d. A record has not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.

e. The requester has failed unreasonably to comply with procedural requirements, including payment of fees, imposed by this Regulation or DoD Component supplementing regulations.

f. The DoD Component determines through knowledge of its files and reasonable search efforts that it neither controls nor otherwise possesses the requested record. (A "no record" determination is not considered a denial; therefore an appeal is not appropriate).

g. The record is denied in accordance with procedures set forth in the FOIA and this Regulation.

5–202 Denial Tests

To deny a requested record that is in the possession or control of a DoD Component, it must be determined that the denial meets the following tests:

a. The record is included in one or more of the nine categories of records exempt from mandatory disclosure as provided by the FOIA and outlined in Chapter III of this Regulation.

b. The use of its discretionary authority is deemed unwarranted.

5–203 Reasonably Segregable Portions

Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. When a record is denied in whole, the response advising the requester of that determination will specifically state that is not to reasonable to segregate portions of the records for release.

5–204 Response to Requester

a. Initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 10 working days after receipt of the request by the official designated to respond. The action command or office holding the records will date- and time-stamp each request on receipt. The 10-day limit will start from the date stamped.

b. When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

c. When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular

record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the DoD Component. **The IDA will inform the requester of his or her right to appeal, in whole or part, the denial of the FOIA or fee waiver request and that the appeal must be sent through the IDA to the Secretary of the Army (ATTN: General Counsel). (See para 5–300.)**

d. The response to the requester should contain information concerning the fee status of the request, consistent with the provisions of Chapter VI, this Regulation. **Generally, the information shall reflect one or more of the following conditions:**

(1) All fees due have been received.

(2) Fees have been waived because they fall below the automatic fee waiver threshold.

(3) Fees have been waived or reduced from a specified amount to another specified amount because the rationale provided in support of a request for waiver was accepted.

(4) A request for waiver has been denied.

(5) Fees due in a specified amount have not been received.

e. The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this Regulation. Merely referring to a classification or to a "For Official Use Only" marking on the requested record does not constitute a proper citation or explanation of the basis for invoking an exemption.

f. When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

5–205 Extension of Time

a. In unusual circumstances, when additional time is needed to respond, the DoD Component shall acknowledge the request in writing within the 10-day period, describe the circumstances requiring the delay, and indicate the anticipated date for substantive response that may not exceed 10 additional working days. Unusual circumstances that may justify delay are:

1. The requested record is located in whole or in part at places other than the office processing the request.

2. The request requires the collection and evaluation of a substantial number of records.

3. Consultation is required with other DoD Components or agencies having substantial interest in the subject matter to determine whether the records requested are exempt from disclosure in whole or in part under provisions of this Regulation or should be released as a matter of discretion.

b. The statutory extension of time for responding to an initial request must be approved on a case-by-case basis by the final appellate authority for the DoD Component, or in accordance with regulations of the DoD Component, or in accordance with regulations of the DoD Component that establish guidance governing the circumstances in which such extensions may be granted. **The time may be extended only once during the initial consideration period. Only the responsible IDA can extend it, and the IDA must first coordinate with the Office of the Army General Counsel.**

c. In these unusual cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester **with notification that he or she may treat the delay as an initial denial with a right to appeal,** or with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. Components are reminded that the requester still retains the right to treat this delay as a defacto denial with full administrative remedies.

d. As an alternative to the taking of formal extensions of time as described in subparagraphs 5–205, *a.*, *b.*, and *c.*, above, the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

5–206 Misdirected Requests

Misdirected requests shall be forwarded promptly to the DoD Component with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the DoD Component that manages the records requested.

5–207 Records of Non-U.S. Government Source

a. When a request is received for a record that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information (also known as "the submitter" for matters pertaining to proprietary data under 5 U.S.C. 552 (reference (a)) Exemption (b) (4)) (Chapter III, section 2, paragraph 3–200, *Number 4.*, and reference (ee), this Regulation) will be notified promptly of that request and afforded reasonable time (e.g., 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under Exemption (b)(4). If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under Exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

b. The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the Department of Defense from multi-national organizations, such as the North American Treaty Organization (NATO) and North American Aerospace Defense Command (NORAD), or foreign governments. Coordination with foreign governments under the provisions of this paragraph shall be made through Department of State.

5–208 File of Initial Denials

Copies of all initial denials shall be maintained by each DoD Component in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation. **Records will be maintained in accordance with AR 25–400–2.**

5–209 Special Mail Services

DoD Components are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

5–210 Receipt Accounts

The Treasurer of the United States has established two accounts for FOIA receipts. These accounts, which are described below, shall be used for depositing all FOIA receipts, except receipts for industrially-funded and non-appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially-funded and nonappropriated funded activity FOIA receipts shall be deposited to the applicable fund.

a. Receipt Account 3210 Sale of Publications and Reproductions, Freedom of Information Act. This account shall be used when depositing funds received from providing existing publications and

forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles. **Deliver collections within 30 calendar days to the servicing finance and accounting office.**

b. Receipt Account 3210 Fees and Other Charges for Services, Freedom of Information Act. This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

Section 3
Appeals

5–300 General

a. If the official designated by the DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a request for waiver or reduction of fees. A "no record" finding may not be appealed, although the requester may ask the agency to search other files or provide more detailed identification to facilitate another search of the files.

b. **Appeals of denial of records made by Army IDAs must be made through the denying IDA to the Secretary of the Army (ATTN: General Counsel). On receipt of an appeal, the IDA will—**

(1) Send the appeal to the Office of the Secretary of the Army, Office of the General Counsel, together with a copy of the documents that are the subject of the appeal, marked to show the portions withheld; the initial denial letter; and any other relevant material.

(2) Assist the General Counsel as requested during his or her consideration of the appeal.

c. **Appeals of denial of records made by the General Counsel, AAFES, shall be made to the Secretary of the Army when the Commander, AAFES, is an Army officer.**

5–301 Time of Receipt

An FOIA appeal has been received by a DoD Component when it reaches the office of an appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

5–302 Time Limits

a. The requester should be advised to file an appeal so that it reaches the appellate authority no later than 60 calendar days after the date of the initial denial letter. At the conclusion of this period, the case may be considered closed; however, such closure does not preclude the requester from filing litigation. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the requester receives the last such notification. Records which are denied shall be retained during the time permitted for appeal.

b. Final determinations on appeals normally shall be made within 20 working days after receipt.

5–303 Delay in Responding to an Appeal

a. If additional time is needed due to the unusual circumstances described in 5–205, above, the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request.

b. If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in paragraph 5–205, above, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The DoD Component shall continue to process the case expeditiously, whether or not the requester seeks a court order for release of the records, but a copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.

5–304 Response to the Requester

a. When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

b. Final refusal to provide a requested record or to approve a request for waiver or reduction of fees must be made in writing by the head of the DoD Component or by a designated representative. The response, at a minimum, shall include the following:

1. The basis for the refusal shall be explained to the requester, in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of this Regulation.

2. When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

3. The final denial shall include the name and title or position of the official responsible for the denial.

4. The response shall advise the requester that the material being denied does not contain meaningful portions that are reasonably segregable.

5. The response shall advise the requester of the right to judicial review.

5–305 Consultation

a. Final refusal, involving issues not previously resolved or that the DoD Component knows to be inconsistent with rulings of other DoD Components, ordinarily should not be made before consultation with the Office of the General Counsel of the Department of Defense.

b. Tentative decisions to deny records that raise new or significant legal issues of potential significance to other agencies of the government shall be provided to the Department of Justice, ATTN: Office of Legal Policy, Office of Information and Policy, Washington, DC 20530.

Section 4
Judicial Actions

5–400 General

a. This section states current legal and procedural rules for the convenience of the reader. The statements of rules do not create rights or remedies not otherwise available, nor do they bind the Department of Defense to particular judicial interpretations or procedures.

b. A requester may seek an order from a United States District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond within the time limits prescribed by the FOIA and in this Regulation.

5–401 Jurisdiction

The requester may bring suit in the United States District Court in the district in which the requester resides or is the requester's place of business, in the district in which the record is located, or in the District of Columbia.

5–402 Burden of Proof

The burden of proof is on the DoD Component to justify its refusal to provide a record. The court shall evaluate the case de novo

(anew) and may elect to examine any requested record in camera (in private) to determine whether the denial was justified.

5–403 Actions by the Court

a. When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumsfances, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

b. If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

c. When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether DoD Component personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board shall conduct an investigation to determine whether or not disciplinary action is warranted. The DoD Component is obligated to take the action recommended by the special counsel.

d. The court may punish the responsible official for contempt when a DoD Component fails to comply with the court order to produce records that it determines have been withheld improperly.

5–404 Non-United States Government Source Information

A requester may bring suit in a U.S. District Court to compel the release of records obtained from a nongovernment source or records based on information obtained from a nongovernment source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

5–405 Litigation Status Sheet

FOIA managers at DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. The Litigation Status Sheet at Appendix C provides a standard format for recording information concerning FOIA litigation and forwarding that information to the Office of the Secretary of Defense. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a Ligitation Status Sheet, with items 1 through 6 completed, and a copy of the complaint to the OASD(PA), ATTN: DFOISR, with an information copy to the General Counsel, Department of Defense, ATTN: Office of Legal Counsel. A revised Litigation Status Sheet shall be provided at each stage of the litigation. **In the Department of the Army, HQDA TJAG (DAJA–LT), WASH DC 20310–2210 is responsible for preparing this report.**

Chapter VI
Fee Schedule

Section 1
General Provisions

6–100 Authorities

The Freedom of Information Act (5 U.S.C. 552), as amended; by the Freedom of Information Reform Act of 1986; the Paperwork Reduction Act (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et. seq.); the Budget and Accounting Procedures Act (31 U.S.C. 67 et. seq.); the Defense Authorization Act for FY 87, Section 954, (P.L. 99–661), as amended by the Defense Technical Corrections Act of 1987 (P.L. 100–26).

6–101 Application

a. The fees described in this Chapter apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as DoD Instruction 7230.7 (reference (r)) **(AR 37–60)**, which does not supersede the collection of fees under the FOIA. Nothing in this Chapter shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552 (a)(4)(A)(vi)) means any statute that enables a Government Agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

b. The term "direct costs" means those expenditures a Component actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to an FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed at Section 2 of this Chapter. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

c. The term "search" includes all time spent looking for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the document to determine if it, or portions thereof are responsive to the request. Components should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Component and the requester. For example, Components should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time. See subparagraph 6–101, *e.*, for the definition of review, and subparagraph 6–201, *b.*, for information pertaining to computer searches.

d. The term "duplication" refers to the process of making a copy of a document in response to an FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably usable by requesters. If it is not possible to provide copies which are clearly usable, the requester shall be notified that their copy is the best available and that the agency's master copy shall be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator's time, shall be charged. In practice, if a Component estimates that assessable duplication charges are likely to exceed $25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

e. The term "review" refers to the process of examining documents located in response to an FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such

as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Components may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

6–102 Fee Restrictions

a. No fees may be charged by any DoD Component if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Components shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and ten minutes of search time, and resulted in one hundred and five pages of documents, a Component would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than the cost to the Component for billing the requester and processing the fee collected, no charges would result.

b. Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if a Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another Federal Agency to action their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

c. The elements to be considered in determining the "cost of collecting a fee" are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

d. For the purposes of these restrictions, the word "pages" refers to paper copies of a standard size, which will normally be "8½ × 11" or "11 × 14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

e. In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal $24.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time.

6–103 Fee Waivers

a. Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in paragraph 6–104 when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester.

b. When assessable costs for an FOIA request total $15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

c. Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

1. Disclosure of the information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."

(i) The subject of the request. Components should analyze whether the subject matter of the request involves issues which will significantly contribute to the public understanding of the operations or activities of the Department of Defense. Requests for records in the possession of the Department of Defense which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value will likely not contribute to public understanding of the operations or activities of the Department of Defense. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of Defense; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the Department of Defense, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of the Department of Defense.

(ii) The informative value of the information to be disclosed. This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of Defense. While the subject of a request may contain information which concerns operations or activities of the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a heavily redacted record, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the Department of Defense must be approached with caution, and carefully weighed against the arguments offered by the the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the Department of Defense.

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure. The key element in determining the applicability of this factor is whether disclosure will inform, or have the potential to inform the public, rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigency are insufficient without demonstrating the capacity to further disclose the information in a manner which will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(iv) The significance of the contribution to public understanding. In applying this factor, Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previously unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public. A decision regarding *significance* requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant public understanding of the issue. Components *shall not* make value judgments as to whether the information is *important* enough to be made public.

2. Disclosure of the information "is not primarily in the commercial interest of the requester."

(i) The existence and magnitude of a commercial interest. If the request is determined to be of a commercial interest, Components should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, Components may draw inference from the requester's identity and circumstances of the request. In such situations, the provisions of paragraph 6–104, below, apply. Components are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefits must *clearly* override any personal or non-profit interest.

(ii) The primary interest in disclosure. Once a requester's commercial interest has been determined, Components should then determine if the disclosure would be *primarily* in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a *primary* interest. Therefore, any commercial interest becomes secondary to the *primary* interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are *primarily* undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest *primarily* of a commercial nature.

d. Components are reminded that the above factors and examples are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Components should rule in favor of the requester.

e. In addition, the following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

1. A record is voluntarily created to preclude an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

2. A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. $15.00–$30.00).

6–104 Fee Assessment

a. Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

b. In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Components shall adhere to the following procedures:

1. Analyze each request to determine the category of the requester. If the Component determination regarding the category of the requester is different than that claimed by the requester, the component will:

(i) Notify the requester that he should provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (i.e., 30 calendar days), the Component shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

(ii) Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category detemined by the Component.

2. Requesters must submit a fee declaration appropriate for the below categories.

(i) Commercial. Requesters must indicate a willingness to pay all search, review and duplication costs.

(ii) Educational or Noncommercial Scientific Institution or News Media. Requesters must indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(iii) All Others. Requesters must indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

3. If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

4. In the situations described by subparagraphs 6–104, *b.*1. and 2., above, Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Component estimates exceed the actual amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

5. No DoD Component may require advance payment of any fee; i.e., payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Component.

6. Where a Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

7. Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the Component may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717 (reference (ff)), and confirmed with respective Finance and Accounting Offices.

8. After all work is completed on a request, and the documents are ready for release, Components may request payment prior to forwarding the documents if there is no payment history on the requester, or if the requester has previously failed to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of the billing). In the case of the latter, the provisions of subparagraph 6–104, *b.*7., above, apply. Components may not hold documents ready for release pending payment from requesters with a history of prompt payment.

9. When Components act under subparagraphs 6–104, 1 through 7, above, the administrative time limits of the FOIA (i.e., 10 working days from receipt of initial requests, and 20 working days from receipt of appeals, plus permissible extensions of these time limits) will begin only after the Component has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate).

10. Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request, or if records located are determined to be exempt from disclosure. In practice, if the Component estimates that search charges are likely to exceed $25.00 it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

c. Commercial Requesters. Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought (see paragraph 1–507).

1. The term "commercial use" request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Components must determine the *use* to which a requester will put the documents requested. Moreover, where a Component has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Components should seek additional clarification before assigning the request to a specific category.

2. When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) *are not* entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because *use* is the exclusive determining criteria, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial use. Such situations must be addressed on a case-by-case basis.

d. Educational Institution Requesters. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the record sought (see paragraph 1–507). The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

e. Non-Commercial Scientific Institution Requesters. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought (see paragraph 1–507). The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as defined in subparagraph 6–104, *c.*, above, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

f. Components shall provide documents to requesters in subparagraphs 6–104, *d.* and *e.*, above, for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in these categories, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

g. Representatives of the news media. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see paragraph 1–507).

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

2. To be eligible for inclusion in this category, a requester must meet the criteria in subparagraph 6–104, *g.*1., above, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

h. All Other Requesters. Components shall charge requesters who do not fit into any of the above categories, fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought (see paragraph 1–507). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 (reference (gg)), which permit fees only for duplication. Components are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined under subparagraph 6–103, *a.*, above. (See also subparagraph 6–104, *c.*2.) **DD Form 2086 (Record of Freedom of Information (FOI) Processing Cost) will be used to annotate fees for processing FOIA information. The form is available through normal publications channels.**

6–105 Aggregating Requests

Except for requests that are for a commercial use, a Component may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When a Component reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30 day period had been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and Components should have a solid basis for determining that aggregation is warranted in such cases. Components are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are

acting specifically to avoid payment of fees. In no case may Components aggregate multiple requests on unrelated subjects from one requester.

6–106 Effect of the Debt Collection Act of 1982 (P.L. 97–365)

The Debt Collection Act of 1982 (P.L. 97–365) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in 31 U.S.C. 3717 (reference (ff)). Components should verify the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Components may submit the debt to respective Finance and Accounting Offices for collection pursuant to the Debt Collection Act of 1982.

6–107 Computation of Fees

The fee schedule in this Chapter shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized.

Section 2
Collection of Fees and Fee Rates

6–200 Collection of Fees

Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the DoD Component, or the Component has determined that the fee will be in excess of $250 (see paragraph 6–104).

6–201 Search Time

a. Manual Search

Type	Grade	Hourly Rate
Clerical	E9/GS8 and below	$12
Professional	01–06/GS9–GS/GM15	$25
Executive	07/GS/GM16/ES1 and above	$45

b. Computer Search. Computer search is based on direct cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The salary scale (equating to paragraph *a.* above) for the computer operator/programmer determining how to conduct and subsequently executing the search will be recorded as part of the computer search.

6–202 Duplication

Type	Cost per Page
Pre-Printed material	2 cents
Office copy	15 cents
Microfiche	25 cents
Computer copies (tapes or printouts)	Actual cost of duplicating the tape or printout (includes operator's time and cost of the tape)

6–203 Review Time (in the case of commercial requesters)

Type	Grade	Hourly Rate
Clerical	E9/GS8 and below	$12
Professional	01–06/GS9–GS15	$25
Executive	07/GS16/ES1 and above	$45

6–204 Audiovisual Documentary Materials

Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality. **Army audiovisual materials are referred to as "visual information."**

6–205 Other Records

Direct search and duplication cost for any record not described above shall be computed in the manner described for audiovisual documentary material.

6–206 Costs for Special Services

Complying with requests for special services is at the discretion of the Components. Neither the FOIA, nor its fee structure cover these kinds of services. Therefore, Components may recover the costs of special services requested by the requester after agreement has been obtained in writing from the requester to pay for one or more of the following services:

a. Certifying that records are true copies.

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

Section 3
Collection of Fees and Fee Rates for Technical Data

6–300 Fees for Technical Data

a. Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays *all reasonable* costs attributed to search, duplication and review of the records to be released. Technical data, as used in this Section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. DoD Components shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. *All reasonable* costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full cost shall include all *direct* and *indirect* costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under Section 2 of this Chapter for other types of information released under the FOIA. **DD Form 2086–1 (Record of Freedom of Information (FOI) Processing Cost for Technical Data) will be used to annotate fees for technical data. The form is available through normal publications channels.**

b. Waiver. Components shall waive the payment of costs required in subparagraph 6–300, *a.*, above, which are greater than the costs that would be required for release of this same information under Section 2 of this Chapter if:

1. The request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies

that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Components may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

2. The release of technical data is requested in order to comply with the terms of an international agreement; or,

3. The Component determines in accordance with subparagraph 6–103, *a.*, that such a waiver is in the interest of the United States.

c. Fee Rates.

1. Search Time

(i) Manual Search

Type	Grade	Hourly Rate
Clerical (Minimum Charge)	E9/GS8 and below	$13.25 $ 8.30
Professional and Executive (To be established at actual hourly rate prior to search. A minimum charge will be established at ½ hourly rates.)		

(ii) Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale in subparagraph 6–300, *c.*1.(i), above) for the computer operator and/or programmer determining how to conduct, and subsequently executing the search will be recorded as part of the computer search.

2. Duplication

Type	Cost
Aerial photographs, specifications, permits, charts, blueprints, and other technical documents	$2.50
Engineering data (microfilm)	
a. Aperture cards	
(i) Silver duplicate negative, per card	.75
When key punched and verified, per card	.85
(ii) Diazo duplicate negative, per card	.65
When key punched and verified, per card	.75
b. 35mm roll film, per frame	.50
c. 16mm roll film, per frame	.45
d. Paper prints (engineering drawings), each	1.50
e. Paper reprints of microfilm indices, each	.10

3. Review Time

Type	Grade	Hourly Rate
Clerical (Minimum Charge)	E9/GS8 and below	$13.25 $ 8.30
Professional and Executive (To be established at actual hourly rate prior to review. A minimum charge will be established at ½ hourly rates.)		

d. Other Technical Data Records. Charges for any additional services not specifically provided in subparagraph 6–300, *c.*, above, consistent with DoD Instruction 7230.7 (reference (r)), shall be made by Components at the following rates:

1. Minimum charge for office copy (up to six images)	$ 3.50
2. Each additional image	.10
3. Each typewritten page	3.50
4. Certification and validation with seal, each	5.20
5. Hand-drawn plots and sketches, each hour or fraction thereof	12.00

Chapter VII
Reports

Section 1
Reports Control

7–100 General

The reporting requirement outlined in this Chapter is assigned Report Control Symbol DD–PA(A)1365. **Prepare the annual report using the format in figure 7–1. Figure 7–2 provides a worksheet for preparing the annual report.**

Section 2
Annual Report

7–200 Reporting Time

Each DoD Component shall prepare statistics and accumulate paperwork for the preceding calendar year on those items prescribed for the annual report and submit them in duplicate to the ASD(PA) on or before each February 1. Existing DoD standards and registered data elements are to be used for all data requirements to the greatest extent possible in accordance with the provisions of DoD Directive 5000.11 (reference (s)) (AR 25–9). The standard data elements are contained in DoD 5000.12–M (reference (hh)). **The Army will follow guidelines below and submit the information to the Army Freedom of Information and Privacy Act Division, Information Systems Command–Pentagon, ATTN: ASQNS–OP–F, Room 1146, Hoffman Building I, Alexandria, VA 22331–0301 by the second week of each January.**

***a.* Each reporting activity will submit the information requested in paragraph 7–201, items 1*a*, 1*b*, 1*d*, 9, 10, and 11. Data will be collected throughout the year on DD Form 2086.**

***b.* Each IDA will submit the information requested in paragraph 7–201, excluding items 4 through 8.**

***c.* The Judge Advocate General, Army will submit the information requested in paragraph 7–201, item 7.**

***d.* The Army General Counsel will submit the information requested in paragraph 7–201, items 4 through 6.**

***e.* The Information Systems Command–Pentagon will compile the data submitted in the Department of the Army's annual Reporting of Freedom of Information Processing Costs (RCS DD–PA (A) 1365). This report will be sent through the DISC4 (SAIS–PS), WASH DC 20310–0107, to the Director of Freedom of Information and Security Review by 31 January each year.**

7–201 Annual Report Content

The following instructions and attached format shall be used in preparing the annual report (see figure 7–1):

1. ITEM 1

a. Completed Public Requests: Enter the total number of FOIA requests received and responded to during the reporting period.

b. Completed Reportable Requests: Enter the number of actions taken on a completed public request. To arrive at this figure, count the number of blocks checked in item a. of the Annual Report Worksheet (see figure 7–2) for each request processed. (Note: This figure will be equal to or greater than Item 1.a., above).

c. Number of Requests Denied: Enter the number of FOIA requests which were denied in whole or in part based on one or more of the nine FOIA exemptions.

d. Other Reason Responses: Enter the number of FOIA requests in which you were unable to provide the requested information based on an "Other Reason" response, (See Item 2.c., below for an explanation of "Other Reason" responses).

e. Total: Enter the sum of Items 1.c. and 1.d., above.

2. ITEM 2

a. Exemptions Invoked on Initial Determinations: Identify the exemption(s) claimed for each request that was denied in whole or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than that of Item 1.c., above.

b. "(b)(3)" Statutes Invoked on Initial Determinations: Identify the statute(s) cited when you claimed a "(b)(3)" exemption. Cite the specific sections when invoking the Atomic Energy Act of 1954, or the National Security Act of 1947.

c. Initial Request Other Reason Responses: Identify the "other reason" response cited when responding to an FOIA request and enter the number of times each was claimed.

1. Transferred Requests: Enter the number of times a request was transferred to another DoD Component or Federal Agency for action.

2. Lack of Records: Enter the number of times a search of files failed to identify records responsive to subject request and there was no statutory obligation to create a record.

3. Failure of Requester to Reasonably Describe Record: Enter the number of times an FOIA request could not be acted on since the requester failed to reasonably describe the record(s) being sought.

4. Other Failures by Requester to Comply with Published Rules and/or Directives: Enter the number of times a requester failed to follow published rules concerning time, place, fees, and procedures.

5. Request/Appeal Withdrawn by Requester: Enter the number of times a requester withdrew a request and/or appeal.

6. Not an Agency Record: Enter the number of times a requester was provided a response indicating the requested information was not an agency record.

TOTAL: Enter the sum of columns 1 through 6. The total will be equal to or greater than Item 1.d., above, since more than one other reason response may be claimed.

3. ITEM 3. INITIAL DENIAL AUTHORITIES (IDAs BY PARTICIPATION)

a. Total IDAs Authorized: Enter the total number of IDA's at your activity.

b. Individuals Involved in Adverse Determinations: Enter the name, grade, activity and title of each individual who signed a partial and/or total denial response and cite the number of instances of participation.

4. ITEM 4. NUMBER OF APPEALS AND RESULTS

Number of Appeals: Enter the disposition of appeals under the appropriate category and then the total.

5. ITEM 5

a. Exemptions Invoked on Appeal Determinations: Identify the exemption(s) claimed for each appeal that is denied in whole or part. Since more than one exemption may be claimed when responding to a single appeal, this number will be equal to or greater than the total listed in Item 4., above.

b. Statutes Invoked on Appeal Determinations: Identify the statute(s) cited when you claimed a "(b)(3)" exemption.

c. Other Reasons Cited on Appeal Determinations: Identify the "other reason" response when responding to an appeal and enter the number of times each was claimed and the total.

6. ITEM 6

Participation of Appellate Authorities (Those Responsible for Denials in Whole or in Part): Enter the name, grade, activity, and title of each individual who signed a partial and/or total denial response and cite the number of instances of participation.

7. ITEM 7

Court Opinions and Actions Taken: Briefly describe the results of each completed court action the Judge Advocate General and/or the General Counsel participated in during the calendar year. There is no requirement to submit lengthy narratives, nor narratives for court actions pending a decision.

8. ITEM 8

FOIA Implementation Rules or Regulations: List all changes or revisions of rules or regulations affecting the implementation of the FOIA Program, followed by the *Federal Register* reference (volume number, date, and page) that announces the change or revision to the public. Append a copy of each.

9. ITEM 9

FOIA Instructional and Educational Efforts: Report what training and/or seminars your activity has given or attended during this reporting period.

10. ITEM 10

a. Cost of Routine Request: Some reporting activities shall find it economical to develop an average cost factor for processing repetitive routine requests rather than tracking costs on each request as it is processed. This section provides for that economy, but care must be exercised so that costs are comprehensive to include a 25 percent overhead, yet are not duplicated elsewhere in the report.

b. Personnel Costs: (Civilian and Military)

1. Direct costs of personnel assigned FOI duties based upon estimated payroll manyears by grade: Personnel costs are reported in two ways. This section uses a manyear/wage type of costing by grade. To achieve this computation, identify those individuals who are primarily involved in the planning, program management and/or administrative handling of FOIA requests. Use DoD 7220.9–M (reference (v)) for military personnel and Office of Personnel Management salary table for civilian personnel to identify salaries. **Table 7–1 shows how the cost computation is made.**

Table 7–1
Sample Computation

Grade	Number of personnel	Salary	Percentage of time	Costs
0–5	1	$50,000	10	$ 5,000
0–1	1	21,000	30	6,000
GS–12	1	35,000	50	17,500
GS–5	1	18,000	50	9,000

Notes:
1. To determine the manyear computation, Add the total percentages of time and divide the percentage by 100.
2. Sample Computation: Manyears = 140% divided by 100 = 1.4 manyears.

2. Direct costs for other personnel involved in processing request not included above upon accumulation of total hourly data: This section accounts for all other personnel (not reported above) who are involved in processing FOIA requests. Enter the total hourly cost for each area. Only search, review, and reproduction costs may be recouped from the requester. Review costs may only be recouped from commercial requesters. In the case of collections resulting from release of technical data, all reasonable costs for search and reproduction may be recouped (See Section 3, Chapter VI).

(a) Search Time Cost—This includes only those direct costs associated with time spent looking for material that is responsive to a request, including line-by-line identification of material within a document to determine if it is responsive to the request. Searches may be done manually or by computer using existing programming.

(b) Classification Review Costs—This includes all direct costs incurred during the process of examining documents located in response to a commercial use request to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure; e.g. doing all that is necessary to excise them and otherwise prepare them for release. It does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(c) Coordination and Approval/Denial Decision Costs—This includes all costs involved in coordinating the release/denial of documents requested under the FOIA.

(d) Correspondence and Form Preparation Costs—This includes all costs involved in typing responses, filling out forms and/or logbooks, supplies, etc., to respond to an FOIA request.

(e) Other Activity Costs—This includes all other processing costs not covered above, such as processing time by the mail room.

Total Manhour Costs: Enter the sum of 2*(a)* through 2*(e)*.

3. Application of Overhead—The overhead rate is 25% and includes the cost of supervision, space and administrative support. Add items 1 and 2, then multiply the sum by 25%.

c. Other Case Related Costs: Using the fee schedule, enter the total amounts incurred in each area to process FOIA requests.

d. Other Operating Costs: Report all other costs which are easily identifiable, such as: per diem, operation of courier vehicles, training courses, printing (indexes and forms), long distance telephone calls, special mail services, use of indicia, etc.

e. SUMMARY: The summary data provides a total cost figure for administering the FOIA Program and a recap of the fees collected.

11. ITEM 11

a. Formal Time Extensions: Enter the total number of instances in which it was necessary to seek a formal 10 working day time extension, because of:

1. Location: The need to search for and collect the requested records from another activity that was separate from the office processing the request.

2. Volume: The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records indicated in a single request.

3. Consultation: The need for consultation with another agency having substantial interest in the material requested.

4. Court Involvement: Where court actions were taken on the basis of exhaustion of administrative procedures because the department/activity was unable to comply with the request within the applicable time limits, and in which a court allowed additional time upon a showing of exceptional circumstances, report the number of instances the court allowed additional time because the Component was unable to comply with applicable time limits.

b. TOTAL: Enter the sum of items 1 through 4.

Appendix A
Unified Commands—Processing Procedures for FOI Appeals

1. General

a. In accordance with DoD Directive 5400.7 (reference (b)) and this Regulation, the Unified Commands are placed under the jurisdiction of the Office of the Secretary of Defense, instead of the administering Military Department, only for the purpose of administering the Freedom of Information (FOI) Program. This policy represents an exception to the policies in DoD Directive 5100.3 (reference (f)).

b. The policy change above authorizes and requires the Unified Commands to process FOI requests in accordance with DoD Directive 5400.7 (reference (b)) and DoD Instruction 5400.10 (reference (ii)) and to forward directly to the OASD(PA) all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

2. Responsibilities of Commands

Unified Commanders in Chief shall:

a. Designate the officials authorized to deny initial FOIA requests for records.

b. Designate an office as the point-of-contact for FOIA matters.

c. Refer FOIA cases to the ASD(PA) for review and evaluation when the issues raised are of unusual significance, precedent setting, or otherwise require special attention or guidance.

d. Consult with other OSD and DoD Components that may have a significant interest in the requested record prior to a final determination. Coordination with agencies outside of the Department of Defense, if required, is authorized.

e. Coordinate proposed denials of records with the appropriate Unified Command's Office of the Staff Judge Advocate.

f. Answer any request for a record within 10 working days of receipt. The requester shall be notified that his request has been granted or denied. In unusual circumstances, such notification may state that additional time, not to exceed 10 working days, is required to make a determination.

g. Provide to the ASD(PA) when the request for a record is denied in whole or in part, a copy of the response to the requester or his representative, and any internal memoranda that provide background information or rationale for the denial.

h. State in the response that the decision to deny the release of the requested information, in whole or in part, may be appealed to the Assistant Secretary of Defense (Public Affairs), the Pentagon, Washington, DC 20301–1400.

i. Upon request, submit to ASD(PA) a copy of the records that were denied. ASD(PA) shall make such requests when adjudicating appeals.

3. Fees for FOI Requests

The fees charged for requested records shall be in accordance with Chapter VI, above.

4. Communications

Excellent communication capabilities currently exist between the OASD(PA) and the Public Affairs Offices of the Unified Commands. This communication capability shall be used for FOIA cases that are time sensitive.

5. Reporting Requirements

a. The Unified Commands shall submit to the ASD(PA) an annual report. The instructions for the report are outlined in Chapter VII, above.

b. The annual report shall be submitted in duplicate to the ASD(PA) not later than each February 1. This reporting requirement is assigned Report Control Symbol DD–PA(A)1365.

Appendix B
Addressing FOIA Requests

1. General

a. The Department of Defense includes the Office of the Secretary of Defense and the Joint Staff, the Military Departments, the Unified Commands, the Defense Agencies, and the DoD Field Activities.

b. The Department of Defense does not have a central repository for DoD records. FOIA requests, therefore, should be addressed to the DoD Component that has custody of the record desired. In answering inquiries regarding FOIA requests, DoD personnel shall assist requesters in determining the correct DoD Component to address their requests. If there is uncertainty as to the ownership of the record desired, the requester shall be referred to the DoD Component that is most likely to have the record.

2. Listing of DoD Component Addresses for FOIA Requests

a. Office of the Secretary of Defense and the Joint Staff. Send all requests for records from the below listed offices to: Office of the Assistant Secretary of Defense (Public Affairs), ATTN: Directorate for Freedom of Information and Security Review, Room 2C757, The Pentagon, Washington, DC 20301–1400.

(1) Executive Secretariat
(2) Under Secretary of Defense (Policy)
(a) Deputy Under Secretary of Defense (Policy)
(b) Deputy Under Secretary of Defense (Planning & Resources)
(c) Deputy Under Secretary of Defense (Trade Security Policy)
(3) Under Secretary of Defense (Acquisition)
(a) Assistant Secretary of Defense (Production & Logistics)
(b) Assistant Secretary of Defense (Command, Control, Communications, and Intelligence)
(c) Assistant to the Secretary of Defense (Atomic Energy)
(d) Director of Defense Research and Engineering
(e) Director of Small and Disadvantaged Business Utilization
(f) Director, Program Integration
(4) Comptroller of the Department of Defense
(5) Assistant Secretary of Defense (Force Management & Personnel)
(6) Assistant Secretary of Defense (Health Affairs)
(7) Assistant Secretary of Defense (International Security Policy)
(a) Deputy Assistant Secretary of Defense (European & NATO Policy)
(b) Deputy Assistant Secretary of Defense (Negotiations Policy)
(c) Deputy Assistant Secretary of Defense (Nuclear Forces & Arms Control Policy)
(8) Assistant Secretary of Defense (International Security Affairs)
(a) Deputy Assistant Secretary of Defense (African Affairs)
(b) Deputy Assistant Secretary of Defense (East Asian & Pacific Affairs)
(c) Deputy Assistant Secretary of Defense (Inter-American Affairs)
(d) Deputy Assistant Secretary of Defense (Near East & South Asian Affairs)
(e) Deputy Assistant Secretary of Defense (Policy Analysis)
(9) Defense Security Assistance Agency
(10) Assistant Secretary of Defense (Legislative Affairs)
(11) Assistant Secretary of Defense (Public Affairs)
(12) Assistant Secretary of Defense (Program Analysis & Evaluation)
(13) Assistant Secretary of Defense (Reserve Affairs)
(14) Assistant to the Secretary of Defense (Intelligence Oversight)
(15) General Counsel, Department of Defense
(16) Director of Net Assessment
(17) Director of Operational Test and Evaluation
(18) Defense Advanced Research Projects Agency

(19) Strategic Defense Initiative Organization
(20) Defense Systems Management College
(21) National Defense University
(22) Armed Forces Staff College
(23) Department of Defense Dependents Schools
(24) Uniformed Services University of the Health Sciences

b. Department of the Army. Army records may be requested from those Army officials who are listed in 32 CFR 518 (reference (jj)), Appendix B. Send requests to the Army Freedom of Information and Privacy Act Division, Information Systems Command – Pentagon, ATTN: ASQNS–OP–F, Room 1146, Hoffman I, 2461 Eisenhower Avenue, Alexandria, VA 22331–0301 for records of the Headquarters, U.S. Army, or if there is uncertainty as to which Army activity may have the records. Send requests to particular installations or organizations as follows:

(1) Current publications and records of DA field commands, installations, and organizations.

(a) Send the request to the commander of the command, installation, or organization, to the attention of the Freedom of Information Act Official.

(b) Consult AR 25–400–2 for more detailed listings of all record categories kept in DA offices.

(c) Contact the installation or organization public affairs officer for help if you cannot determine the official within a specific organization to whom your request should be addressed.

(2) Department of the Army publications.

(a) Write to the U.S. Government Printing Office, which has many DA publications for sale. Address: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402–0001.

(b) Use the facilities of about 1,000 Government publication depository libraries throughout the United States. These libraries have copies of many DA publications. Obtain a list of these libraries from the Superintendent of Documents at the above address.

(c) Send requests for current administrative, training, technical, and supply publications to the National Technical Information Service, U.S. Department of Commerce, ATTN: Order Preprocessing Section, 5285 Port Royal Road, Springfield, VA 22151–2171; commercial telephone, (703) 487–4600. The National Technical Information Service handles general public requests for unclassified, uncopyrighted, and nondistribution-restricted Army publications not sold through the Superintendent of Documents.

(3) Military personnel records. Send requests for military personnel records of information as follows:

(a) Army Reserve personnel not on active duty and retired personnel—Commander, U.S. Army Reserve Personnel Center, 9700 Page Blvd., St. Louis, MO 63132–5200; commercial telephone, (314) 263–7600.

(b) Army officer personnel discharged or deceased after 1 July 1917 and Army enlisted personnel discharged or deceased after 1 November 1912—Director, National Personnel Records Center, 9700 Page Blvd., St. Louis, MO 63132–5100.

(c) Army personnel separated before the dates specified in (ii) above—Textual Reference Division, Military Reference Branch, National Archives and Records Administration, Washington, DC 20408–0001.

(d) Army National Guard officer personnel—Chief, National Guard Bureau. Army National Guard enlisted personnel—Adjutant General of the proper State.

(e) Active duty commissioned and warrant officer personnel—Commander, U.S. Total Army Personnel Command, ATTN: TAPC–ALS, Alexandria, VA 22332–0405; commercial telephone, (703) 325–4053. Active duty enlisted personnel—Commander, U.S. Army Enlisted Records and Evaluation Center, ATTN: PCRE–RF, Fort Benjamin Harrison, IN 46249–4701; commercial telephone, (317) 542–3643.

(4) Medical records.

(a) Medical records of non-active duty military personnel. Use the same addresses as for military personnel records.

(b) Medical records of military personnel on active duty. Address the medical treatment facility where the records are kept. If necessary, request locator service per (e) above.

(c) Medical records of civilian employees and all dependents. Address the medical treatment facility where the records are kept. If the records have been retired, send requests to the Director, National Personnel Records Center, 111 Winnebago St., St. Louis, MO 63118–4199.

(5) Legal records.

(a) Records of general courts-martial and special courts-martial in which a bad conduct discharge was approved. For cases not yet forwarded for appellate review, apply to the staff judge advocate of the command having jurisdiction over the case. For cases forwarded for appellate review and for old cases, apply to the U. S. Army Legal Service Agency, ATTN: JALS–CC, Nassif Building, Falls Church, VA 22041–5013; AUTOVON 289–1888, commercial telephone, (202) 756–1888.

(b) Records of special courts-martial not involving a bad conduct discharge. These records are kept for 10 years after completion of the case. If the case was completed within the past 3 years, apply to the staff judge advocate of the headquarters where it was reviewed. If the case was completed from 3 to 10 years ago, apply to the National Personnel Records Center (Military Records), 9700 Page Blvd., St. Louis, MO 63132–5100. If the case was completed more than 10 years ago, the only evidence of conviction is the special courts-martial order in the person's permanent records. Request as in (3) above.

(c) Records of summary courts-martial. Locally maintained records are retired 3 years after action of the supervisory authority. Request records of cases less than 3 years old from the staff judge advocate of the headquarters where the case was reviewed. After 10 years, the only evidence of conviction is the summary courts-martial order in the person's permanent records. Request as in (3) above.

(d) Requests submitted under (b) and (c) above. These requests will be processed in accordance with chapter V. The IDA is The Judge Advocate General, HQDA (DAJA–CL), WASH DC 20310–2213; AUTOVON 225–1891, commercial telephone, (202) 695–1891.

(e) Administrative settlement of claims. Apply to the Chief, U.S. Army Claims Service, ATTN: JACS–TCC, Fort George G. Meade, MD 20755–5360; AUTOVON 923–7860, commercial telephone, (301) 677–7860.

(f) Records involving debarred or suspended contractors. Apply to HQDA (JALS–PF), WASH DC 20310–2217; AUTOVON 285–4278, commercial telephone, (202) 504–4278.

(g) Records of all other legal matters (other than records kept by a command, installation, or organization staff judge advocate). Apply to HQDA (DAJA–AL), WASH DC 20310–2212; AUTOVON 224–4316, commercial telephone, (202) 694–4316.

(6) Civil works program records. Civil works records include those relating to construction, operation, and maintenance for the improvement of rivers, harbors, and waterways for navigation, flood control, and related purposes, including shore protection work by the Army. Apply to the proper division or district office of the Corps of Engineer. If necessary to determine the proper office, contact the Commander, U.S. Army Corps of Engineers, ATTN: CECC–K, WASH DC 20314–1000; commercial telephone, (202) 272–0028.

(7) Civilian personnel records. Send requests for personnel records of current civilian employees to the employing installation. Send requests for personnel records of former civilian employees to the Director, National Personnel Records Center, 111 Winnebago St., St. Louis, MO 63118–4199.

(8) Procurement records. Send requests for information about procurement activities to the contracting officer concerned or, if not feasible, to the procuring activity. If the contracting officer or procuring activity is not known, send inquiries as follows:

(a) Army Materiel Command procurement: Commander, U.S. Army Materiel Command, ATTN: AMCPA, 5001 Eisenhower Ave., Alexandria, VA 22333–0001.

(b) Corps of Engineers procurement: Commander, U.S. Army Corps of Engineers, ATTN: CECC–K, WASH DC 20314–1000; commercial telephone, (202) 272–0028.

(c) All other procurement: HQDA (DAJA-KL), WASH DC 20310-2208; AUTOVON 225-6209, commercial telephone, (202) 695-6209.

(9) Criminal investigation files. Send requests involving criminal investigation files to the Commander, U.S. Army Criminal Investigation Command, ATTN: CICR-FP, 2301 Chesapeake Ave., Baltimore, MD 21222-4099; commercial telephone, (301) 234-9340. Only the Commanding General, USACIDC, can release any USACIDC-originated criminal investigation file.

(10) Personnel security investigation files and general Army intelligence records. Send requests for personnel security investigation files, intelligence investigation and security records, and records of other Army intelligence matters to the Commander, U.S. Army Intelligence and Security Command, ATTN: IACSF-FI, Fort George G. Meade, MD 20755-5995.

(11) Inspector General records. Send requests involving records within the Inspector General system to HQDA (SAIG-ZXL), WASH DC 20310-1714. AR 20-1 governs such records.

(12) Army records in Government records depositories.

(a) Noncurrent Army records are in the National Archives of the United States, WASH DC 20408-0001; in Federal Records Centers of the National Archives and Records Administration; and in other records depositories. Requesters must write directly to the heads of these depositories for copies of such records.

(b) A list of pertinent records depositories is published in AR 25-400-2, table 6-1.

c. Department of the Navy. Navy and Marine Corps records may be requested from any Navy or Marine Corps activity by addressing a letter to the Commanding Officer and clearly indicating that it is an FOIA request. Send requests to Chief of Naval Operations, Code OP-09B30, Room 5E521, Pentagon, Washington, DC 20350-2000, for records of the Headquarters, Department of the Navy, and to Freedom of Information and Privacy Act Office, Code MI-3, HQMC, Room 4327, Washington, DC 20308-0001, for records of the U.S. Marine Corps, or if there is uncertainty as to which Navy or Marine activities may have the records.

d. Department of the Air Force. Air Force records may be requested from the Commander of any Air Force installation, major command, or separate operating agency (ATTN: FOIA Office). For Air Force records of Headquarters, United States Air Force, or if there is uncertainty as to which Air Force activity may have the records, send requests to Secretary of the Air Force, ATTN: SAF/AADS(FOIA), Washington, DC 20330-1000.

e. Defense Contract Audit Agency (DCAA). DCAA records may be requested from any of its regional offices or from its headquarters. Requesters should send FOIA requests to the Defense Contract Audit Agency, ATTN: CMR, Cameron Station, Alexandria, VA 22304-6178, for records of its headquarters or if there is uncertainty as to which DCAA region may have the records sought.

f. Defense Communications Agency (DCA). DCA records may be requested from any DCA field activity or from its headquarters. Requesters should send FOIA requests to Defense Communications Agency, Code H104, Washington, DC 20305-2000.

g. Defense Intelligence Agency (DIA). FOIA requests for DIA records may be addressed to Defense Intelligence Agency, ATTN: RTS-1B, Washington, DC 20340-3299.

h. Defense Investigative Service (DIS). All FOIA requests for DIS records should be sent to the Defense Investigative Service, ATTN: V0020, 1900 Half St., SW, Washington, DC 20324-1700.

i. Defense Logistics Agency (DLA). DLA records may be requested from its headquarters or from any of its field activities. Requesters should send FOIA requests to Defense Logistics Agency, ATTN: DLA-XA, Cameron Station, Alexandria, VA 22304-6130.

j. Defense Mapping Agency (DMA). FOIA requests for DMA records may be sent to the Defense Mapping Agency, 8613 Lee Highway, Fairfax, VA 22031-2137.

k. Defense Nuclear Agency (DNA). FOIA requests for DNA records may be sent to the Defense Nuclear Agency, Public Affairs Office, Room 111, Washington, DC 20305-1000.

l. National Security Agency (NSA). FOIA requests for NSA records may be sent to the National Security Agency/Central Security Service, ATTN: Q-43, Fort George G. Meade, MD 20755-6000.

m. Office of the Inspector General, Department of Defense (IG, DoD). FOIA requests for IG, DoD records may be sent to the Department of Defense, Office of the Inspector General, Assistant Inspector General for Investigations, ATTN: FOIA Coordinator, 400 Army Navy Drive, Arlington, Virginia 22202-2884.

3. Other Addressees

Although the below organizations are OSD and Joint Staff Components for the purposes of the FOIA, requests may be sent directly to the addresses indicated.

a. Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS). Director, OCHAMPUS, ATTN: Freedom of Information Officer, Aurora, CO 80045-6900.

b. Chairman, Armed Services Board of Contract Appeals (ASBCA). Chairman, Armed Services Board of Contract Appeals, Hoffman II, 200 Stovall Street, Alexandria, VA 22332-0002.

c. U.S. Central Command. U.S. Central Command/CCAG, MacDill Air Force Base, FL 33608.

d. U.S. European Command. Records Administrator, Headquarters, U.S. European Command/ECJ1-AR(FOIA), APO New York 09128-4209.

e. U.S. Southern Command. Attorney-Advisor (International), Headquarters U.S. Southern Command/SCSJA, APO Miami 34003-0007.

f. U.S. Pacific Command. Administrative & Security Programs Division (J147A), Joint Secretariat, CINCPAC, Box 28, Camp H. M. Smith, HI 96861-5025.

g. U.S. Special Operations Command. Freedom of Information Officer, ATTN: U.S. Special Operations Command, MacDill Air Force Base, FL 33608.

h. U.S. Atlantic Command. Commander-in-Chief, Atlantic Command, Code J008, Norfolk, VA 23511.

i. U.S. Space Command. Chief, Records Management Division, Directorate of Administration, United States Space Command, Peterson Air Force Base, CO 80914-5001.

4. National Guard Bureau

FOIA requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau, (NGB-DAI), Pentagon, Room 2C362, Washington, D.C. 20310-2500.

5. Miscellaneous

If there is uncertainty as to which DoD component may have the DoD record sought, the requester may address a Freedom of Information request to the Office of the Assistant Secretary of Defense (Public Affairs), ATTN: Directorate for Freedom of Information and Security Review, Room 2C757, The Pentagon, Washington, DC 20301-1400.

Appendix C
Litigation Status Sheet

1. Case Number*
(for DA, use case name)

2. Requester

3. Document Title or Description

4. Litigation
a. Date Complaint Filed

*Number used by Component for reference ses.

b. Court

c. Case File Number*

5. Defendants (agency and individual)

6. Remarks: (brief explanation of what the case is about)

7. Court Action

a. Court's Finding

b. Disciplinary Action (as appropriate)

8. Appeal (as appropriate)

a. Date Complaint Filed

b. Court

c. Case File Number*

d. Court's Finding

e. Disciplinary Action (as appropriate)

Appendix D
Other Reason Categories

1. Transferred Requests

This category applies when responsibility for making a determination or a decision on categories 2, 3, or 4 below is shifted from one Component to another, or to another Federal Agency.

2. Lack of Records

This category covers those situations wherein the requester is advised the DoD Component has no record or has no statutory obligation to create a record.

3. Failure of Requester to Reasonably Describe Record

This category is specifically based on Section 552(a) (3)(a) of the FOIA (reference (a)).

4. Other Failures by Requesters to Comply with Published Rules or Directives

This category is based on Section 552(a)(3)(b) of the FOIA (reference (a)) and includes instances of failure to follow published rules concerning time, place, fees, and procedures.

5. Request Withdrawn by Requester

This category covers those situations wherein the requester asks an agency to disregard the request (or appeal) or pursues the request outside FOIA channels.

6. Not an Agency Record

This category covers situations where the information requested is not an agency record within the meaning of the FOIA and this Regulation.

Appendix E
DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost" *(Removed)*

Appendix F
DD Form 2086–1, "Record of Freedom of Information (FOI) Processing Cost for Technical Data" *(Removed)*

Appendix G
DoD Freedom of Information Act Program Components

Office of the Secretary of Defense/Joint Staff/Unified Commands, Defense Agencies, and the DoD Field Activities

Department of the Army

Department of the Navy

Department of the Air Force

Defense Communications Agency

Defense Contract Audit Agency

Defense Intelligence Agency

Defense Investigative Service

Defense Logistics Agency

Defense Mapping Agency

Defense Nuclear Agency

National Security Agency

Office of the Inspector General, Department of Defense

APPENDIX C

Extracts of Procurement Regulations

1. Extract of Federal Acquisition Regulation (FAR)

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

[¶ 30,432]

24.000 Scope of part.

This part prescribes policies and procedures that apply requirements of the Privacy Act of 1974 (5 U.S.C. 552a) (the Act) and OMB Circular No. 108, July 9, 1975, to Government contracts and cites the Freedom of Information Act (5 U.S.C. 552, as amended.)

SUBPART 24.1—PROTECTION OF INDIVIDUAL PRIVACY

[¶ 30,433]

24.101 Definitions.

"Agency," as used in this subpart, means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

"Individual," as used in this subpart, means a citizen of the United States or an alien lawfully admitted for permanent residence.

"Maintain," as used in this subpart, means maintain, collect, use, or disseminate.

"Operation of a system of records," as used in this subpart, means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

"Record," as used in this subpart, means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, financial transactions, medical history, and criminal or employment history, and that contains the individual's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voiceprint or a photograph.

"System of records on individuals," as used in this subpart, means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

[¶ 30,434]

24.102 General.

(a) The Act requires that when an agency contracts for the design, development, or operation of a system of records on individuals on behalf of the agency to accomplish an agency function the agency must apply the requirements of the Act to the contractor and its employees working on the contract.

(b) An agency officer or employee may be criminally liable for violations of the Act. When the contract provides for operation of a system of records on individuals, contractors and their employees are considered employees of the agency for purposes of the criminal penalties of the Act.

(c) If a contract specifically provides for the design, development, or operation of a system of records on individuals on behalf of an agency to accomplish an agency function, the agency must apply the requirements of the Act to the contractor and its employees working on the contract. The system of records operated under the contract is deemed to be maintained by the agency and is subject to the Act.

(d) Agencies, which within the limits of their authorities, fail to require that systems of records on individuals operated on their behalf under contracts be operated in conformance with the Act may be civilly liable to individuals injured as a consequence of any subsequent failure to maintain records in conformance with the Act.

[¶ 30,435]

24.103 Procedures.

(a) The contracting officer shall review requirements to determine whether the contract will involve the design, development, or operation of a system of records on individuals to accomplish an agency function.

(b) If one or more of those tasks will be required, the contracting officer shall—

(1) Ensure that the contract work statement specifically identifies the system of

records on individuals and the design, development, or operation work to be performed; and

(2) Make available, in accordance with agency procedures, agency rules and regulation implementing the Act.

[¶ 30,436]

24.104 Contract clauses.

When the design, development, or operation of a system of records on individuals is required to accomplish an agency function, the contracting officer shall insert the following clauses in solicitations and contracts:

(a) The clause at 52.224-1, Privacy Act Notification.

(b) The clause at 52.224-2, Privacy Act.

SUBPART 24.2—FREEDOM OF INFORMATION ACT

[¶ 30,437]

24.201 Authority.

The Freedom of Information Act (5 U.S.C. 552, as amended) provides that information is to be made available to the public either by (a) publication in the Federal Register; (b) providing an opportunity to read and copy records at convenient locations; or (c) upon request, providing a copy of a reasonably described record.

[¶ 30,438]

24.202 Policy.

(a) The Act specifies, among other things, how agencies shall make their records available upon public request, imposes strict time standards for agency responses, and exempts certain records from public disclosure. Each agency's implementation of these requirements is located in its respective title of the Code of Federal Regulations and referenced in Subpart 24.2 of its implementing acquisition regulations.

(b) Contracting officers may receive requests for records that may be exempted from mandatory public disclosure. The exemptions most often applicable are those relating to classified information, to trade secrets and confidential commercial or financial information, to interagency or intragency memoranda, or to personal and medical information pertaining to an individual. Since these requests often involve complex issues requiring an in-depth knowledge of a large and increasing body of court rulings and policy guidance, contracting officers are cautioned to comply with the implementing regulations of their agency and to obtain necessary guidance from the agency officials having Freedom of Information Act responsibility. If additional assistance is needed, authorized agency officials may contact the Department of Justice, Office of Information and Privacy. [FAC 84-21, 51 FR 31426, 9/3/86, effective 8/29/86]

PART 224—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

(48 CFR Part 224)

SUBPART 224.1—PROTECTION OF INDIVIDUAL PRIVACY

[¶ 33,801]

224.102 General.

(a)(2) The Act does not apply to systems of records on individuals when:

(i) records are maintained by the contractor on individuals whom the contractor employs in the process of providing goods and services to the Federal Government;

(ii) an agency contracts with a state or private educational organization to provide training, and the records generated on contract students pursuant to their attendance (admission forms, grade reports) are similar to those maintained on other students and are commingled with their records on other students.

[¶ 33,802]

224.103 Procedures.

(b)(2) Implementation of the requirements of the Privacy Act is located in DoD Directive 5400.11 (see Appendix P).

SUBPART 224.2—FREEDOM OF INFORMATION ACT

[¶ 33,805]

224.202 Policy.

Implementation of the requirements of the Freedom of Information Act is located in DoD Directive 5400.7 and DoD Regulation 5400.7-R (see Appendix L).

PART 24—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

SUBPART 24.2—FREEDOM OF INFORMATION ACT

[¶ 42,051]

24.202 Policy.

(a) Contracting officers shall follow the instructions in AR 340-17, FAR and DFARS 24.202 and DFARS Appendix L with respect to release of acquisition information. AR 360-5, Public Information, contains policies for private entities holding Army contracts. Policy on release of intelligence material to contractors is in AR 380-9(c).

(90) Nonrelease of Acquisition Information.

(1) If, after review of a request for information made under the Freedom of Information Act (FOIA), the contracting officer concludes that some or all information requested should not be released, contracting offices under the Heads of Contracting Activity listed in the Redelegation of Authority at 1.9101(b)(16) shall forward such recommendation for denial to the Head of Contracting Activity. The recommendation shall be prepared in accordance with AR 340-17, indicate what, if any, records were released and include copies of the records recommended for nonrelease. Contracting offices of the Army Materiel Command and Corps of Engineers shall follow procedures specified by their headquarters.

(2) If, after coordination with counsel, the cognizant Head of Contracting Activity decides that some or all of the information recommended for nonrelease is to be denied to the requestor, the requestor is to be notified in writing within the time constraints provided in AR 340-17. The letter is to indicate, as a minimum, the records under consideration and reasons for denial of the request. The letter shall conclude with a paragraph worded substantially as follows:

"Your request is (partially) denied. You may appeal this denial to the Secretary of the Army. In the event you decide to appeal, your letter of appeal should be sent within 60 days of the date of this denial letter through (type in HCA address) to the Office of the Secretary of the Army, Pentagon, ATTN: Office of the General Counsel, Freedom of Information Act Appeal, Washington, D.C. 20310-0105. This denial is made on behalf of the Initial Denial Authority, the Assistant Secretary of the Army (Research, Development and Acquisition) by (name and rank), Principal Assistant for Contracting, (office).

(3) Upon receipt of appeals, Heads of Contracting Activities shall, within 3 working days, transmit the appeal letter, along with a copy of the initial denial letter and both a sanitized and an unsanitized copy of the FOIA information requested to the address in 24.202(90)(2). [AL 88-16, 6/6/88; AL 89-22, 9/20/89]

APPENDIX D

THE PRIVACY ACT OF 1974

5 U.S.C. §552a

As Amended

§552a. Records maintained on individuals

(a) Definitions

For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of Title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 464 or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel; or

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of Title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any

joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction;

(12) to a consumer reporting agency in accordance with section 3711(f) of Title 31.

(c) Accounting of Certain Disclosures

Each agency, with respect to each system of records under its control shall--

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of--

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records

Each agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and--

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either--

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of records shall--

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual--

(A) the authority (whether granted by statute, or by Executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include--

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall--

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency

notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case

shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is--

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent,

control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is--

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of Title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records

Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of Title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of Title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law.

This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Matching agreements-- (1) No record which is contained in a system of records may be disclosed to a recipient agency or non-Federal agency for use in a computer matching program except pursuant to a written agreement between the source agency and the recipient agency or non-Federal agency specifying--

(A) the purpose and legal authority for conducting the program;

(B) the justification for the program and the anticipated results, including a specific estimate of any savings;

(C) a description of the records that will be matched, including each data element that will be used, the approximate number of records that will be matched, and the projected starting and completion dates of the matching program;

(D) procedures for providing individualized notice at the time of application, and notice periodically thereafter as directed by the Data Integrity Board of such agency (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)), to--

(i) applicants for and recipients of financial assistance or payments under Federal benefit programs, and

(ii) applicants for and holders of positions as Federal personnel,

that any information provided by such applicants, recipients, holders, and individuals may be subject to verification through matching programs;

(E) procedures for verifying information produced in such matching program as required by subsection (p);

(F) procedures for the retention and timely destruction of identifiable records created by a recipient agency or non-Federal agency in such matching program;

(G) procedures for ensuring the administrative, technical, and physical security of the records matched and the results of such programs;

(H) prohibitions on duplication and redisclosure of records provided by the source agency within or outside the recipient agency or the non-Federal agency, except where required by law or essential to the conduct of the matching program;

(I) procedures governing the use by a recipient agency or non-Federal agency of records provided in a matching program by a source agency, including procedures governing return of the records to the source agency or destruction of records used in such program;

(J) information on assessments that have been made on the accuracy of the records that will be used in such matching program; and

(K) that the Comptroller General may have access to all records of a recipient agency or a non-Federal agency that the

Comptroller General deems necessary in order to monitor or verify compliance with the agreement.

(2)(A) A copy of each agreement entered into pursuant to paragraph (1) shall--

(i) be transmitted to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives; and

(ii) be available upon request to the public.

(B) No such agreement shall be effective until 30 days after the date on which such a copy is transmitted pursuant to subparagraph (A)(i).

(C) Such an agreement shall remain in effect only for such period, not to exceed 18 months, as the Data Integrity Board of the agency determines is appropriate in light of the purposes, and length of time necessary for the conduct, of the matching program.

(D) Within 3 months prior to the expiration of such an agreement pursuant to subparagraph (C), the Data Integrity Board of the agency may, without addition review, renew the matching agreement for a current, ongoing matching program for not more than one additional year if--

(i) such program will be conducted without any change; and

(ii) each party to the agreement certifies to the Board in writing that the program has been conducted in compliance with the agreement.

(p) Verification and Opportunity to Contest Findings-- (1) In order to protect any individual whose records are used in matching programs, no recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to such individual, or take other adverse action against such individual as a result of information produced by such matching programs, until an officer or employee of such agency has independently verified such information. Such independent verification may be satisfied by verification in accordance with (A) the requirements of paragraph (2); and (B) any additional requirements governing verification under such Federal benefit program.

(2) Independent verification referred to in paragraph (1) requires independent investigation and confirmation of any information used as a basis for an adverse action against an individual including, where applicable--

(A) the amount of the asset or income involved,

(B) whether such individual actually has or had access to such asset or income for such individual's own use, and

(C) the period or periods when the individual actually had such asset or income.

(3) No recipient agency, non-Federal agency, or source agency may suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program to any individual described in paragraph (1), or take other adverse

action against such individual as a result of information produced by a matching program, (A) unless such individual has received notice from such agency containing a statement of its findings and informing the individual of the opportunity to contest such findings, and (B) until the subsequent expiration of any notice period provided by the program's law or regulations, or 30 days, whichever is later. Such opportunity to contest may be satisfied by notice, hearing, and appeal rights governing such Federal benefit program. The exercise of any such rights shall not affect any rights available under this section.

(4) Notwithstanding paragraph (3), an agency may take any appropriate action otherwise prohibited by such paragraph if the agency determines that the public health or public safety may be adversely affected or significantly threatened during the notice period required by such paragraph.

(q) Sanctions-- (1) Notwithstanding any other provision of law, no source agency may disclose any record which is contained in a system of records to a recipient agency or non-Federal agency for a matching program if such source agency has reason to believe that the requirements of subsection (p), or any matching agreement entered into pursuant to subsection (o), or both, are not being met by such recipient agency.

(2) No source agency may renew a matching agreement unless--

(A) the recipient agency or non-Federal agency has certified that it has complied with the provisions of that agreement; and

(B) the source agency has no reason to believe that the certification is inaccurate.

(r) Report on new systems and matching programs

Each agency that proposes to establish or make a significant change in a system of records or a matching program shall provide adequate advance notice of any such proposal (in duplicate) to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget in order to permit an evaluation of the probable or potential effect of such proposal on the privacy or other rights of individuals.

(s) Biennial report

The President shall biennially submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report--

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding two years;

(2) describing the exercise of individual rights of access and amendment under this section during such years;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(t) Effect of other laws

(1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(u) Data Integrity Boards-- (1) Every agency conducting or participating in a matching program shall establish a Data Integrity Board to oversee and coordinate among the various components of such agency the agency's implementation of this section.

(2) Each Data Integrity Board shall consist of senior officials designated by the head of the agency, and shall include any senior official designated by the head of the agency as responsible for implementation of this section, and the inspector general of the agency, if any. The inspector general shall not serve as chairman of the Data Integrity Board.

(3) Each Data Integrity Board--

(A) shall review, approve, and maintain all written agreements for receipt or disclosure of agency records for matching programs to ensure compliance with subsection (o), and all relevant statutes, regulations, and guidelines;

(B) shall review all matching programs in which the agency has participated during the year, either as a source agency or recipient agency, determine compliance with applicable laws, regulations, guidelines, and agency agreements, and assess the costs and benefits of such programs;

(C) shall review all recurring matching programs in which the agency has participated during the year, either as a source agency or recipient agency, for continued justification for such disclosures;

(D) shall compile an annual report, which shall be submitted to the head of the agency and the Office of Management and Budget and made available to the public on request, describing the matching activities of the agency, including--

(i) matching programs in which the agency has participated as a source agency or recipient agency;

(ii) matching agreements proposed under subsection (o) that were disapproved by the Board;

(iii) any changes in membership or structure of the Board in the preceding year;

(iv) the reasons for any waiver of the requirement in paragraph (4) of this section for completion and submission of a cost-benefit analysis prior to the approval of a matching program;

(v) any violations of matching agreements that have been alleged or identified and any corrective action taken; and

(vi) any other information required by the Director of the Office of Management and Budget to be included in such report;

(E) shall serve as a clearinghouse for receiving and providing information on the accuracy, completeness, and reliability of records used in matching programs;

(F) shall provide interpretation and guidance to agency components and personnel on the requirements of this section for matching programs;

(G) shall review agency recordkeeping and disposal policies and practices for matching programs to assure compliance with this section; and

(H) may review and report on any agency matching activities that are not matching programs.

(4)(A) Except as provided in subparagraphs (B) and (C), a Data Integrity Board shall not approve any written agreement for a matching program unless the agency has completed and submitted to such Board a cost-benefit analysis of the proposed program and such analysis demonstrates that the program is likely to be cost effective.

(B) The Board may waive the requirements of subparagraph (A) of this paragraph if it determines in writing, in accordance with guidelines prescribed by the Director of the Office of Management and Budget, that a cost-benefit analysis is not required.

(C) A cost-benefit analysis shall not be required under subparagraph (A) prior to the initial approval of a written agreement for a matching program that is specifically required by statute. Any subsequent written agreement for such a program shall not be approved by the Data Integrity Board unless the agency has submitted a cost-benefit analysis of the program as conducted under the preceding approval of such agreement.

(5)(A) If a matching agreement is disapproved by a Data Integrity Board, any party to such agreement may appeal the disapproval to the Director of the Office of Management and Budget. Timely notice of the filing of such an appeal shall be provided by the Director of the Office of Management and Budget to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.

(B) The Director of the Office of Management and Budget may approve a matching agreement notwithstanding the disapproval of a Data Integrity Board if the Director determines that--

(i) the matching program will be consistent with all applicable legal, regulatory, and policy requirements;

(ii) there is adequate evidence that the matching agreement will be cost-effective; and

(iii) the matching program is in the public interest.

(C) The decision of the Director to approve a matching agreement shall not take effect until 30 days after it is reported to committees described in subparagraph (A).

(D) If the Data Integrity Board and the Director of the Office of Management and Budget disapprove a matching program proposed by the inspector general of an agency, the inspector general may report the disapproval to the head of the agency and to the Congress.

(6) The Director of the Office of Management and Budget shall, annually during the first 3 years after the date of enactment of this subsection and biennially thereafter, consolidate in a report to the Congress the information contained in the reports from the various Data Integrity Boards under paragraph (3)(D). Such report shall include detailed information about costs and benefits of matching programs that are conducted during the period covered by such consolidated report, and shall identify each waiver granted by a Data Integrity Board of the requirement for completion and submission of a cost-benefit analysis and the reasons for granting the waiver.

(7) In the reports required by paragraphs (3)(D) and (6), agency matching activities that are not matching programs may be reported on an aggregate basis, if and to the extent necessary to protect ongoing law enforcement or counterintelligence investigations.

(v) Office of Management and Budget Responsibilities-- The Director of the Office of Management and Budget shall--

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

The following sections were originally part of the Privacy Act but were not codified:

Sec. 7 (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to--

(A) any disclosure which is required by Federal statute, or

(B) any disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

The following sections were originally part of P.L. 100-503, The Computer Matching and Privacy Protection Act of 1988.

Sec. 6 Functions of the Director of the Office of Management and Budget.

(b) Implementation Guidance for Amendments-- The Director shall, pursuant to section 552a(v) of Title 5, United States Code, develop guidelines and regulations for the use of agencies in implementing the amendments made by this Act not later than 8 months after the date of enactment of this Act.

Sec. 9 Rules of Construction.

Nothing in the amendments made by this Act shall be construed to authorize--

(1) the establishment or maintenance by any agency of a national data bank that combines, merges, or links information on individuals maintained in systems of records by other Federal agencies;

(2) the direct linking of computerized systems of records maintained by Federal agencies;

(3) the computer matching of records not otherwise authorized by law; or

(4) the disclosure of records for computer matching except to a Federal, State, or local agency.

Sec. 10 Effective Dates.

(a) In General-- Except as provided in subsection (b), the amendments made by this Act shall take effect 9 months after the date of enactment of this Act.

(b) Exceptions-- The amendment made by sections 3(b) [Notice of Matching Programs - Report to Congress and the Office of Management and Budget], 6 [Functions of the Director of the Office of Management and Budget], 7 [Compilation of Rules and Notices] and 8 [Annual Report] of this Act shall take effect upon enactment.

Headquarters
Department of the Army
Washington, DC
5 July 1985

APPENDIX E

*Army Regulation 340–21

Effective 5 July 1985

Office Management

The Army Privacy Program

This UPDATE printing publishes a revision which is effective 5 July 1985. Because the structure of the entire revised text has been reorganized, no attempt has been made to highlight changes from the earlier regulation dated 27 August 1975.

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
Brigadier General, United States Army
The Adjutant General

Summary. This regulation on the Army Privacy Program has been revised. It supplements DOD Directive 5400.11 and DOD 5400.11–R.

Applicability. This regulation applies to the Active Army, the Army National Guard, the U.S. Army Reserve, and the Army and Air Force Exchange Service.

Impact on New Manning System. This regulation does not contain information that affects the New Manning System.

Supplementation. Supplementation of this regulation is prohibited without prior approval from HQDA(DAAG–AMR–S), ALEX VA 22331–0301.

Interim changes. Interim changes to this regulation are not official unless they are authenticated by The Adjutant General. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested improvements. The proponent agency of this regulation is the Office of The Adjutant General. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to HQDA(DAAG–AMR–S), ALEX VA 22331–0301.

Distribution. Active Army, B; ARNG, D; USAR, D.

Contents (Listed by paragraph number)

Chapter 1
General Information
Purpose • 1–1
References • 1–2
Explanation of abbreviations and terms • 1–3
Responsibilities • 1–4
Policy • 1–5
Authority • 1–6
Access and amendment refusal authority • 1–7
DA Privacy Review Board • 1–8
Privacy official • 1–9

Chapter 2
Individual Rights of Access and Amendment
Access under the Privacy Act • 2–1
Notifying the individual • 2–2
Relationship between the Privacy Act and the Freedom of Information Act • 2–3
Functional requests • 2–4
Medical records • 2–5
Third party information • 2–6
Referral of records • 2–7
Fees • 2–8
Denial of access • 2–9
Amendment of records • 2–10
Procedures • 2–11
Privacy case files • 2–12

Chapter 3
Disclosure of Personnel Information to Other Agencies and Third Parties
Disclosure without consent • 3–1
Blanket routine use disclosures • 3–2
Disclosure to third parties • 3–3
Accounting of disclosure • 3–4

Chapter 4
Recordkeeping Requirements Under the Privacy Act
Systems of records • 4–1
Privacy Act Statement • 4–2
Social Security Number • 4–3
Safeguarding personal information • 4–4
First amendment rights • 4–5
System notice • 4–6
Reporting requirements • 4–7
Rules of conduct • 4–8
Judicial sanctions • 4–9

Chapter 5
Exemptions
Exempting systems of records • 5–1
General exemptions • 5–2
Specific exemptions • 5–3
Procedures • 5–4
Exempt Army records • 5–5
Exempt OPM records • 5–6

Glossary

*This regulation supersedes AR 340–21, 27 August 1975.

RESERVED

Chapter 1
General Information

1–1. Purpose

This regulation sets forth policies and procedures that govern personal information kept by the Department of the Army (DA) in systems of records.

1–2. References

a. Required publications.

(1) AR 195–2, Criminal Investigation Activities. (Cited in para 2–10e.)

(2) AR 340–17, Release of Information and Records from Army Files. (Cited in paras 2–8 and 4–4c.)

(3) AR 340–21–8, The Army Privacy Program; System Notices and Exemption Rules for Civilian Personnel Functions. (Cited in para 2–9c.)

(4) AR 380–380, Automated Systems Security. (Cited in paras 4–4*b* and 4–6c(8).)

b. Related publications. (A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.)

(1) DODD 5400.11, DOD Privacy Program.

(2) DOD 5400.11–R, DOD Privacy Program.

(3) Treasury Fiscal Requirements Manual. This publication can be obtained from The Treasury Department, 15th and Pennsylvania Ave, NW, Washington, DC 20220.

1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this regulation are explained in the glossary.

1–4. Responsibilities

a. The Assistant Chief of Staff for Information Management (ACSIM) is responsible for issuing policy and guidance for the Army Privacy Program in consultation with the Army General Counsel.

b. The Adjutant General (TAG) is responsible for developing and recommending policy to ACSIM concerning the Army Privacy Program and for overall execution of the program under the policy and guidance of ACSIM.

c. Heads of Army Staff agencies, field operating agencies, major Army commands (MACOMs), and subordinate commands are responsible for supervision and execution of the privacy program in functional areas and activities under their command.

d. Heads of Joint Service agencies or commands for which the Army is the Executive Agent, or otherwise has responsibility for providing fiscal, logistical, or administrative support, will adhere to the policies and procedures in this regulation.

e. Commander, Army and Air Force Exchange Service (AAFES), is responsible for the supervision and execution of the privacy program within that command pursuant to this regulation.

1–5. Policy

Army policy concerning the privacy rights of individuals and the Army's responsibilities for compliance with operational requirements established by the Privacy Act are as follows:

a. Protect, as required by the Privacy Act of 1974 (5 USC 552a), as amended, the privacy of individuals from unwarranted intrusion. Individuals covered by this protection are living citizens of the United States and aliens lawfully admitted for permanent residence.

b. Collect only the personal information about an individual that is legally authorized and necessary to support Army operations. Disclose this information only as authorized by the Privacy Act and this regulation.

c. Keep only personal information that is timely, accurate, complete, and relevant to the purpose for which it was collected.

d. Safeguard personal information to prevent unauthorized use, access, disclosure, alteration, or destruction.

e. Let individuals know what records the Army keeps on them and let them review or get copies of these records, subject to exemptions authorized by law and approved by the Secretary of the Army. (See chap 5.)

f. Permit individuals to amend records about themselves contained in Army systems of records, which they can prove are factually in error, not up-to-date, not complete, or not relevant.

g. Allow individuals to ask for an administrative review of decisions that deny them access to or the right to amend their records.

h. Maintain only information about an individual that is relevant and necessary for Army purposes required to be accomplished by statute or Executive Order.

i. Act on all requests promptly, accurately, and fairly.

1–6. Authority

The Privacy Act of 1974 (5 USC 552a), as amended, is the statutory basis for the Army Privacy Program. Within the Department of Defense (DOD), the Act is implemented by DODD 5400.11 and DOD 5400–11–R. The Act assigns—

a. Overall Government-wide responsibilities for implementation to the Office of Management and Budget (OMB).

b. Specific responsibilities to the Office of Personnel Management (OPM) and the General Services Administration (GSA).

1–7. Access and amendment refusal authority

Each access and amendment refusal authority (AARA) is responsible for action on requests for access to, or amendment of, records referred to them under this regulation. The officials listed below are the sole AARAs for records in their functional areas:

a. The Adjutant General—for personnel records of Army retired, separated, and reserve military members; DOD dependent school student transcripts; and records not within the jurisdiction of another AARA.

b. The Administrative Assistant to the Secretary of the Army—for records of the Secretariat and its serviced activities, as well as those records requiring the personal attention of the Secretary of the Army.

c. The president or executive secretary of boards, councils, and similar bodies established by DA to consider personnel matters, excluding the Army Board for Correction of Military Records.

d. Chief of Chaplains—for ecclesiastical records.

e. Chief of Engineers—for records pertaining to civil works, including litigation; military construction; engineer procurement; other engineering matters not under the purview of another AARA; ecology; and contractor qualifications.

f. Comptroller of the Army—for financial records.

g. Deputy Chief of Staff for Personnel—for the records listed below.

(1) Personnel records of current Federal civilian employees and active and former nonappropriated fund employees (except those in the AAFES).

(2) Military police records.

(3) Prisoner confinement and correctional records.

(4) Safety records.

(5) Alcohol and drug abuse treatment records.

(Requests from former civilian employees to amend a record in an OPM system of records such as the Official Personnel Folder should be sent to the Office of Personnel Management, Assistant Director for Workforce Information, Compliance and Investigations Group, 1900 E Street, NW, WASH DC 20415–0001.)

h. The Inspector General (TIG)—for TIG investigative records.

i. The Judge Advocate General (TJAG)—for legal records under TJAG responsibility.

j. The Surgeon General—for medical records, except those properly part of the Official Personnel Folder (OPM/GOVT–1 system of records).

k. Commander, AAFES—for records pertaining to employees, patrons, and other matters that are the responsibility of the Exchange Service.

l. Commanding General, U.S. Army Criminal Investigation Command (USACIDC)—for criminal investigation reports and military police reports included therein.

m. Commanding General, U.S. Army Intelligence and Security Command—for intelligence and security investigative records.

n. Commanding General, U.S. Army Materiel Command—for records of Army contractor personnel, exclusive of those in *e* above.

o. Commanding General, U.S. Army Military Personnel Center—for personnel and personnel-related records of Active duty Army members.

p. Commander, Military Traffic Management Command—for transportation records.

q. Chief, National Guard Bureau—for personnel records of the Army National Guard.

1–8. DA Privacy Review Board

The DA Privacy Review Board acts on behalf of the Secretary of the Army to decide appeals from refusal of the appropriate AARAs to amend records. Board membership is comprised of the Administrative Assistant to the Secretary of the Army, The Adjutant General, and The Judge Advocate General, or their representatives. The AARA may serve as a nonvoting member when the Board considers matters in the AARA's area of functional specialization. The Adjutant General chairs the Board and provides the Recording Secretary.

1–9. Privacy official

a. Heads of Army Staff agencies and commanders of MACOMs and subordinate commands and activities will designate a privacy official who will serve as a staff adviser on privacy matters. This function will not be assigned below battalion level.

b. The privacy official will insure that—

(1) Requests are processed promptly and responsively.

(2) Records subject to the Privacy Act in his or her command or agency are described properly by a published system notice.

(3) Privacy statements are included on forms and questionnaires that seek personal information from an individual.

(4) Procedures are in place to meet reporting requirements.

Chapter 2
Individual Rights of Access and Amendment

2–1. Access under the Privacy Act

a. Upon a written or oral request, an individual, or his or her designated agent or legal guardian, will be granted access to a record pertaining to that individual, maintained in a system of records, unless—

(1) The record is subject to an exemption and the system manager has invoked the exemption (see chap 5), or

(2) The record is information compiled in reasonable anticipation of a civil action or proceeding.

b. The requester does not have to state a reason or justify the need to gain access. An individual cannot be denied access solely for refusal to provide his or her Social Security Number (SSN) unless the SSN was required for access by statute or regulation adopted prior to January 1, 1975. The request should be submitted to the custodian of the record.

2–2. Notifying the individual

The custodian of the record will acknowledge requests for access within 10 work days of receipt. Releasable records will be provided within 30 days, excluding Saturdays, Sundays, and legal public holidays.

2–3. Relationship between the Privacy Act and the Freedom of Information Act

A Privacy Act request for access to records will be processed also as a Freedom of Information Act request. If all or any portion of the requested material is to be denied, it must be considered under the substantive provisions of both the Privacy Act and the Freedom of Information Act. Any withholding of information must be justified by asserting a legally applicable exemption in each Act.

2–4. Functional requests

If an individual asks for his or her record and does not cite or reasonably imply either the Privacy Act or the Freedom of Information Act, and another prescribing directive authorizes release, the records should be released under that directive. Examples of functional requests are military members asking to see their Military Personnel Records Jacket, or civilian employees asking to see their Official Personnel Folder.

2–5. Medical records

If it is determined that releasing medical information to the data subject could have an adverse effect on the mental or physical health of that individual, the requester will be asked to name a physician to receive the record. The data subject's failure to designate a physician is not a denial under the Privacy Act and cannot be appealed.

2–6. Third party information

Third party information pertaining to the data subject may not be deleted from a record when the data subject requests access to the record unless there is an established exemption. (See para 5–5.) However, personal data such as SSN and home address of a third party in the data subject's record normally do not pertain to the data subject and therefore may be withheld. Information about the relationship between the data subject and the third party would normally be disclosed as pertaining to the data subject.

2–7. Referral of records

Requests for access to Army systems of records containing records that originated with other DOD components or Federal agencies that claimed exemptions for them will be coordinated with or referred to the originator for release determination. The requester will be notified of the referral.

2–8. Fees

Requesters will be charged only for reproduction of requested documents. Normally, there will be no charge for the first copy of a record provided to an individual to whom the record pertains. Thereafter, fees will be computed as set forth in AR 340–17.

2–9. Denial of access

a. The only officials authorized to deny a request from a data subject for records in a system of records pertaining to that individual are the appropriate AARAs, or the Secretary of the Army, acting through the General Counsel. (See para 1–7.) Denial is appropriate only if the record—

(1) Was compiled in reasonable anticipation of a civil action or proceeding, or

(2) Is properly exempted by the Secretary of the Army from the disclosure provisions of the Privacy Act (see chap 5), there is a legitimate governmental purpose for invoking the exemption, and it is not required to be disclosed under the Freedom of Information Act.

b. Requests for records recommended to be denied will be forwarded to the appropriate AARA within 5 workdays of receipt, together with the request, disputed records, and justification for withholding. The requester will be notified of the referral.

c. Within the 30 workday period, the AARA will give the following information to the requester in writing if the decision is to deny the request for access: (See para 2–2.)

(1) Official's name, position title, and business address.

(2) Date of the denial.

(3) Reasons for the denial, including citation of appropriate sections of the Privacy Act and this regulation.

(4) The opportunity for further review of the denial by the General Counsel, Office of the Secretary of the Army, The Pentagon, WASH DC 20310–0104, through the AARA within 60 calendar days. (For denials made by the Army when the record is maintained in one of OPM's Government-wide systems of records, notices for which are described in AR 340–21–8, appendix A, an individual's request for further review must be addressed to the Assistant Director for Agency Compliance and Evaluation, Office of Personnel Management, 1900 E Street, NW, WASH DC 20415–0001.)

2–10. Amendment of records

a. Individuals may request the amendment of their records, in writing, when such records are believed to be inaccurate as a matter of fact rather than judgment, irrelevant, untimely, or incomplete.

b. The amendment procedures are not intended to permit challenges of an event in a record that actually occurred, or to permit collateral attack upon an event that has been the subject of a judicial or quasi-judicial action.

c. Consideration of a request for amendment would be appropriate if it can be shown that—

(1) Circumstances leading up to the event recorded on the document were challenged through administrative procedures and found to be inaccurately described.

(2) The document is not identical to the individual's copy, or

(3) The document was not constructed in accordance with the applicable record-keeping requirements prescribed.

d. For an example of *c* above, the amendment provisions do not allow an individual to challenge the merits of an adverse action. However, if the form that documents the adverse action contains an error on the fact of the record (for example, the individual's name is misspelled, or an improper date of birth or SSN was recorded), the amendment procedures may be used to request correction of the record.

e. USACIDC reports of investigation (records in system notices A0501.08e Informant Register, A0508.11b Criminal Information Reports and Cross Index Card Files, and A0508.25a Index to Criminal Investigative Case Files) have been exempted from the amendment provisions of the Privacy Act. Requests to amend these reports will be considered under AR 195–2 by the Commander, U.S. Army Criminal Investigation Command. Action by the Commander, U.S. Army Criminal Investigation Command, will constitute final action on behalf of the Secretary of the Army under that regulation.

f. Records placed in the National Archives are exempted from the Privacy Act provision allowing individuals to request amendment of records. Most provisions of the Privacy Act apply only to those systems of records that are under the legal control of the originating agency; for example, an agency's current operating files or records stored at a Federal Records Center.

2–11. Procedures

a. Requests to amend a record should be addressed to the custodian or system manager of that record. The request must reasonably describe the record to be amended and the changes sought (that is, deletion, addition, or amendment). The burden of proof rests with the requester; therefore, the alteration of evidence presented to courts, boards, and other official proceedings is not permitted. (An individual acting for the requester must supply a written consent signed by the requester.)

b. The custodian or system manager will acknowledge the request within 10 workdays and make final responses within 30 workdays.

c. The record for which amendment is sought must be reviewed by the proper system manager or custodian for accuracy, relevance, timeliness, and completeness to assure fairness to the individual in any determination made about that individual on the basis of that record.

d. If the amendment is proper, the custodian or system manager will physically amend the record by adding or deleting information, or destroying the record or a portion of it. He or she will notify the requester of such action.

e. If the amendment is not justified, the request and all relevant documents, including reasons for not amending, will be forwarded to the proper AARA within 5 workdays; the requester will be notified.

f. The AARA, on the basis of the evidence, either will amend the record and notify the requester and the custodian or deny the request and inform the requester of—

(1) Reasons for not amending.

(2) His or her right to seek further review by the DA Privacy Review Board (through the AARA).

g. On receipt of an appeal from a denial to amend, the AARA will append any additional records or background information that substantiates the refusal or renders the case complete and, within 5 workdays of receipt, forward the appeal to the DA Privacy Review Board.

h. The DA Privacy Review Board, on behalf of the Secretary of the Army, will complete action on a request for further review within 30 workdays of its receipt by the AARA. The General Counsel may authorize an additional 30 days when unusual circumstances and good cause so warrant. The Board may seek additional information, including the appellant's official personnel file, if relevant and necessary to decide the appeal.

(1) If the Board determines that amendment is justified, it will amend the record and notify the requester, the AARA, the custodian of the record and any prior recipients of the record.

(2) If the Board denies the request, it will obtain the General Counsel's concurrence. Response to the appellant will include reasons for denial and the appellant's right to file a statement of disagreement with the Board's action and to seek judicial review of the Army's refusal to amend.

i. Statements of disagreement will be an integral part of the record to which they pertain so the fact that the record is disputed is apparent to anyone who may have access to, use of, or need to disclose from it. The disclosing authority may include a brief summary of the Board's reasons for not amending the disputed record. The summary will be limited to the reasons stated to the individual by the Board.

2–12. Privacy case files

Whenever an individual submits a Privacy Act request, a case file will be established. (See system notice A0240.01DAAG.) In no instance will the individual's request and Army actions thereon be included in the individual's personnel file. The case file will comprise the request for access/amendment, grants, refusals, coordination action, and related papers. This file will not be used to make any determinations about the individual.

Chapter 3
Disclosure of Personnel Information to Other Agencies and Third Parties

3–1. Disclosure without consent

The Army is prohibited from disclosing a record from a system of records without obtaining the prior written consent of the data subject, except when disclosure is—

a. Made to officers and employees of DOD who have a need for the record in the performance of their duties.

b. Required under the Freedom of Information Act. (See para 3–3 for information normally releasable.)

c. Permitted by a routine use that has been published in the *Federal Register.*

d. Made to the Bureau of the Census for planning or carrying out a census or survey, or to a related activity pursuant to title 13 of the United States Code.

e. Made to a recipient who has provided the Army with advance written assurance that the record will be—

(1) Used solely as a statistical research or reporting record.

(2) Transferred in a form that is not individually identifiable.

f. Made to the National Archives of the United States as a record that has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or for determination of such value by the Administrator of the General Services Administration (GSA), or designee. (Records sent to Federal Records Centers for storage remain under Army control. These transfers are not disclosures and do not therefore need an accounting.)

g. Made to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if—

(1) The activity is authorized by law.

(2) The head of the agency or instrumentality has made a written request to the Army element that maintains the record. The request must specify the particular portion desired and the law enforcement activity for which the record is sought.

h. Made to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual. Upon such disclosure notification will be transmitted to the last known address of such individual.

i. Made to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress, or subcommittee of any such joint committee.

j. Made to the Comptroller General, or authorized representatives, in the course of the performance of the duties of the General Accounting Office (GAO).

k. Pursuant to the order signed by a judge of a court of competent jurisdiction. (Reasonable efforts must be made to notify the subject individual if the legal process is a matter of public record.)

l. Made to a consumer reporting agency under section 3(d) of the Federal Claims Collection Act of 1966 (originally codified at 31 USC 952(d); recodified at 31 USC 3711(f)). The name, address, SSN, and other information identifying the individual; amount, status, and history of the claim; and the agency or program under which the case arose may be disclosed in this instance.

3–2. Blanket routine use disclosures

In addition to routine uses in each system notice, the following blanket routine uses apply to all records from systems of records maintained by the Army except those which state otherwise.

a. Law enforcement. Relevant records maintained to carry out Army functions may be referred to Federal, State, local, or foreign law enforcement agencies if the record indicates a violation or potential violation of law. The agency to which the records are referred must be the appropriate agency charged with the responsibility of investigating or prosecuting the violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

b. Disclosure when requesting information. A record may be disclosed to a Federal, State, or local agency that maintains civil, criminal, or other relevant enforcement information, or other pertinent information, such as licensing, to obtain data relevant to an Army decision concerning—

(1) Hiring or retention of an employee.

(2) Issuance of a security clearance.

(3) Letting of a contract.

(4) Issuance of a license, grant, or other benefit.

c. Disclosure of requested information. If the information is relevant and necessary to the requesting agency's decision, a record may be disclosed to a Federal agency in response to its request in connection with—

(1) Hiring or retention of an employee.

(2) Issuance of a security clearance.

(3) Reporting of an investigation of an employee.

(4) Letting of a contract.

(5) Issuance of a license, grant, or other benefit.

d. Congressional inquiries. Disclosure from a system of records maintained by the Army may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

e. Private relief legislation. Relevant information in all systems of records of DOD published on or before August 22, 1975, will be disclosed to OMB for review of private relief legislation, as set forth in OMB Circular A–19. Information may be disclosed at any stage of the legislative coordination and clearance process.

f. Disclosures required by international agreements. A record may be disclosed to foreign law enforcement, security, investigatory, or administrative authorities. These disclosures are in compliance with requirements imposed by, or to claim rights conferred in, international agreements and arrangements including those regulating the stationing and status in foreign countries of DOD military and civilian personnel.

g. Disclosure to State and local taxing authorities. Any information normally contained in Internal Revenue Service Form W–2, which is maintained in a record from a system of records of the Army, may be disclosed to State and local taxing authorities with which the Secretary of the Treasury has entered into agreements under 5 USC 5516, 5517, and 5520; only to those State and local taxing authorities for which an employee or military member is or was subject to tax regardless of whether tax is or was withheld. This routine use complies with Treasury Fiscal Requirements Manual, sec 5060.

h. Disclosure to OPM. A record may be disclosed to OPM concerning information on pay and leave, benefits, retirement deduction, and any other information necessary for OPM to carry out its legally authorized Government-wide personnel management functions and studies.

i. Disclosure to National Archives and Records Service (NARS), GSA. A record may be disclosed to NARS, GSA, in records management inspections conducted under 44 USC, 2904 and 2906.

j. Disclosure to the Department of Justice for litigation. A record may be disclosed as a routine use to any component of the Department of Justice for the purpose of representing DOD, or any officer, employee, or member of DOD in pending or potential litigation to which the record is pertinent.

3–3. Disclosure to third parties

Personal information that may be disclosed under the Freedom of Information Act is as follows:

a. Military personnel.

(1) Name, rank, date of rank, gross salary, present and past duty assignments, future assignments that are officially established, office or duty telephone number, source of commission, promotion sequence number, awards and decorations, military and civilian educational level, and duty status at any given time.

(2) Lists or compilations of unit or office addresses or telephone numbers of military personnel are not released where the requester's primary purpose in seeking the information is to use it for commercial solicitation.

b. Civilian employees.

(1) Name and present and past position titles, grades, salaries, and duty stations that include office or duty telephone numbers.

(2) Disclosure of information in (1) above will not be made when the request is a list of present or past position titles, grades, salaries, and/or duty stations and—

(a) Is selected to constitute a clearly unwarranted invasion of personal privacy. For example, the nature of the request calls for a response that would reveal more about the employee than the items in (1) above.

(b) Would be protected from mandatory disclosure under an exemption of the Freedom of Information Act.

(3) In addition to the information in (1) above, the following information may be made available to a prospective employer of a current or former Army employee:

(a) Tenure of employment.

(b) Civil service status.

(c) Length of service in the Army and the Government.

(d) Date and reason for separation shown on SF 50 (Notification of Personnel Action).

3–4. Accounting of disclosure

a. An accounting of disclosure is required whenever a record from an Army system of records is disclosed to someone other than the data subject, except when that record—

(1) Is disclosed to officials within DOD who have a need for it to perform official business.

(2) Is required to be disclosed under the Freedom of Information Act.

b. Since the characteristics of records maintained within the Army vary widely, no uniform method for keeping the disclosure of accounting is prescribed. For most paper records, the accounting may be affixed to the record being disclosed. It must be a written record and consist of—

(1) Description of the record disclosed.

(2) Name, position title, and address of the person to whom disclosure was made.

(3) Date, method, and purpose of the disclosure.

(4) Name and position title of the person making the disclosure.

c. Purpose of the accounting of disclosure is to enable an individual—

(1) To ascertain those persons or agencies that have received information about the individual.

(2) To provide a basis for informing recipients of subsequent amendments or statements of dispute concerning the record.

d. When an individual requests such an accounting, the system manager or designee will respond within 10 workdays and inform the individual of the items in *b* above.

e. The only bases for not furnishing the data subject an accounting of disclosures are if disclosure was made for law enforcement purposes under 5 USC 552a(b)(7), or the disclosure was from a system of records for which an exemption from 5 USC 552a(c)(3) has been claimed. (See table 5–1.)

Chapter 4
Recordkeeping Requirements Under the Privacy Act

4–1. Systems of records

a. Notices of all Army systems of records are required by the Privacy Act to be published in the *Federal Register*. An example

is at figure 4–1. When new systems are established, or major changes occur in existing systems, which meet the criteria of OMB guidelines summarized in paragraph 4–6*b*, advance notice must be furnished OMB and the Congress before the system or proposed changes become operational.

b. Uncirculated personal notes, papers, and records that are retained at the author's discretion and over which the Army exercises no control or dominion are not considered Army records within the meaning of the Privacy Act. Individuals who maintain such notes must restrict their use to that of memory aids. Any disclosure from personal notes, either intentional or through carelessness, removes the information from the category of memory aids and the notes then become subject to provisions of the Act.

c. Only personal information that is necessary to accomplish a purpose or mission of the Army, required by Federal statute or Executive Order of the President, will be maintained in Army systems of records. Statutory authority or regulatory authority to establish and maintain a system of records does not convey unlimited authority to collect and maintain all information that may be useful or convenient. The authority is limited to relevant and necessary information.

d. Except for statistical records, most records could be used to determine an individual's rights, benefits, or privileges. To ensure accuracy, personal information to be included in a system of records will be collected directly from the individual if possible. Collection of information from third parties will be limited to verifying information for security or employment suitability or obtaining performance data or opinion-type evaluations.

4–2. Privacy Act Statement

a. Whenever personal information is requested from an individual that will become part of a system of records retrieved by reference to the individual's name or other personal identifier, the individual will be furnished a Privacy Act Statement. This Statement is to ensure that individuals know why this information is being collected so they can make an informed decision on whether or not to furnish it. As a minimum, the Privacy Act Statement will include the following information in language that is explicit and easily understood and not so lengthy as to deter an individual from reading it:

(1) Cite the specific statute or Executive order, including a brief title or subject, that authorizes the Army to collect the personal information requested. Inform the individual whether or not a response is mandatory or voluntary and any possible consequences of failing to respond.

(2) Cite the principal purposes for which the information will be used.

(3) Cite the probable routine uses for which the information may be used. This may be a summary of information published in the applicable system notice.

b. The above information normally will be printed on the form used to record the information. In certain instances, it may be printed in a public notice in a conspicuous location such as at check-cashing facilities; however, if the individual requests a copy of its contents, it must be provided.

4–3. Social Security Number

Executive Order 9397 authorizes DA to use the SSN as a system to identify Army members and employees. Once a military member or civilian employee of DA has disclosed his or her SSN for purposes of establishing personnel, financial, or medical records upon entry into Army service or employment, the SSN becomes his or her identification number. No other use of this number is authorized. Therefore, whether the SSN alone is requested from the individual, or the SSN together with other personal information, the Privacy Act Statement must make clear that disclosure of the number is voluntary. If the individual refuses to disclose the SSN, the Army activity must be prepared to identify the individual by alternate means.

4–4. Safeguarding personal information

a. The Privacy Act requires establishment of proper administrative, technical, and physical safeguards to—

(1) Ensure the security and confidentiality of records.

(2) Protect against any threats or hazards to the subject's security or integrity that could result in substantial harm, embarrassment, inconvenience, or unfairness.

b. At each location, and for each system of records, an official will be designated to safeguard the information in that system. Consideration must be given to such items as sensitivity of the data, need for accuracy and reliability in operations, general security of the area, and cost of safeguards. (See AR 380–380.)

c. Ordinarily, personal information must be afforded at least the protection required for information designated "For Official Use Only." (See AR 340–17, chap IV.) Privacy Act data will be afforded reasonable safeguards to prevent inadvertent or unauthorized disclosure of record content during processing, storage, transmission, and disposal.

4–5. First amendment rights

No record describing how an individual exercises rights guaranteed by the first amendment will be kept unless expressly authorized by Federal statute, by the subject individual, or unless pertinent to and within the scope of an authorized law enforcement activity. Exercise of these rights includes, but is not limited to, religious and political beliefs, freedom of speech and the press, and the right of assembly and to petition.

4–6. System notice

a. The Army publishes in the *Federal Register* a notice describing each system of records for which it is responsible. A notice contains—

(1) Name and locations of the records.

(2) Categories of individuals on whom records are maintained.

(3) Categories of records in the system.

(4) Authority (statutory or executive order) authorizing the system.

(5) Purpose of the system.

(6) Routine uses of the records, including categories of users and purposes of such uses.

(7) Policies and practices for storing, retrieving, accessing, retaining, and disposing of the records.

(8) Position title and business address of the responsible official.

(9) Procedures an individual must follow to learn if a system of records contains a record about the individual.

(10) Procedures an individual must follow to gain access to a record about that individual in a system of records, to contest contents, and to appeal initial determinations.

(11) Categories of sources of records in the system.

(12) Exemptions from the Privacy Act claimed for the system. (See table 5–1.)

b. New, or altered systems that meet the requirements below require a report to the Congress and OMB. A new system is one for which no system notice is published in the *Federal Register*. An altered system is one that—

(1) Increases or changes the number or types of individuals on whom records are kept so that it significantly alters the character and purpose of the system of records.

(2) Expands the types or categories of information maintained.

(3) Alters the manner in which records are organized, indexed, or retrieved to change the nature or scope of those records.

(4) Alters the purposes for which the information is used, or adds a routine use that is not compatible with the purpose for which the system is maintained.

(5) Changes the equipment configuration on which the system is operated, to create potential for either greater or easier access.

c. Report of a new or altered system must be sent to HQDA(DAAG–AMR–S) at least 120 days before the system or changes become operational and include a narrative statement and supporting documentation. The narrative statement must contain the following items:

(1) System identification and name.

(2) Responsible official.

(3) Purpose of the system, or nature of changes proposed (if an altered system).

(4) Authority for the system.

(5) Number (or estimate) of individuals on whom records will be kept.

(6) Information on First Amendment activities.

(7) Measures to assure information accuracy.

(8) Other measures to assure system security. (Automated systems require risk assessment under AR 380–380.)

(9) Relations to State/local government activities. (See fig 4–2.)

d. Supporting documentation consists of system notice for the proposed new or altered system and proposed exemption rule, if applicable.

4–7. Reporting requirements

a. The annual report required by the Privacy Act, as amended by Public Law 97–375, 96 Statute 1821, focuses on two primary areas:

(1) Information describing the exercise of individuals' rights of access to and amendment of records.

(2) Changes or additions to systems of records.

b. Specific reporting requirements will be disseminated each year by HQDA(DAAG–AMR–S) in a letter to reporting elements.

4–8. Rules of conduct

Systems managers will ensure that all personnel, including Government contractors or their employees who are involved in the design, development, operation, maintenance, or control of any system of records are informed of all requirements to protect the privacy of individuals who are subjects of the records.

4–9. Judicial sanctions

The Privacy Act has both civil remedies and criminal penalties for violations of its provisions.

a. Civil remedies. An individual may file a civil suit against the Army if Army personnel fail to comply with the Privacy Act.

b. Criminal penalties. A member or employee of the Army may be found guilty of a misdemeanor and fined not more than $5,000 for willfully—

(1) Maintaining a system of records without first meeting the public notice requirements of publishing in the *Federal Register.*

(2) Disclosing individually identifiable personal information to one not entitled to it.

(3) Asking for or getting another's record under false pretenses.

Chapter 5
Exemptions

5–1. Exempting systems of records

The Secretary of the Army may exempt Army systems of records from certain requirements of the Privacy Act. The two kinds of exemptions are general and specific. The general exemption relieves systems of records from most requirements of the Act; the specific exemptions from only a few. (See table 5–1.)

5–2. General exemptions

Only Army activities actually engaged in the enforcement of criminal laws as their primary function may claim the general exemption. To qualify for this exemption, a system must consist of—

a. Information compiled to identify individual criminals and alleged criminals, which consists only of identifying data and arrest records; type and disposition of charges; sentencing, confinement, and release records; and parole and probation status.

b. Information compiled for the purpose of a criminal investigation, including efforts to prevent, reduce, or control crime, and reports of informants and investigators associated with an identifiable individual.

c. Reports identifiable to an individual, compiled at any stage of the process of enforcement of the criminal laws, from arrest or indictment through release from supervision.

5–3. Specific exemptions

The Secretary of the Army has exempted from certain parts of the Privacy Act all properly classified information and a few systems of records that have the following kinds of information. The Privacy Act exemption cited appears in parentheses after each category.

a. Classified information in every Army system of records. This exemption is not limited to the systems listed in paragraph 5–5. Before denying an individual access to classified information, the Access and Amendment Refusal Authority must make sure that it was properly classified under the standards of Executive Order 11652, 12065, or 12356 and that it must remain so in the interest of national defense or foreign policy. (5 USC 552a(k)(1))

b. Investigatory data for law enforcement purposes (other than that claimed under the general exemption). However, if this information has been used to deny someone a right, privilege, or benefit to which the individual is entitled by Federal law, it must be released, unless doing so would reveal the identity of a confidential source. (5 USC 552a(k)(2))

c. Records maintained in connection with providing protective services to the President of the United States or other individuals protected pursuant to 18 USC 3056. (5 USC 552a(k)(3))

d. Statistical data required by statute and used only for statistical purposes and not to make decisions on the rights, benefits, or entitlements of individuals, except for census records that may be disclosed under 13 USC 8. (5 USC 552a(k)(4))

e. Data compiled to determine suitability, eligibility, or qualifications for Federal service, Federal contracts, or access to classified information. This information may be withheld only to the extent that disclosure would reveal the identity of a confidential source. (5 USC 552a(k)(5))

f. Testing material used to determine if a person is qualified for appointment or promotion in the Federal service. This information may be withheld only if disclosure would compromise the objectivity or fairness of the examination process. (5 USC 552a(k)(6))

g. Information to determine promotion potential in the Armed Forces. Information may be withheld, but only to the extent that disclosure would reveal the identity of a confidential source. (5 USC 552a(k)(7))

5–4. Procedures

a. When a system manager seeks an exemption for a system of records, the following information will be furnished to HQDA(DAAG–AMR–S), Alexandria, VA 22331–0301:

(1) Applicable system notice.

(2) Exemptions sought.

(3) Justification.

b. After appropriate staffing and approval by the Secretary of the Army, a proposed rule will be published in the *Federal Register,* followed by a final rule 30 days later. No exemption may be invoked until these steps have been completed.

5–5. Exempt Army records

The following records are exempt from certain parts of the Privacy Act:

a. ID–AO224.04DAIG.

(1) *Sysname.* Inspector General Investigative Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(2) or (5) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(k)(2) and (5).

(4) *Reasons.* Selected portions and/or records in this system are compiled for the purposes of enforcing civil, criminal, or military law, including Executive orders or regulations validly adopted pursuant to law. Granting individuals access to information collected and maintained in these files could interfere with enforcement proceedings; deprive a person of a right to fair trial or an impartial adjudication or be prejudicial to the conduct of administrative action affecting rights, benefits, or privileges of individuals; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose nonroutine investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel; violate statutes which authorize or require certain information to be withheld from the public such as: trade or financial information, technical data, National Security Agency information, or information relating to inventions. Exemption from access necessarily includes exemption from the other requirements.

b. ID–AO224.05DAIG.

(1) *Sysname.* Inspector General Action Request/Complaint Files.

(2) *Exemption.* All portions of this system of records which fall within 5 USC 552a(k)(2) or (5) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(k)(2) and (5).

(4) *Reasons.* Selected portions and/or records in this system are compiled for the

purposes of enforcing civil, criminal, or military law, including executive orders or regulations validly adopted pursuant to law. Granting individuals access to information collected and maintained in these files could interfere with enforcement proceedings; deprive a person of a right to fair trial or an impartial adjudication or be prejudicial to the conduct of administrative action affecting rights, benefits, or privileges of individuals; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source; disclose nonroutine investigative techniques and procedures, or endanger the life or physical safety of law enforcement personnel; violate statutes that authorize or require certain information to be withheld from the public such as trade or financial information, technical data, National Security Agency information, or information relating to inventions. Exemption from access necessarily includes exemption from the other requirements.

c. ID–AO239.01DAAG.

(1) *Sysname.* Request for Information Files.

(2) *Exemption.* Portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g). Portions of the system maintained by offices of Initial Denying Authorities that do not have a law enforcement mission and that fall within 5 USC 552a(k)(1) through (k)(7) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(j)(2) and (k)(1) through (k)(7).

(4) *Reasons.* This system of records is maintained solely for the purpose of administering the Freedom of Information Act and processing routine requests for information. To ensure an accurate and complete file on each case, it is sometimes necessary to include copies of records that have been the subject of a Freedom of Information Act request. This situation applies principally to cases in which an individual has been denied access and/or amendment of personal records under an exemption authorized by 5 USC 552. The same justification for the original denial would apply to a denial of access to copies maintained in the Freedom of Information Act file. It should be emphasized that the majority of records in this system are available on request to the individual and that all records are used solely to process requests. This file is not used to make any other determinations on the rights, benefits, or privileges of individuals.

d. ID–AO240.01DAAG.

(1) *Sysname.* Privacy Act Case Files.

(2) *Exemptions.* Portions of this system that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g). Portions of this system maintained by the DA Privacy Review Board and by those Access and Amendment Refusal Authorities that do not have a law enforcement mission and that fall within 5 USC 552a(k)(1) through (k)(7) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(j)(2) and (k)(1) through (k)(7).

(4) *Reasons.* This system of records is maintained solely for the purpose of administering the Privacy Act of 1974. To ensure an accurate and complete file on each case, it is sometimes necessary to include copies of records which have been the subject of a Privacy Act request. This situation applies principally to cases in which an individual has been denied access and/or amendment of personnel records under an exemption authorized by 5 USC 552a. The same justification for the original denial would apply to a denial of access and/or amendment of copies maintained in the Privacy Act Case File. It should be emphasized that the majority of records in this system are available on request to the individual and that all records are used solely to administer Privacy Act requests. This file is not used to make any other determinations on the rights, benefits, or privileges of individuals.

e. ID–AO241.01HQDA.

(1) *Sysname.* HQDA Correspondence and Control/Central File System.

(2) *Exemption.* Portions of this system of records that fall within 5 USC 552a(k)(1) through (k)(7) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(k)(1) through (k)(7).

(4) *Reasons.* Documents are generated by other elements of the Army or are received from other agencies and individuals. Because of the broad scope of the contents of this system and since the introduction of documents is largely unregulatable, specific portions or documents that may require an exemption cannot be predetermined. Therefore, and to the extent that such material is received and maintained, selected individual documents may be exempted from disclosure under any of the provisions of 5 USC 552a(k)(1) through (k)(7).

f. ID–AO401.08DAJA.

(1) *Sysname.* Prosecutorial Files.

(2) *Exemption.* Portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (e)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsection (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of laws could interfere with proper investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration or destruction of evidence; the identification of offenders or alleged offenders; nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation. Exemption from access necessarily includes exemption from other requirements.

(b) From subsection (c)(3) because the release of accounting of disclosure would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(e) From subsection (e)(8) because compliance with this provision would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

g. ID–AO402.01aDAJA.

(1) *Sysname.* General Legal Files.

(2) *Exemption.* Those portions of this system of records falling within 5 USC 552a(k)(1), (2), (5), (6), and (7) may be exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(1), and (f).

(3) *Authority.* 5 USC 552a(k)(1), (2), (5), (6), and (7).

(4) *Reasons.* Various records from other exempted systems of records are sometimes submitted for legal review or other action. A copy of such records may be permanently incorporated into the General Legal Files system of records as evidence of the facts upon which a legal opinion or review was based. Exemption of the General Legal Files system of records is necessary in order to ensure that such records continue to receive the same protection afforded them by exemptions granted to the system of records in which they were originally filed.

h. ID–AO404.02DAJA.

(1) *Sysname.* Courts-Martial Files.

(2) *Exemption.* All portions of this system that fall under 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (d)(2), (d)(3), (d)(4), (e)(2), (e)(3), (e)(4)(H), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.* Courts-martial files are exempt because a large body of existing criminal law governs trials by court-martial to the exclusion of the Privacy Act. The Congress recognized the judicial nature of court-martial proceedings and exempted them from the Administrative Procedures Act by specifically excluding them from the definition of the term "agency" (5 USC 551(1)(f)). Substantive and procedural law applicable in trials by court-martial is set forth in the Constitution, the Uniform Code of Military Justice (UCMJ) Manual for Courts-Martial, 1984, and the decisions of the U.S. Court of Military Appeals and Courts of Military Review. The right of the accused not to be compelled to be a witness against himself or herself and the need to obtain accurate and reliable information with regard to criminal misconduct necessitate the collection of information from sources other than the individual accused.

(a) Advising the accused or any other witness of the authority for collection of the information, the purpose for which it is to be used, whether disclosure is voluntary or mandatory, and the effects on the individual of not providing the information would unnecessarily disrupt and confuse court-martial proceedings. It is the responsibility of the investigating officer or military judge to determine what information will be considered as evidence. In making the determination, the individual's rights are weighed against the accused's right to a fair trial. The determination is final for the moment and the witness' failure to comply with the decision would delay the proceeding and may result in prosecution of the witness for wrongful refusal to testify.

(b) In a trial by court-martial, the accused has a unique opportunity to assure that the record is accurate, relevant, timely, and complete as it is made. He or she has the right to be present at the trial, to be represented by counsel at general and special courts-martial, and to consult with counsel in summary courts-martial, to review and challenge all information before it is introduced into evidence, to cross-examine all witnesses against him or her, to present evidence in his or her behalf, and in general and special courts-martial, to review and comment upon the record of trial before it is authenticated. Procedures for correction of the record are controlled by the Manual for Courts-Martial, 1984. After completion of appellate review, the record may not be amended. The Uniform Code of Military Justice (10 USC 876) provides that the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed are final and conclusive and binding upon all departments, courts, agencies, and officers of the United States subject only to action upon a petition for new trial, action by the Secretary concerned, and the authority of the President.

i. ID–AO501.08eUSACIDC.

(1) *Sysname.* Informant Register.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsection (c)(3) because release of accounting of disclosures would provide the informant with significant information concerning the nature of a particular investigation, the internal methods and techniques involved in criminal investigation, and the investigative agencies (State, local or foreign) involved in a particular case resulting in a serious compromise of the criminal law enforcement processes.

(b) From subsection (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because disclosure of portions of the information in this system of records would seriously impair the prudent and efficient handling of these uniquely functioning individuals; hamper the inclusion of comments and evaluations concerning the performance qualification, character, identity, and propensities of the informant; and prematurely compromise criminal investigations which either concern the conduct of the informant, or investigations wherein he or she is integrally or only peripherally involved. Additionally, the exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records and civil liability predicated upon agency compliance with specific provisions of the Privacy Act.

(c) From subsections (d), (e)(4)(G), (e)(4)(H), and (f) are also necessary to protect the security of information properly classified in the interest of national defense and foreign policy.

(d) From subsection (e)(1) because the nature of the criminal investigative function creates unique problems in prescribing what information concerning informants is relevant or necessary. Due to close liaison and existing relationships with other Federal, State, local, and foreign law enforcement agencies, information about informants may be received, which may relate to a case then under the investigative jurisdiction of another Government agency; but it is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of both the USACIDC and other agencies. Additionally, the failure to maintain all known information about informants could affect the effective utilization of the individual and substantially increase the operational hazards incumbent in the employment of an informant in very compromising and sensitive situations.

(e) From subsection (e)(2) because collecting information from the informant would potentially thwart both the criminal investigative process and the required management control over these individuals by appraising the informant of investigations or management actions concerning his or her involvement in criminal activity or with USACIDC personnel.

(f) From subsection (e)(3) because supplying an informant with a form containing the information specified could result in the compromise of an investigation, tend to inhibit the cooperation of the informant, and render ineffectual investigative techniques and methods utilized by USACIDC in the performance of its criminal law enforcement duties.

(g) From subsection (e)(5) because this requirement would unduly hamper the criminal investigative process due to type of records maintained and necessity for rapid information retrieval and dissemination. Also, in the collection of information about informants, it is impossible to determine what information is then accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation or contact brings new details to light. In the criminal investigative process, accuracy and relevance of information concerning informants can only be determined in a court of law. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators to exercise their judgment in reporting information relating to informant's actions and would impede the development of criminal intelligence necessary for effective law enforcement.

(h) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement by revealing investigative techniques, procedures, and the existence of confidential investigations.

j. ID–AO501.10DAMI.

(1) *Sysname.* Counterintelligence Research File System (CIRFS).

(2) *Exemption.* All portions of this system of records which fall within 5 USC 552a(k)(1), (2), or (5) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(3) *Authority.* 5 USC 552a(k)(1), (2), and (5).

(4) *Reasons.* Information in the files is obtained from overt and sensitive intelligence sources, and contains information classified in the interest of national security under the provisions of EO 12356 and predecessor orders. The system contains investigatory material compiled for law enforcement purposes as well as for determining the suitability for employment or military service and thus will also require the protection of confidential sources. Information may reflect the efforts of hostile intelligence services in the collection effort against the U.S. Army.

Additionally, the following factors are at issue in disclosure of data from this system of records: release of exempted information would endanger the safety of sources involved in intelligence programs; release

would invade the privacy of those individuals involved in intelligence programs; release would compromise and thus negate specialized techniques used to support intelligence programs; and release would interfere with and negate the orderly conduct of intelligence operations. Exemption from the remaining provisions is predicated upon the exemption from disclosure or upon the need for conducting complete and proper investigations.

k. ID–AO502.03DAMI.

(1) *Sysname.* Intelligence Collection Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(1), (2) or (5) are exempt from the following provisions of 5 USC 552a; (c)(3), (d), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(3) *Authority.* 5 USC 552a(k)(1), (2), and (5).

(4) *Reasons.* Executive Order 12356 and predecessor orders provide for the protection of some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our Allies. To protect against actions hostile to the United States, of both overt and covert nature, it is essential that such official information and material be given only limited dissemination. This exemption is also essential to protect the privacy and personal safety of the sources involved. It is vital to the conduct of secure operations under Director, Central Intelligence Directives 4 and 5 and Defense Intelligence Agency Manual 58–11. Additionally, the disclosure of data within this system of records is exempt to the extent the disclosure of such data would reveal the identity of sources who furnished information to the Government under an express or implied promise that source identities would be held in confidence. These assurances are essential to the candid disclosure of information that is essential to the investigative purpose. Confidence in the integrity of government assurances must be maintained or the investigative process will be severely damaged. Exemption from the other requirements is premised on and follows from the rationale that requires exemption from access.

l. ID–AO502.03bDAMI.

(1) *Sysname.* Technical Surveillance Index.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(1), (2), or (5) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (e)(4)(I).

(3) *Authority.* 5 USC 552a(k)(1), (2), or (5).

(4) *Reasons.* The material contained in this record system contains data concerning sensitive sources and operational methods whose dissemination must be strictly controlled because of national security intelligence considerations. Disclosure of documents or the disclosure accounting record may compromise the effectiveness of the operation, and negate specialized techniques used to support intelligence or criminal investigative programs, or otherwise interfere with the orderly conduct of intelligence operations or criminal investigations.

m. ID–AO502.10aDAMI.

(1) *Sysname.* USAINTA Investigative File System.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(1), (2), or (5) are exempt from the following provisions of 5 USC 552a: (d), (e)(4)(G), (e)(4)(H), and (e)(4)(I).

(3) *Authority.* 5 USC 552a(k)(1), (2), and (5).

(4) *Reasons.* Executive Order 12356 and predecessor orders provides for the protection of some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our Allies. To protect against actions hostile to the United States, of both overt and covert nature, it is essential that such official information and material be given only limited dissemination. Additionally, in the conduct of such operations which produce these records, at times the methods and arrangements with our Allies pertinent to the conduct of intelligence operations are relevant to this issue of national security interests and must be safeguarded. Further, the disclosure of unclassified data within this record system is exempt only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express or implied promise that the identity of the source would be held in confidence. These assurances are essential to the candid disclosure of information that is essential to the purposes of these investigations. Confidence in the integrity of the Government's assurances must be maintained or the investigative process will be severely damaged. Exemption from the other requirements is premised on and follows from the rationale that requires exemption from access.

n. ID–AO503.03aDAMI.

(1) *Sysname.* Department of the Army Operational Support Activities Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(1), (2), or (5) are exempt from the following provisions of 5 USC 552a: (c)(3), (d), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(3) *Authority.* 5 USC 552a(k)(1), (2), and (5).

(4) *Reasons.* Executive Order 12356 and predecessor orders provide for the protection of official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be limited in its accessibility. To protect against hostile actions, both overt and covert, it is essential that such official information and material be given only limited dissemination. Additionally, the following factors are at issue in disclosure of data from this system of records: release of exempted information would endanger the safety of sources involved in intelligence programs; release would invade the privacy of those individuals involved in intelligence programs; release would compromise and thus negate specialized techniques used to support intelligence programs; and release would interfere with and negate the orderly conduct of intelligence operations. Exemption from the other provisions is premised on and follows from the rationale that exempts access to this system of records.

o. ID–AO503.06aDAMI.

(1) *Sysname.* Counterintelligence Operations File.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(1), (2) or (5) are exempt from provisions of 5 USC 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(3) *Authority.* 5 USC 552a(k)(1), (2), and (5).

(4) *Reasons.* Executive Order 12356 and predecessor orders provide for the protection of official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be limited in its accessibility. To protect against hostile actions, both overt and covert, it is essential that such official information and material be given only limited dissemination. Additionally, the following factors are at issue in disclosure of data from this system of records: release of exempted information would endanger the safety of sources involved in intelligence programs; release would invade the privacy of those individuals involved in intelligence programs; release would compromise and thus negate specialized techniques used in support of intelligence programs; and release would interfere with and negate the orderly conduct of intelligence operations. Relevant to the above considerations, exemption is necessary from the requirements to provide an individual an accounting of disclosures and to inform an individual whether a record exists on him or her within this system of records, during the period in which an investigative interest and activity remains concerning that individual. Exemption is necessary to avoid disclosure of the existence of ongoing law enforcement investigations and compromise of the purposes and objectives for such ongoing investigations. Further, the disclosure of data within this record system is exempt to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express or implied promise that the identity of the source would be held in confidence. These assurances are essential to the candid disclosure of information, which

is essential to the purposes of these investigations. Confidence in the integrity of the Government's assurances must be maintained or the investigative process will be severely damaged. The exemption of an individual's right of access to records on him or her in this system of records and the reasons therefor necessitate and provide the rationale for the exemption of this system of records from the requirements of amendment and other cited provisions. Maintaining information that is strictly relevant to law enforcement purposes may result in exclusion of seemingly irrelevant data of significant value in determining the qualifications and suitability of individuals for Federal civilian employment, military service, Federal contracts, or access to classified information.

p. ID–AO506.01fDAMI.

(1) *Sysname.* Personnel Security Clearance Information Files.

(2) *Exemption.* All portions of this system which fall within 5 USC 552a(k)(1), (2), or (5) are exempt from the following provisions of 5 USC 552a: (d), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(3) *Authority.* 5 USC 552a(k)(1), (2), and (5).

(4) *Reasons.* Material contained in this record system that is properly and currently classified under Executive Order 12356 and predecessor orders includes data concerning sensitive source and operational methods whose dissemination must be strictly controlled because of its relationship to national security intelligence considerations. Additionally, in the conduct of operations that produce these records, at times the methods and arrangements with our Allies pertinent to the conduct of intelligence operations are relevant to this issue of national security interests and must be safeguarded. Further, the disclosure of unclassified data is exempt only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of 5 USC 552a, under an implied promise that the identity of the source would be held in confidence. These assurances are essential to the purposes of these investigations. Confidence in the integrity of the Government's assurance must be maintained or the investigative process will be severely damaged. Exemption from access necessarily includes exemption from the other requirements.

q. ID–AO508.07USACIDC.

(1) *Sysname.* Criminal Investigation Accreditation Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(2), (5), or (7) are exempt from the following provisions of 5 USC 552a: (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(k)(2), (5), and (7).

(4) *Reasons.*

(a) From subsections (d), (e)(4)(G), (e)(4)(H), and (f) because disclosure of portions of the information in this system of records would seriously impair the selection and management of these uniquely functioning individuals; hamper the inclusion of comments, reports, and evaluations concerning the performance, qualifications, character, actions, and propensities of the agent; and prematurely compromise investigations which either concern the conduct of the agent himself or herself or investigations wherein he or she is integrally or only peripherally involved. Additionally, the exemption from access necessarily includes exemptions from the amendment and the agency procedures that would otherwise be required to process these types of requests.

(b) From subsection (e)(1) because the failure to maintain all known information about agents could affect the effective utilization of the individual and substantially increase the operational hazards incumbent in the employment of agents in very compromising and sensitive situations.

r. ID–AO508.11aUSACIDC.

(1) *Sysname.* Criminal Investigation and Crime Laboratory Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsection (c)(3) because the release of accounting of disclosures would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning coordinated investigative effort and techniques and the nature of the investigation, resulting in a serious impediment to criminal law enforcement activities or the compromise of properly classified material.

(b) From subsection (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because access might compromise ongoing investigations, reveal classified information, investigatory techniques or the identity of confidential informants, or invade the privacy of persons who provide information in connection with a particular investigation. The exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records, and civil liability predicated upon agency compliance with those specific provisions of the Privacy Act. The exemption from access necessarily includes exemption from other requirements.

(c) From subsection (e)(1) because the nature of the investigative function creates unique problems in prescribed specific perimeters in a particular case as to what information is relevant or necessary. Also, due to close liaison and working relationships with other Federal, State, local, and foreign law enforcement agencies, information may be received that may relate to a case then under the investigative jurisdiction of another Government agency, but it is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of both the USACIDC and other agencies.

(d) From subsection (e)(2) because collecting information from the subject of criminal investigations would thwart the investigative process by placing the subject of the investigation on notice thereof.

(e) From subsection (e)(3) because supplying an individual with a form containing the information specified could result in the compromise of an investigation, tend to inhibit the cooperation of the individual queried, and render ineffectual investigation techniques and methods utilized by the USACIDC in the performance of their criminal law enforcement duties.

(f) From subsection (e)(5) because this requirement would unduly hamper the criminal investigative process due to the great volume of records maintained and the necessity for rapid information retrieval and dissemination. Also, in the collection of information for law enforcement purposes, it is impossible to determine what information is then accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. In the criminal investigative process, accuracy and relevance of information can only be determined in a court of law. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement.

(g) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement by revealing investigative techniques, procedures, and the existence of confidential investigations.

s. ID–AO508.11bUSACIDC.

(1) *Sysname.* Criminal Information Reports and Cross Index Card Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g).

(3) *Authority.* 5 USCa(j)(2).

(4) *Reasons.*

(a) From subsection (c)(3) because the release of accounting of disclosures would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning coordinated investigative effort and techniques and the nature of the investigation, resulting in a serious impediment to criminal law enforcement activities or the compromise of properly classified material.

(b) From subsections (c)(4),, (d), (e)(4)(G), (e)(4)(H), (f), and (g) because access might compromise ongoing investigations, reveal investigatory techniques and the identity of confidential informants, and invade the privacy of persons who provide information in connection with a particular investigation. The exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records, and civil liability predicated upon agency compliance with those specific provisions of the Privacy Act. In addition, subsections (d), (e)(4)(G), (e)(4)(H), and (f) are necessary to protect the security of information properly classified in the interest of national and foreign policy.

(c) From subsection (e)(1) because the nature of the criminal investigative function creates unique problems in prescribing specific perimeters in a particular case what information is relevant or necessary. Also, due to close liaison and working relationships with other Federal, State, local, and foreign law enforcement agencies, information may be received that may relate to a case then under the investigative jurisdiction of another Government agency, but it is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of both the USACIDC and other agencies.

(d) From subsection (e)(2) because collecting information from the subject of criminal investigation would thwart the investigative process by placing the subject of the investigation on notice thereof.

(e) From subsection (e)(3) because supplying an individual with a form containing the information specified could result in the compromise of an investigation, tend to inhibit the cooperation of the individuals queried, and render ineffectual investigative techniques and methods utilized by USACIDC in the performance of their criminal law enforcement duties.

(f) From subsection (e)(5) because this requirement would unduly hamper the criminal investigative process due to the great volume of records maintained and the necessity for rapid information retrieval and dissemination. Also, in the collection of information for law enforcement purposes, it is impossible to determine what information is then accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. In the criminal investigative process, accuracy and relevance of information can only be determined in a court of law. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement.

(g) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement by revealing investigative techniques, procedures, and the existence of confidential investigations.

t. ID–AO508.16DAPE

(1) *Sysname.* Absentee Case Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsection (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of laws could interfere with proper investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration, or destruction of evidence, the identification of offenders or alleged offenders, nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation. Exemption from access necessarily includes exemption from the other requirements.

(b) From subsection (c)(3) because the release of accounting of disclosure would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(e) From subsection (e)(8) because compliance with this provision would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

u. ID–AO508.24aDAPE.

(1) *Sysname.* Serious Incident Reporting Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsection (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with orderly investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration or destruction of evidence, the identification of offenders or alleged offenders, nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation. Exemption from access necessarily includes exemption from the other requirements.

(b) From subsection (c)(3) because the release of accounting of disclosure would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(e) From subsection (e)(8) because compliance with this provision would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

v. ID–AO508.25aUSACIDC.

(1) *Sysname.* Index to Criminal Investigative Case Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsection (c)(3) because the release of accounting of disclosures would place the subject of an investigation on notice that he or she is under investigation and

provide him or her with significant information concerning coordinated investigative effort and techniques and the nature of the investigation, resulting in a serious impediment to criminal law enforcement activities or the compromise of properly classified material.

(b) From subsection (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because access might compromise ongoing investigations, reveal investigatory techniques and the identity of confidential informants, and invade the privacy of persons who provide information in connection with a particular investigation. The exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records, and civil liability predicated upon agency compliance with those specific provisions of the Privacy Act. In addition, subsections (d), (e)(4)(G), (e)(4)(H), and (f) are necessary to protect the security of information properly classified in the interest of national and foreign policy.

(c) From subsection (e)(1) because the nature of the criminal investigative function creates unique problems in prescribing specific perimeters in a particular case what information is relevant or necessary. Also, due to close liaison and working relationships with other Federal, State, local and foreign law enforcement agencies, information may be received that may relate to a case then under the investigative jurisdiction of another Government agency, but it is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of both the USACIDC and other agencies.

(d) From subsection (e)(2) because collecting information from the subject of criminal investigations would thwart the investigative process by placing the subject of the investigation on notice thereof.

(e) From subsection (e)(3) because supplying an individual with a form containing the information specified could result in the compromise of an investigation, tend to inhibit the cooperation of the individuals queried, and render ineffectual investigative techniques and methods utilized by USACIDC in the performance of their criminal law enforcement duties.

(f) From subsection (e)(5) because this requirement would unduly hamper the criminal investigative process due to the great volume of records maintained and the necessity for rapid information retrieval and dissemination. Also, in the collection of information for law enforcement purposes, it is impossible to determine what information is then accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. In the criminal investigative process, accuracy and relevance of information can only be determined in a court of law. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators to exercise their judgment in reporting on investigations and impede the development of criminal intelligence necessary for effective law enforcement.

(g) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement by revealing investigative techniques, procedures, and the existence of confidential investigations.

w. ID–AO509.08DAPE.

(1) *Sysname.* Registration and Permit Files.

(2) *Exemption.* This system of records insofar as it contains information falling within 5 USC 552a(k)(2) is exempted from the following provisions of 5 USC 552a: (c)(3).

(3) *Authority.* 5 USC 552a(k)(2).

(4) *Reasons.* From subsection (c)(3) because the release of accounting of disclosures would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation thus resulting in a serious impediment to criminal law enforcement investigations, activities, or the compromise of properly classified material.

x. ID–AO509.10DAPE.

(1) *Sysname.* Law Enforcement: Offense Reporting System (MPMIS).

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons*

(a) From subsections (c)(4), (d), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with orderly investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration, or destruction of evidence; the identification of offenders or alleged offenders; nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses, and their families and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation.

(b) From subsection (c)(3) because the release of accounting of disclosure would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it would compromise the existence of a confidential investigation, or reveal the identity of witnesses or confidential informants.

(e) From section (e)(8) because compliance with this provision would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

y. ID–AO509.18bDAPE.

(1) *Sysname.* Expelled or Barred Person Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsections (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with orderely investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration or destruction of evidence, the identification of offenders or alleged offenders, and the nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses, and their families and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation.

(b) From subsection (c)(3) because the release of accounting of disclosures would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(e) From subsection (e)(8) because compliance with this provision would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

z. ID–AO509.19DAPE.

(1) *Sysname.* Military Police Investigator Certification Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(2), (5), or (7) are exempt from the following provisions of 5 USC 552a: (d), (e)(4)(G), (e)(4)(H), and (f).

(3) *Authority.* 5 USC 552a(k)(2), (5), and (7).

(4) *Reasons.* From subsections (d), (e)(4)(G), (e)(4)(H), and (f) because disclosure of portions of the information in this system of records would seriously impair the selection and management of these uniquely functioning individuals; hamper the inclusion of comments, reports and evaluations concerning the performance, qualifications, character, actions, and propensities of the agent; and prematurely compromise investigations which either concern the conduct of the agent himself or herself, or investigations wherein he or she is integrally or only peripherally involved. Additionally, the exemption from access necessarily includes exemptions from the amendment and the agency procedures that would otherwise be required to process these types of requests.

aa. ID–AO509.21DAPE.

(1) *Sysname.* Local Criminal Information Files.

(2) *Exemptions.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsections (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of laws could interfere with proper investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration, or destruction of evidence; the identification of offenders or alleged offenders; nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses, and their families and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of the privacy of individuals only incidentally related to an investigation. Exemption from access necessarily includes exemption from the other requirements.

(b) From subsection (c)(3) because the release of accounting of disclosure would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because, in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(e) From subsection (e)(8) because compliance with this provision would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

ab. ID–AO511.05DAPE.

(1) *Sysname.* Traffic Law Enforcement/ Vehicle Registration System: MPMIS.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(j)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.*

(a) From subsections (c)(4), (d), (e)(4)(G), (e)(4)(H), (f), and (g) because granting individuals access to information collected and maintained by this component relating to the enforcement of laws could interfere with proper investigations and the orderly administration of justice. Disclosure of this information could result in the concealment, alteration, or destruction of evidence; the identification of offenders or alleged offenders; nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses, and their families and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component and could result in the invasion of the privacy of individuals only incidentally related to an investigation. Exemption from access necessarily includes exemption from the other requirements.

(b) From subsection (c)(3) because the release of accounting of disclosure would place the subject of an investigation on notice that he or she is under investigation and provide him or her with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(c) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(d) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(e) From subsection (e)(8) because compliance with this provision would provide and impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

ac. ID–AO702.03aUSAREC.

(1) *Sysname.* Enlistment Eligibility Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(5) are exempt from the following provisions of 5 USC 552a: (d).

(3) *Authority.* 5 USC 552a(k)(5).

(4) *Reasons.* It is imperative that the confidential nature of evaluations and investigatory material on applicants applying for enlistment furnished to the U.S. Army Recruiting Command under an express promise of confidentiality be maintained to ensure the candid presentation of information necessary in determinations of enlistment and suitability for enlistment into the United States Army.

ad. ID–AO702.08aDASG.

(1) *Sysname.* Army Medical Procurement Applicant Files.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(5) are exempt from the following provisions of 5 USC 552a: (d).

(3) *Authority. 5 USC 552a (k)(5).*

(4) *Reasons.* It is imperative that the confidential nature of evaluation and investigatory material on applicants furnished to the Army Medical Procurement Program under an express promise of confidentiality be maintained to ensure that candid presentation of information necessary in determinations involving selection for AMEDD training programs and for suitability for commissioned service and future promotion.

ae. ID–AO704.10bMEPCOM.

(1) *Sysname.* ASVAB Institutional Test Scoring and Reporting System.

(2) *Exemption.* All portions of this system that fall within 5 USC 552a(k)(6) are exempt from the following provision of 5 USC 552a: (d).

(3) *Authority.* 5 USC 552a(k)(6).

(4) *Reasons.* Exemption is needed for the portion of records that pertains to individual item response on tests, to preclude compromise of scoring keys.

af. ID–AO709.01aDAPE.

(1) *Sysname.* United States Military Academy Candidate Files.

(2) *Exemption.* All portions of this system that fall within 5 USC 552a(k)(5), (6),

or (7) are exempt from the following provisions of 5 USC 552a: (d).

(3) *Authority.* 5 USC 552a(k)(5), (6), and (7).

(4) *Reasons.*

(a) From subsection (d) because access might reveal investigatory and testing techniques. The exemption from access necessarily includes exemption from amendment, certain agency requirements relating to access and amendment of records, and civil liability predicated upon agency compliance with those specific provisions of the Privacy Act.

(b) Exemption is necessary to protect the identity of individuals who furnished information to the U.S. Military Academy, which is used in determining suitability, eligibility, or qualifications for military service and which was provided under an express promise of confidentiality.

(c) Exemption is needed for the portion of records compiled within the Academy that pertain to testing or examination material used to rate individual qualifications, the disclosure of which would compromise the objectivity or fairness of the testing or examination process.

(d) Exemption is required for evaluation material used by the Academy in determining potential for promotion in the Armed Services, to protect the identity of a source who furnished information to the Academy under an express promise of confidentiality.

ag. ID–AO709.03DAPE.

(1) *Sysname.* U.S. Military Academy Personnel Cadet Records.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(k)(5) or (7) are exempt from the following provisions of 5 USC 552a: (d)

(3) *Authority.* 5 USC 552a(k)(5) and (7).

(4) *Reasons.* It is imperative that the confidential nature of evaluation and investigatory material on candidates, cadets, and graduates, furnished to the U.S. Military Academy under promise of confidentiality be maintained to ensure the candid presentation of information necessary in determinations involving admission to the Military Academy and suitability for commissioned service and future promotion.

ah. ID–AO713.09aTRADOC.

(1) *Sysname.* Skill Qualification Test.

(2) *Exemption.* All portions of this system that fall under 5 USC 552a(k)(6) are exempt from the following provision of 5 USC 552a: (d).

(3) *Authority.* 5 USC 552a(K)(6).

(4) *Reasons.* An exemption is required for those portions of the Skill Qualification Test system pertaining to individual item responses and scoring keys to preclude compromise of the test and to ensure fairness and objectivity of the evaluation system.

ai. ID–AO720.04DAPE.

(1) *Sysname.* Army Correctional System: Correctional Treatment Records.

(2) *Exemption.* All portions of this system of records that fall within 5 USC 552a(J)(2) are exempt from the following provisions of 5 USC 552a: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f), and (g).

(3) *Authority.* 5 USC 552a(j)(2).

(4) *Reasons.* Granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with the orderly administration of justice. Disclosure of this information could jeopardize the safety and well-being of information sources, correctional supervisors, and other confinement facility administrators. Disclosure of the information could also result in the invasion of privacy of persons who provide information used in developing individual treatment programs. Further, disclosure could result in a deterioration of a prisoner's self-image and adversely affect meaningful relationships between a prisoner and his or her counselor or supervisor. These factors are, of course, essential to the rehabilitative process. Exemption from the remaining provisions is predicated upon the exemption from disclosure, or upon the need for proper functioning of correctional programs.

aj. ID–AO917.10DASG.

(1) *Sysname.* Family Advocacy Case Management Files.

(2) *Exemption.* All portions of this system that fall within 5 USC 552a (k)(2) and (5) are exempt from the following provision of 5 USC 552a: (d).

(3) *Authority.* 5 USC 552a(k)(2) and (5).

(4) *Reasons.* Exemptions are needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information and to protect such sources from embarrassment or recriminations as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. In the case of spouse abuse, it is important to protect the privacy of spouses seeking treatment. Additionally, granting individuals access to information relating to criminal and civil law enforcement could interfere with ongoing investigations and the orderly administration of justice in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders or alleged offenders; and the disposition of charges; and could jeopardize the safety and well-being of parents, children, and abused spouses.

ak. ID–A1012.01DPE.

(1) *Sysname.* Applicants/Students, US Military Academy Prep School.

(2) *Exemption.* Parts of this system that fall within 5 USC 552a(k)(5) and (7) are exempt from subsection (d) of 5 USC 552a.

(3) *Authority.* 5 USC 552a(k)(5) and (7).

(4) *Reasons.* It is imperative that the confidential nature of evaluation material on individuals, furnished to the U.S. Military Academy Preparatory School under an express promise of confidentiality, be maintained to ensure the candid presentation of information necessary in determinations involving admission to or retention at the U.S. Military Academy Preparatory School and subsequent admission to the U.S. Military Academy and suitability for commissioned military service.

5–6. Exempt OPM records

Three OPM systems of records apply to Army employees, except for nonappropriated fund employees. These systems, the specific exemptions determined to be necessary and proper, the records exempted, provisions of the Privacy Act from which exempted, and justification are set forth below.

a. Personnel Investigations Records (OPM/CENTRAL–9).

(1) All material and information in these records that meets the criteria stated in 5 USC 552a(k)(1), (2), (3), (5), and (6) is exempt from the requirements of 5 USC 552a(c)(3) and (d). These provisions of the Privacy Act relate to making accountings of disclosures available to the data subject and access to and amendment of records.

(2) The specific applicability of the exemptions to this system and the reasons for the exemptions are as follows:

(a) Personnel investigations may obtain from another Federal agency, properly classified information that pertains to National defense and foreign policy. Application of exemption (k)(1) may be necessary to preclude the data subject's access to and amendment of such classified information under 5 USC 552a(d).

(b) Personnel investigations may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 USC 552a(j)(2), e.g., investigations into the administration of the merit system. Application of exemption (k)(2) may be necessary to preclude the data subject's access to or amendment of such records, under 552a(c)(3) and (d).

(c) Personnel investigations may obtain from another Federal agency information that relates to providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18. Application of exemption (k)(3) may be necessary to preclude the data subject's access to and amendment of such records under 5 USC 552a(d).

(d) All information about individuals in these records that meets the criteria stated in 5 USC 552a(k)(5) is exempt from the requirements of 5 USC 552a(c)(3) and (4). These provisions of the Privacy Act relate to making accountings of disclosures available to the data subject and access to and amendment of records.

(e) All material and information in these records that meets the criteria stated in 5 USC 552a(k)(6) is exempt from the requirements of 5 USC 552a(d), relating to access to and amendment of records by the data subject. This exemption is claimed because portions of this system relate to testing or examination materials used solely to determine individual qualifications for appointment or promotion in the Federal Service. Access to or amendment of this information by the data subject would compromise the

objectivity and fairness of the testing or examination process.

(3) Exemptions (a) through (d) are claimed because this system contains investigatory material compiled solely for the purpose of determining suitability, eligibility, and qualifications for Federal civilian employment. To the extent that the disclosure of material would reveal the identity of source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the application of exemption (k)(5) will be required to honor such a promise should the data subject request access to or amendment of the record, or access to the accounting of disclosures of the record.

b. Recruiting, Examining, and Placement Records (OPM/GOVT–5).

(1) All information about individuals in these records that meets the criteria stated in 5 USC 552a(k)(5) is exempt from the requirements of 5 USC 552a(c)(3) and (d). These provisions of the Privacy Act relate to making accountings of disclosures available to the data subject and access to and amendment of records. These exemptions are claimed because this system contains investigative material compiled solely for the purpose of determining the appropriateness of a request for approval of an objection to an eligible's qualification for employment in the Federal Service. To the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, the application of exemption (k)(5) will be required to honor such a promise should the data subject request access to the accounting of disclosures of the record or access to or amendment of the record.

(2) All material and information in these records that meets the criteria stated in 5 USC 552a(k)(6) are exempt from the requirements of 5 USC 552a(d), relating to access to and amendment of records by the subject. This exemption is claimed because portions of this system relate to testing or examination materials used solely to determine individual qualification for appointment or promotion in the Federal Service and access to or amendment of this information by the data subject would compromise the objectivity and fairness of the testing or examining process.

c. Personnel Research Test Validation Records (OPM/GOVT–6). All material and information in these records that meets the criteria stated in 5 USC 552a(k)(6) is exempt from the requirements of 5 USC 552a(d), relating to access to and amendment of the records by the data subject. This exemption is claimed because portions of this system relate to testing or examination materials used solely to determine individual qualifications appointment or promotion in the Federal Service. Access to or amendment of this information by the data subject would compromise the objectivity and fairness of the testing or examination process.

Table 5–1
Provisions of the Privacy Act from which a general or specific exemption may be claimed

Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(1) Disclosures within the DOD
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(2) Disclosures to the public
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(3) Disclosures for a "Routine Use"
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(4) Disclosures to the Bureau of Census
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(5) Disclosures for statistical research and reporting
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(6) Disclosures to the National Archives
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(7) Disclosures for law enforcement purposes
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(8) Disclosures under emergency circumstances
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(9) Disclosures to the Congress
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(10) Disclosures to the General Accounting Office
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(11) Disclosures pursuant to court orders
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (b)(12) Disclosures to consumer reporting agencies
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (c)(1) Making disclosure accountings
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (c)(2) Retaining disclosure accountings
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (c)(3) Making disclosure accountings available to the individual
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (c)(4) Informing prior recipients of corrections
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (d)(1) Individual access to records
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (d)(2) Amending records
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (d)(3) Review of the component's refusal to amend a record
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (d)(4) Disclosure of disputed information
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (d)(5) Access to information compiled in anticipation of civil action
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (e)(1) Restrictions on collecting information
Exemption (j)(2): Yes **Exemption (k)(1–7):** Yes **Section of the Privacy Act:** (e)(2) Collection directly from the individual
Exemption (j)(2): Yes **Exemption (k)(1–7):** No **Section of the Privacy Act:** (e)(3) Informing individuals from whom information is requested
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (e)(4)(A) Describing the name and location of the system
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (e)(4)(B) Describing categories of individuals
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (e)(4)(C) Describing categories of records
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (e)(4)(D) Describing routine uses
Exemption (j)(2): No **Exemption (k)(1–7):** No **Section of the Privacy Act:** (e)(4)(E) Describing records management policies and practices

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(4)(F) Identifying responsible officials

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (e)(4)(G) Procedures for determining if a system contains a record on an individual

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (e)(4)(H) Procedures for gaining access

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (e)(4)(I) Describing categories of information sources

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (e)(5) Standards of accuracy

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(6) Validating records before disclosure

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(7) Records of First Amendment Activities

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(8) Notification of disclosure under compulsory legal process

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(9) Rules of conduct

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(10) Administrative, technical, and physical safeguards

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (e)(11) Notices for new and revised routine uses

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (f)(1) Rules for determining if an individual is the subject of a record

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (f)(2) Rules for handling access requests

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (f)(3) Rules for granting access

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (f)(4) Rules for amending records

Exemption (j)(2): Yes
Exemption (k)(1–7): Yes
Section of the Privacy Act: (f)(5) Rules regarding fees

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (g)(1) Basis for civil action

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (g)(2) Basis for judicial review and remedies for refusal to amend

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (g)(3) Basis for judicial review and remedies for denial of access

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (g)(4) Basis for judicial review and remedies for other failure to comply

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (g)(5) Jurisdiction and time limits

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (h) Rights of legal guardians

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (i)(1) Criminal penalties for unauthorized disclosure

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (i)(2) Criminal penalties for failure to publish

Exemption (j)(2): No
Exemption (k)(1–7): No
Section of the Privacy Act: (i)(3) Criminal penalties for obtaining records under false pretenses

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (j) Rulemaking requirement

Exemption (j)(2): N/A
Exemption (k)(1–7): No
Section of the Privacy Act: (j)(1) General exemption for the Central Intelligence Agency

Exemption (j)(2): N/A
Exemption (k)(1–7): No
Section of the Privacy Act: (j)(2) General exemption for criminal law enforcement records

Exemption (j)(2): Yes
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(1) Exemption for classified material

Exemption (j)(2): N/A
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(2) Exemption for law enforcement material

Exemption (j)(2): Yes
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(3) Exemption for records pertaining to Presidential protection

Exemption (j)(2): Yes
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(4) Exemption for statistical records

Exemption (j)(2): Yes
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(5) Exemption for investigatory material compiled for determining suitability for employment or service

Exemption (j)(2): Yes
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(6) Exemption for testing or examination material

Exemption (j)(2): Yes
Exemption (k)(1–7): N/A
Section of the Privacy Act: (k)(7) Exemption for promotion evaluation materials used by the Armed Forces

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (l)(1) Records stored in GSA records centers

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (l)(2) Records archived before September 27, 1975

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (l)(3) Records archived on or after September 27, 1975

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (m) Applicability to Government contractors

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (n) Mailing Lists

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (o) Reports on new systems

Exemption (j)(2): Yes
Exemption (k)(1–7): No
Section of the Privacy Act: (p) Annual report

System name: Out-of-Service Accounts Receivables

System location: U.S. Army Finance and Accounting Center, Ft Benjamin Harrison, IN 46249–1536.

Categories of individuals covered by the system: Separated and retired military/civilian personnel and others indebted to the U.S. Army.

Categories of records in the system: Records of current and former military members and civilian employees' pay accounts showing entitlements, deductions, payments made, and any indebtedness resulting from deductions and payments exceeding entitlements. These records include, but are not limited to:

a. Individual military pay records, substantiating documents such as military pay orders, pay adjustment authorizations, military master pay account printouts from the Joint Uniform Military Pay System (JUMPS), records of travel payments, financial record data folders, miscellaneous vouchers, personal financial records, credit reports, promissory notes, individual financial statements, and correspondence.

b. Applications for waiver of erroneous payments or for remission of indebtedness with supporting documents, including, but not limited to, statements of financial status (personal income and expenses), statements of commanders and/or accounting and finance officers, and correspondence with members and employees.

c. Claims of individuals requesting additional payments for service rendered with supporting documents including, but not limited to time and attendance reports, leave and earnings statements, travel orders and/or vouchers, and correspondence with members and employees.

d. Delinquent accounts receivable from field accounting and finance officers including, but not limited to returned checks, medical services billings, collection records, and summaries of the Army Criminal Investigations Command and/or Federal Bureau of Investigation reports.

e. Reports from probate courts regarding estates of deceased debtors.

f. Reports from bankruptcy courts regarding claims of the United States against debtors.

Authority for maintenance of the system: 31 USC 3711; 10 USC 2774; and 12 USC 1715.

Purpose: To process, monitor, and post-audit accounts receivable, to administer the Federal Claims Collection Act, and to answer inquiries pertaining thereto.

Routine uses of records maintained in the system, including categories of users and the purposes of such uses: Information may be disclosed to—

a. U.S. Attorneys, Department of Justice—for legal action or final disposition of the debt claims. The litigation briefs (comprehensive, written referral recommendations) will restructure the entire scope of the collection cases.

b. Internal Revenue Service (IRS)—to obtain locator status for delinquent accounts receivables (automated controls exist to preclude redisclosure of solicited IRS address data), or to report writeoff amounts as taxable income pertaining to amounts compromised and accounts barred from litigation due to age.

c. Private collection agencies—for collection action when the Army has exhausted its internal collection efforts.

Disclosure to Consumer Reporting Agencies: Disclosures pursuant to 5 USC 552a(b)(12) may be made to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 USC 1681a (f), or the Federal Claims Collection Act of 1966 (31 USC 3701(a)(3)) when an individual is responsible for a debt to the U.S. Army. This is provided the debt has been validated, is overdue, and the debtor has been advised of the disclosure and the right to dispute, appeal, or review the claim; and/or whenever a financial status report is requested for use in the administration of the Federal Claims Collection Act. Claims of the United States may be compromised, terminated, or suspended when warranted by information collected.

Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:

Storage: Paper records in collection file folders and bulk storage; card files, computer magnetic tapes, and printouts; and microfiche.

Retrievability: By SSN, name, substantiating document number and conventional indexing is used to retrieve data.

Safeguards: The U.S. Army Finance and Accounting Center employs security guards. An employee badge and visitor registration system is in effect. Hard copy records are maintained in areas accessible only to authorized personnel who are properly screened, cleared, and trained. Computerized records are accessed by the custodian of the records system and by persons responsible for servicing the record system in the performance of their official duties. Certifying finance and accounting officers of debts have access to debt information to confirm if the debt is valid and collection action is to be continued. Computer equipment and files are located in a separate secured area.

Retention and disposal: Individual military pay records and accounts receivables are converted to microfiche and retained for 6 years. Destruction is by shredding. Retention periods for other records vary according to category, but total retention does not exceed 56 years; these records are sent to the Federal Records Center, GSA at Dayton, Ohio; destruction is by burning or salvage as waste paper.

System manager(s) and address: Commander, U.S. Army Finance and Accounting Center, Indianapolis, IN 46249-1536.

Notification procedure: Individuals desiring to know whether this system of records contains information about them should contact the System Manager, ATTN: FINCP–F, furnishing full name, SSN, and military status, or other information verifiable from the record itself.

Record access procedures: Individuals seeking access to records in this system pertaining to them should submit a written request as indicated in "Notification procedure" and furnish information required therein.

Contesting record procedures: The Army's rules for access to records and for contesting contents and appealing initial determinations are contained in AR 340–21 (32 CFR, part 505).

Record source categories: Information is received from DOD staff and field installations, Social Security Administration, Treasury Department, financial organizations, and automated systems interface.

Systems exempted from certain provisions of the act: None.

Figure 4–1. Sample of a System of Records Notice

NARRATIVE STATEMENT

1. *System identification and name*: A0404.02DAJA, Courts-Martial Files.

2. *Responsible official*: Mr. James D. Kemper, U.S. Army Legal Services Agency, Office of The Judge Advocate General, Room 204B, Nassif Building, Falls Church, VA 22041–5013.

3. *Purpose of the system*: Records of trial by court-martial are necessary for the purpose of legal review and final action in court-martial cases. After completion of appellate review, they protect each accused against a subsequent trial for the same offense.

4. *Authority for the system*: Title 10 USC, chapter 47, section 865 states that in the case of a general court-martial, or when a sentence that includes a bad-conduct discharge is approved by the convening authority in a special court-martial, the record will be sent to TJAG. All other special and summary courts-martial records will be reviewed by a judge advocate.

5. *Number (or estimate) of individuals on whom records will be maintained*: Approximately 7,000,000.

6. *Information of first amendment activities*: The system contains no information on first amendment activities; the system may include records of trial in which the charged misconduct was an activity protected by the First Amendment.

7. *Measures to assure information accuracy*: In a trial by court-martial, the accused has a unique opportunity to assure that his or her record is accurate, relevant, timely, and complete as it is made. He or she has the right to—

a. Be present at trial.
b. Be represented by counsel in general and special courts-martial.
c. Consult with counsel prior to a summary court-martial.
d. Review and challenge all information before it is introduced into evidence.
e. Cross-examine all witnesses against him or her.
f. Present evidence in his or her behalf.
g. Review and comment upon the record of trail before the convening authority's action in general and special courts-martial.

8. *Other measures to assure system security*: As courts-martial records reflect criminal proceedings ordinarily open to the public, copies are normally releasable to the public pursuant to the Freedom of Information Act. However, access to the original records is limited to authorized individuals. Security measures consist of standard physical security devices and civilian and military guards.

9. *Relationship to State/local Government activities*: None.

10. *Supporting documentation*: Proposed system notice and proposed exemption rule are at enclosures 1 and 2, respectively.

Figure 4–2. Sample of a report for a new system of records

Glossary

Section I
Abbreviations

AAFES
Army and Air Force Exchange Service

AARA
Access and Amendment Refusal Authority

ACSIM
Assistant Chief of Staff for Information Management

DA
Department of the Army

DOD
Department of Defense

GAO
General Accounting Office

GSA
General Services Administration

JUMPS
Joint uniform military pay system

MACOM
major Army command

MPMIS
Military Police management information system

NARS
National Archives and Records Service

NGB
National Guard Bureau

OMB
Office of Management and Budget

OPM
Office of Personnel Management

SSN
Social Security Number

TAG
The Adjutant General

TIG
The Inspector General

TJAG
The Judge Advocate General

USACIDC
U.S. Army Criminal Investigation Command

Section II
Terms

Access
The review of a record or obtaining a copy of a record or parts thereof in a system of records.

Agency
The DOD is a single agency for the purpose of disclosing records subject to The Privacy Act of 1974. For other purposes, including access, amendment, appeals from denials of access or amendment, exempting systems of records, and record-keeping for release to non-DOD agencies, the DA is an agency.

Access and Amendment Refusal Authority
The Army Staff agency head or major Army commander designated sole authority by this regulation to deny access to, or refuse amendment of, records in his or her assigned area or functional specialization.

Confidential source
A person or organization that has furnished information to the Federal Government under an express promise that its identity would be withheld, or under an implied promise of such confidentiality if this implied promise was made before September 27, 1975.

Data subject
The individual about whom the Army is maintaining information in a system of records.

Disclosure
The furnishing of information about an individual, by any means, to an organization, Government agency, or to an individual who is not the subject of the record, the subject's designated agent or legal guardian. Within the context of the Privacy Act and this regulation, this term applies only to personal information that is a part of a system of records.

Individual
A living citizen of the United States or an alien admitted for permanent residence. The Privacy Act rights of an individual may be exercised by the parent or legal guardian of a minor or an incompetent. (The Privacy Act confers no rights on deceased persons, nor may their next-of-kin exercise any rights for them.)

Maintain
Collect, use, maintain, or disseminate.

Official use
Any action by a member or employee of DOD that is prescribed or authorized by law or a regulation and is intended to perform a mission or function of the Department.

Personal information
Information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions or public life.

Privacy Act request
A request from an individual for information about the existence of, or for access to or amendment of, a record about him or her that is in a system of records. The request must cite or implicitly refer to the Privacy Act.

Record
Any item, collection, or grouping of information about an individual that—

a. Is kept by the Government including, but not limited to, an individual's home address, home telephone number, SSN, education, financial transactions, medical history, and criminal or employment history.

b. Contains an individual's name, identifying number, symbol, or other individual identifier such as a finger, voice print, or a photograph.

Routine use
Disclosure of a record outside DOD without the consent of the subject individual for a use that is compatible with the purpose for which the information was collected and maintained by DA. The routine use must be included in the published system notice for the system of records involved.

Statistical record
A record maintained only for statistical research or reporting purposes and not used in whole or in part in making determinations about specific individuals.

System manager
The official responsible for policies and procedures for operating and safeguarding a system of records. This official is located normally at Headquarters, DA.

System of records
A group of records under the control of DA from which information is retrieved by the individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. System notices for all systems of records must be published in the *Federal Register*. (A grouping or files series of records arranged chronologically or subjectively that is not retrieved by individual identifier is not a system of records, even though individual information could be retrieved by such an identifier, such as through a paper-by-paper search.)

APPENDIX F

THE JUDGE ADVOCATE GENERAL'S OPINIONS

ON

THE FREEDOM OF INFORMATION

AND

PRIVACY ACTS

AS

DIGESTED IN THE ARMY LAWYER (AL)

AND

THE JUDGE ADVOCATE LEGAL SERVICE (JALS)

[through 1 August 1985]

(Information, Release of Medical Records) Blood and Urine Tests May Not Be Released When Made Only For Diagnosis Or Treatment. Two enlisted men were injured in an automobile accident off-post. They were taken to the Army hospital for treatment. Blood and urine samples were taken for diagnosis and treatment. With a view to possible prosecution the local Chief of Police requested the results of the tests for the purpose of determining alcohol or drug intoxication.

The Judge Advocate General opined that such tests constitute medical records of the member concerned, when such tests are taken solely for diagnostic or treatment purposes. Such medical records are exempt from the mandatory release provisions of the "Freedom of Information" Act (5 USC § 552), as implemented by AR 345-20, 30 Jun. 1967, as changed. It was noted that AR 345-20 does not preclude the release of medical records when required by State law or pursuant to subpoena or other compulsory process. Accordingly, no legal objection is posed to a release under para. 4-6 AR 340-1, 30 Jul. 1968, as changed by C 3, 3 Aug. 1970, when required by State law or pursuant to court orders. JAGA 1971/4809, 12 Aug. 1971. [AL, Jan. 1972, at 31]

(Information, Release Of — General) **Release Of Army Records To Military For Purposes Not Required In Offical Duties Or For Personal Usage Is "Outside" DA.** A captain sought a copy of correspondence between a university PMS and Chief, ROTC Div, DCSOT, First U. S. Army. The requested record apparently pertained to a personnel action involving the officer. He was twice refused by both corresponding agencies.

In response to a query from the Freedom of Information Office, it was opined that release of Army records, for the personal usage of active or reserve members, or for purposes not required for performance of official military duties, is release "outside of the Department of the Army." Army Regulation 345-20, 30 Jun. 1967, as changed by Change 4, 29 Jul. 1973) (superceded by AR 340-17, 25 Jun. 1973) was found not to apply to request for Army records by Army personnel required for the performance of their official duties. (DAJA-AL 1973/4377, 11 Jun. 1973) [AL, Nov. 1973, at 26]

(Information, Release of Personnel Records) **Army Nurse Corps Applicant's Reference Sources Exempt From Release—Even To Applicant Herself.** An applicant turned down for a commission in the Army Nurse Corps requested the release of references from her past employers submitted in connection with her application. TJAG opined that, based upon 5 USC § 552(b)(6) and paragraph 2-12*f*, AR 340-17, 25 June 1973, as changed, those portions of her file which disclosed the identity of the persons who supplied information were exempt from release. Citing *Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973), *Getman v. NLRBn* 450 F.2d 670 (D.C. Cir. 1971) and the Privacy Act of 1974, the opinion reasoned that 5 USC § 552(b)(6) provides a basis for protecting the privacy of a reference source even though this statutory exemption was designed primarily to deal with the privacy of the individual about whom a personnel record relates. In balancing the public interest served by release against the sensitivity of the threatened privacy interest herein, it was observed that there was little public interest served by release, except for the satisfaction of the requester in knowing the identity of those who gave references and what they said. However, TJAG reasoned that the privacy interest of those who provide references should be given more weight due to the implicit understanding that their information is given in confidence. It was added that the withholding of reference sources and the continued maintenance of the confidentiality would ensure that the Army continues to gain candid and reliable information about its job applicants. (DAJA-AL 1975/3221, 27 Feb. 1975). [75-5 JALS 23 (1975)]

(Information, Release Of—General) **Non-DOD Access To SPD Codes Denied.** A request from outside DoD for a list of separation program designators (SPD's) was denied under 5 USC §§ 552(b)(2) and (6), and paragraphs 2-12(b) and (f), AR 340-17, 25 Jun 1973, as changed. TJAG observed that these codings are used in statistical accounting to represent the bases for separation, and that such codes are no longer placed on individual discharge certificates nor distributed to nongovernmental organizations or individuals: DoD Dir. 1336.1, 15 Dec. 1972. Additionally, pursuant to AR 635-5-1, 20 May 1974, such designations are listed, and are authorized release to present and former members only. The opinion noted that *Hicks v. Freeman*, *397 F.2d 193 (4th Cir. 1968)*, *cert. denied* 393 US 1064 (1969), supports nondisclosure of documents related solely to internal personnel rules and practices, and having no general applicability and legal effect. Noting that the interests of both the public and military personnel would best be served by nondisclosure of SPD's, TJAG reiterated that restrictions on the

dissemination of codings were bottomed on the rationale that the precise reason for a member's separation is of proper concern only to the member and the government: *Getman v. NLRB*, 450 F.2d 670 (DC 1971). The opinion also observed that release of SPD's could result in the total frustration of their original purpose, *i.e.*, protection against public disclosure of the factual basis for one's military separation. (DAJA-AL 1975/3296, 27 Feb. 1975). [75-5 JALS 24 (1975)]

(Information, Release Of—General) **Intra-Agency Memo Lost Its Exempt Character.** Following TAG's decision that an NCO's mother was not entitled to any of her deceased son's benefits, her attorney requested a copy of the TJAG opinion rendered on a line of duty investigation of the member's death. The letter from TAG to the decedent's mother specifically referred to the determination of "the Army's legal advisors" within OTJAG; it virtually quoted the entire OTJAG opinion verbatim; and gave no other basis for the adverse determination. While acknowledging that an OTJAG opinion is an intra-agency memorandum normally exempt from disclosure by 5 USC 522(b)(5), it was opined that *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969) dictated a contrary result. That case held that where a final order states that it is based upon an internal memorandum, the memorandum is considered to be incorporated into the final order with a consequent loss of its intra-agency character. Applying that rationale to the instant facts, TJAG determined that release of its opinion was merited. Regarding disclosure of OTJAG's note for the retained opinion copy, it was observed that this NFRC is exempt from disclosure as an internal memorandum. Additionally, the NFRC was never forwarded to TAG for consideration, it was not incorporated into TAG's final correspondence, nor was it specifically requested—its release was considered as protected under 5 USC 552(b)(5) and *Montrose Chemical Corporation of California v. Train*, 491 F.2d 63 (D.C. Cir. 1974). (DAJA-AL 1975/3328, 27 Feb. 1975)
[75-5 JALS 24 (1976)]

(Information and Records, General) **Meaning of "Record."** DAJA-AL 1975/4268, 1 Aug 75. The Judge Advocate General was requested to provide an opinion as to whether an inquiry from a computer terminal into the computer data base constituted the creation of a record. In response to the inquiry The Judge Advocate General opined that where the computer is instructed to retrieve data from the data base and print out a hard copy, the hard copy record is not "created" but is the result of a metamorphosis which alters the physical form of the record, i.e., the record on the computer data base is changed into a record on paper. It was pointed out that in automatic data processing language there is a distinction between "data" and "information." Data are those facts which are fed into and stored in a computer memory bank and are retrievable. Only when these facts are mathematically or comparatively manipulated by the computer, does the computer output constitute "information." The retrieval of data does not require processing by mathematical or comparative manipulation, and therefore does not result in the creation of a record. Rather, "data" stored in a computer constitute records within the meaning of the Freedom of Information Act. The mathematical and comparative processing required to obtain "information" would constitute the creation of a record, which is not required under the Freedom of Information Act.
[76-6 JALS 29 (1976)]

(Information and Records, Collection of Information) **Privacy Act Does Not Prohibit Army Check Cashing Facilities From Requiring Patrons To Furnish Social Security Numbers.** DAJA-AL 1975/4350, 16 Jul 75. The Privacy Act of 1974 provides that federal, state and local government agencies may not deny an individual any right, benefit or privilege provided by law because of his refusal to disclose his social security number. This provision does not apply to systems of records in operation prior to 1 January 1975, if disclosure of an individual's

social security number was required, under a statute or regulation adopted prior to that date, to verify the identity of the individual. A question arose as to whether Army facilities which permit the cashing of checks may require individuals to disclose their social security numbers as a condition to cashing checks. With regard to commissaries, The Judge Advocate General opined that an individual's social security number may be required for check cashing because it was required by regulation prior to 1 January 1975. As to clothing sales stores, the opinion stated that the privilege provided by law is the privilege to shop at the clothing sales store—refusal to accept a check in payment for a purchase may frustrate the purchaser at the time, but such a refusal is not equivalent to denying the patron his privilege to purchase items at the clothing sales store. Even if it were determined that payment by check is a privilege provided by law, it appears that the "grandfather" provisions of the Privacy Act would cover the requirement that the patron provide his social security number to pay by check. Finally, the opinion noted that most other check cashing facilities of the Army are operated by nonappropriated fund instrumentalities. The check cashing privilege authorized in the various nonappropriated fund regulations is not a privilege provided by any federal statute, and hence is not a "privilege provided by law" within the meaning of the Privacy Act. Therefore, nonappropriated fund instrumentalities may deny the privilege of cashing checks to individuals who refuse to furnish their social security numbers. [76-6 JALS 29 (1976)]

(Information and Records, Release and Access) **Request For Publications Not Available Through The Superintendent Of Documents Treated As Freedom Of Information Act Request. No Need To Create A Record In Response To A Request.** DAJA-AL 1975/4521, 8 Sep 75. In response to a request from a member of the public for a subscription to *The Army Lawyer*, The Judge Advocate General opined that as *The Army Lawyer* is not available for purchase through the Superintendent of Documents, requests for copies of that publication must be treated as Freedom of Information Act requests pursuant to DoD Directive 5120.43 (5 Sep 1971). It was pointed out, however, that there is no obligation to create a record in response to a FOIA request and, that a request for a *subscription* to a publication as opposed to a request for a copy of a publication which already exists is not a proper FOIA request.

The above digested opinion is published because of its general applicability to similar Army publications. [76-6 JALS 32 (1976)]

(Information and Records, Release and Access) **Records Custodian Should Normally Release Records In Response To Court Order.** DAJA-AL 1975/4685, 18 Sep 75. The Privacy Act of 1974 permits Federal agencies to disclose records which are contained in systems of records "pursuant to the order of a court of competent jurisdiction." The Judge Advocate General's opinion was requested as to the meaning of "court of competent jurisdiction." In response to the inquiry The Judge Advocate General opined that a records custodian may release records in his custody in response to an order, subpoena, or other compulsory legal process of any state or federal court which has jurisdiction over the case or matter for which the records are requested. The phrase "court of competent jurisdiction" is not limited to those instances where the court has jurisdiction over the record custodian personally. The opinion went on to state that when a record custodian receives a court order or subpoena to furnish certain records, he should determine whether the order or subpoena appears to be proper on its face by referring the matter to the appropriate staff judge advocate if possible. Finally, The Judge Advocate General cautioned that the Privacy Act, in some instances, requires notification to the individual concerned when records are released pursuant to compulsory legal process (see 5 U.S.C. § 552a(e)(8)).[76-6 JALS 28 (1976)]

(Information and Records, Collection of Information) **Disclosure of Social Security Number To Military Police.** DAJA-AL 1975/4859, 28 Oct 75. An inquiry was made of The Judge Advocate General as to whether it is appropriate for military police or other Army law enforcement personnel to request disclosure of an individual's social security number. In response to the inquiry The Judge Advocate General opined that law enforcement officials in the performance of their official duties may request disclosure of the social security number for identification purposes from military personnel and Department of Defense civilian employees without stating whether disclosure is mandatory or voluntary, without citing authority for soliciting the social security number, and without informing the individual of what uses will be made of the social security number. Military dependents may be requested to disclose their sponsor's social security number without making the Privacy Act disclosures. The Judge Advocate General also advised that law enforcement officials may request non-DoD civilians including military dependents to disclose their social security numbers. It was pointed out, however, that in such cases, pursuant to the Privacy Act of 1974, the individual must be advised that disclosure of the social security number is voluntary and that the requester's authority for soliciting the social security number is Title 10, United States Code, § 3012(g) and the Army regulation which is the prescribing directive for the form on which the social security number will ultimately be recorded. In addition, the Privacy Act requires disclosure of what uses will be made of the social security number. Generally, a statement to the effect that the social security number is used as an additional means of identification will suffice. However, in those cases where the non-DoD civilian is a subject or suspect, and the social security number will be used to make police record checks, a more detailed statement of use will be required. Finally, The Judge Advocate General pointed out that nothing in the Privacy Act precludes recording the social security number of a non-DoD civilian who, upon being requested to produce identification by a law enforcement official, voluntarily produces identification which contains the social security number. The disclosure provisions would apply, however, if a non-DoD civilian is requested specifically to produce additional identification in order to obtain his social security number. [76-6 JALS 30 (1976)]

(Information and Records, Release and Access) **Military Police And Traffic Accident Reports May Normally Be Released In Response To Requests.** DAJA-AL 1975/5159, 5 Dec 75. In an opinion discussing the Freedom of Information Act, The Judge Advocate General stated that the determination of whether Military Police Traffic Accident Reports (DA Form 3946) and Military Police Reports (DA Form 3975) are exempt from the mandatory disclosure requirements of the Freedom of Information Act must be made on a case by case basis. It was pointed out that these reports may be exempt from release, but only if their release would result in a "clearly unwarranted invasion of privacy." In making that determination, the right of privacy of the affected individual must be balanced against the right of the public to be informed. The Judge Advocate General stated further that balancing the extent of the invasion of privacy resulting from releasing the personal information on DA Forms 3946 and 3975 against the interests supporting disclosure will normally produce a determination that release will not result in a clearly unwarranted invasion of personal privacy. Nevertheless, this could be changed by the presence of unusual circumstances, such as the presence of a personal item of information, the release of which could result in a severe invasion of privacy. In such a case the requester should be contacted to determine if he will accept the reports, less that information. If he insists on the entire reports, the request must be forwarded to The Judge Advocate General in accordance with paragraph 2-6d, AR 340-17, as changed. The opinion went on to point out that Part B of DA Forms 3946 and 3975 may also be exempt from release as internal memoranda containing opinions and recommendations. Nevertheless, they should be released

where there is no legitimate purpose for withholding them. Whenever DA Forms 3946 and 3975 are released, the recipient should be advised that any conclusions expressed therein are not necessarily those of the Department of the Army. [76-6 JALS 30 (1976)]

(Information and Records, Systems of Records; Information and Records, Collection of Information) **Office Telephone Directories May Be Systems Of Records Within The Meaning Of The Privacy Act.** DAJA-AL 1975/5412, 29 Dec. 75. In response to an inquiry whether a certain office telephone roster constituted a system of records within the meaning of the Privacy Act, The Judge Advocate General advised that as the information for the roster was solicited directly from the individuals involved and not extracted from another system of records, the directory itself is a separate system of records requiring a systems notice under the Privacy Act. A systems notice is being prepared by TAGCEN to encompass all office rosters. It was pointed out that if the information for the directory in question had been derived solely from other systems of records the directory would not be a separate system. The opinion further stated that information which is necessary for official governmental purposes may be included in an office telephone roster and required from both civilian and military employees. [76-7 JALS 33 (1976)]

(Information and Records, Collection of Information; Information and Records, Release and Access) **Privacy Act Statements Need Not Be Furnished Subjects Of Audio-Visual Media.** DAJA-AL 1976/3581, 17 Feb. 76. In response to an inquiry whether subjects of photographs must be furnished Privacy Act statements, The Judge Advocate General opined that as the Privacy Act speaks of informing individuals whom the agency asks to supply information and is phrased in terms that contemplate traditional means of gathering information, such as requesting an individual to complete a government form, or an interview by an agent of the government, the taking of photographs does not appear to be collection of information as contemplated by the Act. It was cautioned, however, that if a photographer subsequently requests personal information from the subject, a Privacy Act statement would be necessary unless a personnel file is already maintained on the subject and the photographer merely requests certain minimum identifying data as provided in paragraph 4-3*b*, AR 340-21. The opinion also indicated that the Privacy Act does not preclude liberal access to audio-visual materials maintained by the Army—release within the Department of Defense is permitted by 5 U.S.C. § 552a(b)(1); release to the public may be made pursuant to 5 U.S.C. § 552a(b)(2) to the extent that release would be required under the Freedom of Information Act. It was noted that there is no need to receive an actual Freedom of Information Act request. Rather an agency may release information on its own initiative if its release would be required under the Freedom of Information Act. [76-7 JALS 34 (1976)]

(Information and Records, Release and Access; Information and Records, Systems of Records) **Disclosure Of Personal Information To Government Contractors Who Maintain Systems Of Records For Federal Agencies Is Exempt From The Consent And Accounting Requirements Of The Privacy Act.** DAJA-AL 1976/3597, 13 Feb. 76. An opinion of The Judge Advocate General was requested whether personal information could be disclosed to government contractors. The Judge Advocate General opined that when a government contractor maintains a system of records to accomplish a federal agency function, the system is deemed to be maintained by the agency. Such contractors are made subject to the provisions of the Privacy Act under 5

U.S.C. § 552a(m). Therefore, disclosures of personal information between an agency and its contractor are disclosures "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." The opinion pointed out that as these disclosures are in effect official disclosures within the agency there is no need to secure the consent of the affected individual or to account for the disclosures under 5 U.S.C. § 552a(c).
[76-7 JALS 33 (1976)

(Information and Records, Systems of Records) Records Maintained On Individuals For Personal Convenience Are Not "Systems Of Records" Within The Meaning of the Privacy Act. DAJA-AL 1976/3752, 10 Mar. 1976. An opinion was requested of The Judge Advocate General as to whether "books" maintained by unit comanders on unit personnel require publication of record system notices under the Privacy Act. The books in question generally contained from two to four pages per individual for listing certain specified personal information such as names and ages of family members, description of automobile, registration number, driver's license number, educational background, citizenship, medical data, and disciplinary record. The Judge Advocate General opined that these "books" do not require a system notice as they do not appear to be a system of records under the control of an agency. Rather, they are records maintained by an officer or employee of an agency for his personal convenience. It was pointed out, however, that information in these "books" will generally be contained in one or more system of records. Therefore, disclosures from the "book" which are not permitted by the Privacy Act, even though the book is a personal record, would violate the Act and possibly subject the United States to civil liability and the individual to criminal liability. Generally, it was pointed out that the propriety of maintaining these type "books" is questionable and actions which give them the appearance of agency records, such as passing them on to one's successor, should be avoided. [76-9 JALS 32 (1976)]

Records, Release and Access) Release Of Home Addresses Of Personnel Retired Or Released From Active Duty Must Be Considered On A Case By Case Basis. DAJA-AL 1976/4008, 26 Mar 1976. An inquiry concerning the releasability of the home addresses of two individuals who were no longer on active duty gave rise to an explanation of paragraph 3-5a, AR 340-21. In one case the address of a recently discharged soldier was requested by a County Department of Social Services as his ex-wife and children were receiving aid for dependent children and apparently were not receiving any support from the former soldier. In the other case, the address of a retired NCO was requested by a creditor. The Judge Advocate General pointed out that paragraph 3-5a, AR 340-21, prohibits the release of home addresses on the basis that such release normally constitutes an unwarranted invasion of privacy under the Freedom of Information Act. It was pointed out, however, that paragraph 3-5b, AR 340-21, allows for waiver of this prohibition when circumstances of the case indicate compelling and over-riding interests deemed sufficient to outweigh privacy protection considerations, that is, in those cases where disclosure would not constitute an unwarranted invasion of privacy. The opinion noted that paragraph 3-5a specifically applies the prohibition to creditors, so waiver would be inappropriate in the case of the retired NCO. Concerning release to the County Department of Social Services, however, it was pointed out that the compelling and overriding interests included the interests of society in having individuals support their dependents and the interest of a minor child to be supported by his father. The Judge Advocate General opined that these interests outweight the invasion of privacy incurred by release of the home address.
[76-9 JALS 32 (1976)]

(Information and Records, Release and Access) **Home Address Not Releasable To Post Exchange Concessionaire.** DAJA-AL 1976/4062, 5 Apr. 1976. A Post Exchange concessionaire sought the home address of an individual who had left the installation without returning a rented television set and was no longer on active duty. The Judge Advocate General noted that paragraph 3-5*a*, AR 340-21, prohibits release of home addresses to creditors and others without the consent of the individual involved. It was pointed out that while a Post Exchange concessionaire has a contract to do business on a military installation, the business relationship is no different from that of any other private business or creditor in applying the terms of AR 340-21. The fact that the requestor of the address was a concessionaire was found not to constitute a compelling and overriding interest sufficient to outweigh privacy protection considerations. Nevertheless, the result would be different if the address were being sought by a court or police official in connection with a civil suit or criminal complaint against the former service member. [AL, Feb. 1977, at 15]

(Information and Records, Collection of Information) **Impact Of Privacy Act On Collection Of Personal Data For Unit Alert Rosters.** DAJA-AL 1976/4487, 11 June 1976. An opinion was requested as to whether members of reserve component units could be prosecuted for refusal to furnish personal information for inclusion in a unit alert roster. The Judge Advocate General expressed the opinion that the Privacy Act imposes no additional constraints on the unit commander in obtaining necessary information (such as telephone numbers and temporary address for official alert notification purposes) from individual unit members except for the requirement to provide each reserve unit member with the Privacy Act Statement. The opinion noted that the Privacy Act Statement should advise that furnishing the requested information is mandatory. [AL, Jan. 1977, at 9]

(Information and Records, Release and Access) **Draft Studies Of Installation Closures And Realignments Are Exempt From Release To The Public.** DAJA-AL 1976/4630, 7 June 1976. In response to a request from a member of the public for certain studies concerning the closing or realignment of various installations, The Judge Advocate General advised that the studies were in draft form or were at the "working papers" stage, and as such represented information received or generated preliminary to a decision. It was noted that these studies were exempt from release under 5 U.S.C. § 552(b)(5) (internal memoranda) because premature disclosure would interfere with or impede the orderly decision-making process of the Department of the Army. [AL Jan. 1977, at 9]

(Information and Records, Release and Access) **Opinions Of SJA And Other Staff Elements Are Exempt From Release.** DAJA-AL 1976/4790, 23 June 1976. In response to a request from a member of the public, The Judge Advocate General advised that opinions of a staff judge advocate and certain other elements of the Army staff are exempt from release under the Freedom of Information Act. It was noted that these items constitute predecisional advice, suggestion, or opinion and are therefore exempt from mandatory disclosure under 5 U.S.C. § 552(b)(5), and para. 2-12*e*, AR 340-17 (internal memoranda). The opinion pointed out that the legitimate governmental purpose served by withholding the documents in question was the prevention of injury to the quality of the decisions of the Department of the Army (which would result from disclosures of predecisional memoranda containing the candid opinions, recommendations, and legal advice of the various elements of the Army staff and its field agencies). [AL, Jan. 1977, at 11]

(Information and Records, Systems of Records) **Records Maintained On Individuals For Personal Convenience Are Not "Systems Of Records" Within The Meaning of the Privacy Act.** DAJA-AL 1976/4866, 3 Jun 1976. An opinion was requested of The Judge Advocate General as to whether a system notice under the Privacy Act was required for optional notebooks and files (leader's notebooks/commander's black books) on unit personnel kept by a commander and his subordinate leaders. The Judge Advocate General opined that such notebooks do not require a system notice since they do not appear to be a system of records "... under the control of" an agency (5 U.S.C. § 552(a)(5)). Rather, they are records maintained by an officer or employees of an agency for his personal convenience. It was noted that any actions, such as passing the notebook on to one's successor, which give the notebooks the appearance of agency records should be avoided. The opinion went on to state that notebooks become agency records and a system notice is required when local regulation or command letters require that commanders and other small unit leaders maintain such records. [76-9 JALS 32 (1976)]

(Information and Records, Release and Access) **Home Telephone Numbers Of Department Of The Army Personnel Are Exempt From Release To The Public.** DAJA-AL 1976/5045, 23 July 1976. In an opinion involving a request for copies of an installation phone directory and current organizational charts, The Judge Advocate General advised that a staff directory of the installation was releasable. It was pointed out, however, that a "personnel roster" of key installation personnel would be released only after deletion of home telephone numbers. The Judge Advocate General determined that home telephone numbers are exempt from release under 5 U.S.C. § 552(b)(6) and para 2-12*f*, AR 340-17 (clearly unwarranted invasion of privacy). The opinion stated that the legitimate governmental purpose served in denying this information was the protection of the personal privacy of the individuals involved. This case was distinguished from cases in which post telephone directories were already in the public domain. [AL, Feb. 1977, at 17]

(Information and Records, Release and Access) **Posting Of An Occupant's Name Outside His Assigned Government Quarters Is Not an Unwarranted Invasion Of Personal Privacy.** DAJA-AL 1976/6260, 7 Jan. 1977. An opinion was requested of The Judge Advocate General whether the requirement of posting name identification signs, consisting of name and grade, on government quarters violates the Privacy Act. The Judge Advocate General noted that the purpose of the Privacy Act was to regulate the collection, maintenance, use and dissemination of personal information by federal agencies. On this basis, it was decided that the posting of an occupant's name outside his assigned government quarters does not constitute the type of unwarranted invasion of personal privacy that the Privacy Act (5 U.S.C. § 552*a*) and AR 340-21 protect against. [AL, Sept. 1977, at 29]

(Federal Labor Relations, Employee Discipline; Information and Records, Release and Access; Military Installations, Law Enforcement, Report of Professional Misconduct) **No Legal Objection To Releasing Report Of Nurse's Professional Misconduct To A State Licensing Agency.** DAJA-AL 1976/6320, 11 Jan. 1977. A SJA requested an opinion from The Judge Advocate General whether professional misconduct of a DA civilian nurse may be reported to the appropriate state licensing agency. The nurse had been apprehended for larceny of medications and falsification of hospital records. The FBI declined jurisdiction over the matter and adverse action proceedings under Civilian Personnel Regulation/Federal Personnel Manual (CPR/FPM) were initiated.

The nurse subsequently entered the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) and adverse action was postponed pursuant to AR 600–85.

The right of the public to be protected from professionals who have engaged in misconduct outweighs the individual's privacy interest; *i.e.*, release of information regarding the larceny and falsification of records would not constitute a clearly unwarranted invasion of personal privacy, particularly in light of the ethical responsibility of nurses to report professional misconduct of their colleagues (5 U.S.C. § 552(b)(6)). The Privacy Act, accordingly, permits disclosure under 5 U.S.C. § 552*a*(b)(2) as disclosure to a state licensing agency would be required by the Freedom of Information Act. The information would also be releasable under 5 U.S.C. 552(b)(3) and the routine use established in para. B–4*a*, Appendix B, AR 340–21—the "law enforcement" routine use.

The opinion notes that the state licensing agency may not be advised of the nurse's enrollment or participation in the ADAPCP (21 U.S.C. § 1175 and para. 1–28, AR 600–85). This is the case even though such information is obtained from personal knowledge of the person who would make a report, rather than from inspection of written records (para. 1–26, AR 600–85).

The opinion further notes the policy established in para. 7–18, AR 600–85, that persons who are enrolled in ADAPCP and who are satisfactorily progressing in the program should be free from adverse actions by postponement thereof. Release of information to a license revoking authority, however, is not an adverse action precluded by para. 7–18, AR 600–85, even though such action could result in loss of the individual's license to practice nursing, thereby resulting in suspension from duties. The intent of the provision is to postpone official CPO adverse actions, and not to prevent another employee from fulfilling an ethical responsibility.

[AL, Sept. 1977, at 29]

(Information and Records, General) **Privacy Act Applies To BankAmericard Contract With Officer's Club.** DAJA–PL 1976/6711, 13 July 1976. An opinion was requested as to whether the Privacy Act of 1974 applied to a BankAmericard contract that an Officer's Club had with a local bank. Under the contract, the bank maintained a system of records in order to furnish the club with a monthly printout of membership dues and golf and tennis fees. The Judge Advocate General expressed the opinion that the Privacy Act applied to the BankAmericard contract, because the contract was one the contractor could perform "only by the design, development, or operation of a system of 'records' " (ASPR 1–327.3*a*) and the system of records was not one which was exempt as "a system used by a contractor as a result of his management discretion" (ASPR 1–327.3*a*). It was further noted that the system of records in question came under the provisions of 5 U.S.C. § 552*a*(m) which applies the provisions of the Privacy Act to such systems "when an agency provides by contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function . . . ." Only by modifying the contract so the bank did not maintain any of the club records or systems of records would the Privacy Act not apply.

[AL, Jan. 1977, at 11]

(Information and Records, Release and Access) **Completed Article 138 Complaint Not Releasable To Respondent For His Personal Use.** DAJA–AL 1977/3433, 3 Feb. 1977. The respondent of an Article 138 complaint requested a copy of the complaint under the Freedom of Information Act. The request was denied because disclosure would constitute a clearly unwarranted invasion of the complainant's personal privacy. The Judge Advocate General observed that the complaint contained substantial amounts of personal information pertaining to the complainant an other individuals. While the requestor probably was

aware of much of the information and may even have had access to the requested record in the course of his duties, the issue is whether access to a record in one's official capacity is a factor to be considered in applying the balancing test used in making determinations under exemption six of the Freedom of Information Act. It was decided that prior access to a record in one's official capacity should not be a factor in responding to a Freedom of Information Act request. Because the complaint is contained in a "system of records" within the meaning of the Privacy Act, unauthorized disclosure could result in criminal penalties. There are no restrictions, however, on the use of a record by an individual who acquires it pursuant to the Freedom of Information Act. To provide an individual a record pursuant to the Freedom of Information Act because he had access to the record in his official capacity would tend to circumvent congressional intent to restrict officers and employees of agencies from any use of a record other than that which is necessary for the performance of duties. The respondent of an Article 138 complaint may obtain a copy of the complaint if he has a need for it in the performance of his official duties. If the complaint is furnished to him on that basis, however, he remains subject to the restrictions contained in the Privacy Act.

[AL, Sept. 1977, at 30]

(Information and Records, Release and Access) **Courts-Martial Are Excluded From The Provisions Of The Privacy Act.** DAJA-AL 1977/3889, 8 Apr. 1977. An opinion was requested of The Judge Advocate General as to the impact of the Freedom of Information Act (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 552a) on access to personnel and other files by military and civilian counsel in courts-martial. The Judge Advocate General concluded that the Privacy Act does not apply to courts-martial, in that 5 U.S.C. § 551 defines "agency" for the purposes of subchapter II, chapter 5, Title 5, U.S.C. (5 U.S.C. §§ 551-559) and as defined specifically excludes, except as to the requirements of 5 U.S.C. § 552, courts-martial and military commissions. The 1974 Amendments to the FOIA redefined agency but, as noted in the Attorney General's Memorandum on the Amendments, a review of the legislative history indicates that the redefinition in 5 U.S.C. § 552(e) was intended to clarify and expand the class of organizational entities subject to the FOIA and not to remove the exception for courts-martial found in 5 U.S.C. § 551 for all of subchapter II (except § 552). Based on this rationale it was The Judge Advocate General's opinion that a court-martial has the authority to utilize available records without regard to the provisions of the Privacy Act, even though such records would otherwise be subject to the Act.

Thus, once a case is referred to trial (because a court-martial does not exist until convened and has no authority in a case until the case is referred to the court) a military judge may grant a motion for discovery, without concern for Privacy Act restrictions or requirements, of Military Personnel Records Jackets (Field 201 files), medical files, finance files, or any other records, the disclosure of which is required in order for an accused to receive a fair trial or is otherwise required in the interest of justice. It was also The Judge Advocate General's opinion that the trial counsel, in a case which has been referred to trial, acting in his or her capacity as an officer of the court, could disclose records, otherwise subject to the Privacy Act, to military or civilian defense counsel to ease the administration of justice. The Judge Advocate General noted that, even though the Privacy Act did not apply to courts-martial, officers of the court must still be concerned with the privacy of witnesses and court members and abide by the American Bar Association Standards for the Administration of Criminal Justice relating to the Prosecution Function and the Defense Function. The opinion does not support

the position taken by the Air Force Court of Military Review in *United States v. Credit*, ACM 21959 (1 July 1976) that the ABA Standards serve as a limitation on the type of information to be disclosed. Rather, it was The Judge Advocate General's opinion that the Standards limit investigatory *methods* to those which will not unnecessarily invade privacy. Disclosure of personnel files when appropriate would enhance compliance with the Standards, because it would be the least intrusive method of investigation. For instance, disclosure of personnel files is proper where investigation of court members is justified.

It was The Judge Advocate General's opinion that, before a case is referred to trial, the Freedom of Information Act provides a means for military and civilian counsel to seek to obtain personnel records for use in preparing for trial. Under the Freedom of Information Act a determination must be made whether disclosure would constitute a clearly unwarranted invasion of personal privacy. (5 U.S.C. § 552 (b) (6)) This determination involves balancing the public interest served by disclosure against the individual's right to privacy. It was noted that usually the only public interest to be served by granting a FOIA request made in connection with a court-martial case is the public interest of ensuring that those accused of a crime receive a fair trial. Therefore, the only information which is required to be disclosed by the Freedom of Information Act, in addition to that specified in para. 3-2*b*, AR 340-21, is that which is necessary to satisfy the above discussed public interest. Information discoverable in a criminal proceeding to ensure a fair trial is not exempt from release under the Freedom of Information Act. [AL, Dec. 1977, at 31]

(Information and Records, Release and Access) **Disclosure of Religious Preference May Be A Clearly Unwarranted Invasion Of Personal Privacy.** DAJA-AL 1977/3913, 22 Mar. 1977. In forwarding a Freedom of Information Act request to the appropriate initial denial authority (MILPERCEN), The Judge Advocate General noted that supplying names and either home or unit addresses to a religious organization which had requested the names and adresses of personnel with a particular religious preference may constitute a clearly unwarranted invasion of personal privacy. It was pointed out that while the purpose of the request was ostensibly to confer a benefit on the servicemembers concerned, not all members may want their religious preference disclosed even to an organization associated with their stated religious preference.

[AL, Sept. 1977, at 31]

(Information and Records, Release and Access) **Opinions of The Judge Advocate General Intended To Have Broad Application May Not Be Exempt From Release As Internal Memoranda.** DAJA-AL 1977/4008, 15 Apr. 1977. A copy of a certain opinion of The Judge Advocate General was requested by a law firm. While opinions of The Judge Advocate General are generally exempt from release as internal memoranda (FOIA Exemption 5), it was decided to furnish a copy of the requested opinion to the law firm in question. The Judge Advocate General noted that opinions limited to the particular facts of specific cases which are not intended to have a broad application are generally exempt from release under Exemption 5. On the other hand, when the opinion is a statutory interpretation intended to be applied in all cases of a similar nature, it may be releasable. [AL, Nov. 1977, at 19]

(Information and Records, Release and Access) **Portions Of Correctional Treatment Files May Be Exempt From Access By Present And Former Military Prisoners.** DAJA-AL 1977/4029, 21 Apr. 1977. In response to the question whether records maintained in individual correctional treatment files may be withheld from present or former military prisoners who request copies or access under the Freedom of Information Act or the Privacy Act, The Judge Advocate General advised that the answer will depend on the facts of each particular case. It was noted that the three systems of records for individual correctional treatment files have been exempted from the access provisions of the Privacy Act. Prisoners may be denied access to their records to the extent that one or more of the reasons for exemption apply if the record is also exempt from disclosure under the Freedom of Information Act and AR 340-17. Records maintained in individual correctional treatment files generally will be investigatory records compiled for law enforcement purposes and hence exempt from mandatory disclosure under the Freedom of Information Act to the extent that release would have one or more of the effects set forth in paragraphs 2-12*g*(1) through (7), AR 340-17. The FOIA "internal communications" exemption also may be applicable in certain instances, *i.e.*, to portions of documents which reflect advice, opinions, evaluations or recommendations. Finally, the opinion noted that the exemptions of the FOIA and the reasons for claiming exemption from access under the Privacy Act are primarily intended to protect records from prisoners in actual confinement. It is doubtful that a significant and legitimate governmental purpose would exist for withholding records from a prisoner once he or she has completed his or her sentence.

[AL, Sept. 1977, at 33]

(Information and Records, Release and Access) **Results Of Court-Martial May Be Furnished To State Licensing Agency.** DAJA-AL 1977/4332, 21 Apr. 1977. In response to an inquiry, The Judge Advocate General expressed the opinion that the general court-martial conviction of a Veterinary Corps officer may be reported to an appropriate state licensing agency or professional association charged with regulating his professional conduct. It is not an unwarranted invasion of privacy under the Freedom of Information Act to disclose the results of a public criminal proceeding; therefore, the Privacy Act permits its disclosure. An agency may make such a disclosure on its own initiative. There is no requirement to delay disclosure until completion of appellate review; however, recipients of the information should be notified that appellate review is pending.

[AL, Oct. 1977, at 18]

Collateral Investigation Not Exempt From Release Under FOIA Exemption 5. DAJA-AL 1977/4379, 26 May 1977. A Freedom of Information Act request was received for the report of an investigation of an explosion in which civilian employees were injured. The investigation was not the safety investigation required by AR 385-40, but was a collateral investigation. The Judge Advocate General decided to release the report of investigation in its entirety. It was noted that the investigation was primarily factual in nature and that while factual portions of some safety investigations may be withheld under Exemption 5 of the Freedom of Information Act, the exemption is limited to the safety investigation and does not include collateral investigations required by regulation or conducted at the prerogative of a commander. It was also pointed out that the findings and recommendations of reports of investigation would normally be withholdable under FOIA Exemption 5. However, when recommendations are approved and in effect become the decision of the agency they are no longer exempt from release.

[AL, Nov. 1977, at 20]

(Information and Records, Release and Access) **Medical Information May Be Furnished To State Department Of Motor Vehicles.** DAJA-AL 1977/4514, 11 May 1977. Military doctors diagnosed that a soldier suffered from a medical condition which caused blackouts, making it prohibitively dangerous for him to operate a motor vehicle. This information could not be released to the state department of motor vehicles as a routine use under the applicable system notice required by the Privacy Act (5 U.S.C. § 552(a)), because the state in question did not require the reporting of such information. The question arose whether this medical information could otherwise be released to state authorities on agency initiative.

Release of this information would be required under the Freedom of Information Act unless it constituted a clearly unwarranted invasion of personal privacy under Exemption 6 (5 U.S.C. § 552(b)(6)). In this instance, The Judge Advocate General expressed the opinion that release was not a clearly unwarranted invasion of personal privacy because the public interest in prohibiting medically unfit motor vehicle operators outweighs an individual's privacy interest in this medical information.

[AL, Oct. 1977, at 19]

(Information and Records, General) **Waiver of FOIA Fees Refused Because Of Lack Of Benefit To The General Public.** DAJA-AL 1977/5072, 4 Aug. 1977. In response to a request to waive the fees for processing a Freedom of Information Act request The Judge Advocate General noted that waiver of the fee is required only "where the agency determines that waiver . . . is in the public interest because furnishing the information can be considered as primarily benefiting the general public." The Judge Advocate General advised that a number of factors should be considered in determining whether this standard has been met. Those factors include, but are not limited to, the size of the public to be benefited, the significance of the benefit, the private interest of the requester which the release may further, the usefulness of the material to be released, and the likelihood that tangible public good will be realized. A decision was made not to waive the fees in conjunction with a request from a private military counseling organization for copies of Article 138 complaints. The Judge Advocate General pointed out that waiver of the fees was not seen as primarily benefiting the public at large. In addition, the significance of the benefit to be derived from the waiver as well as the usefulness of the material to be released or the tangible public good to be realized was viewed as profiting or furthering the interests of a limited number of private groups or individuals and not the general public.

[AL, Dec. 1977, at 33]

(Information and Records, Release and Access) **Posting Of Bar To Reenlistment On Unit Bulletin Board Would Violate The Privacy Act.** DAJA-AL 1977/5133, 19 Aug. 1977. In response to an inquiry from the field, The Judge Advocate General advised that bar to reenlistment certificates (DA Form 4126-R) are records contained within a system of records within the meaning of the Privacy Act of 1974. Since the Privacy Act prohibits disclosure of such records they may not be posted on unit bulletin boards. The opinion discussed two exceptions to the disclosure prohibition but found that neither applied. It was pointed out that disclosure of the records to officers and employees of the agency that have a need for the record in the performance of their duties is permissible. Unit personnel other than the unit commander, the member involved and those personnel involved in processing and reviewing the DA Form 4126-R do not need to have access to the record in order to discharge their duties. It was also noted that, while the Privacy Act does not prohibit disclosure of records which are required to be disclosed by the Freedom of Information Act, the DA Form 4126-R contains a substantial amount of personal data which would not be required to be disclosed under the Freedom of Information Act.

[AL, Dec. 1977, at 33]

(Information and Records, Release and Access) **Release of Home Address To Military Banking Facility Not Permitted.** DAJA-AL 1977/5197, 25 Aug. 1977. In response to an inquiry from the field, The Judge Advocate General advised that paragraph 3-5*a*, AR 340-21 generally prohibits the release of home addresses of service members without their consent. It was pointed out that disclosure to creditors is specifically included within this prohibition. The Judge Advocate General noted that waiver of this prohibition requires a compelling and overriding interest sufficient to outweigh privacy protection considerations and stated that the fact that the requester is a military banking facility is not sufficiently compelling or overriding. [AL, Dec. 1977, at 34]

(Information and Records, Filing of Information) **Army Not Required To Comply With State Court Order Directing Sealing Of Juvenile Records Relating To Service Member.** DAJA-AL 1977/5294, 9 Sept. 1977. In response to an inquiry from U.S. Army Enlisted Records Center (USAEREC), The Judge Advocate General opined that the Army is not legally bound to comply with orders issued by state courts to seal records relating to prior civil convictions of service members. However, in accordance with applicable provisions of the Privacy Act of 1974 (5 U.S.C. § 552*a*(e) (5)), military records pertaining to a state conviction should be annotated to reflect any subsequent order of expunction, in order that a member's OMPF be kept accurate, relevant, timely and complete.

It also was pointed out that the DD Form 1966/5 (Application for Enlistment) contains information, certified by the enlistee, which is important to the enlistment process. Thus, the original form should not be destroyed or altered to reflect the new information. If, following enlistment, a member can establish that a modification to the information contained in the enlistment documents is warranted, an additional document may be placed in the member's military records to reflect the correct information. [AL, Feb. 1978, at 6]

(Information and Records, Release and Access; Boards Investigations) **Promises Of Confidentiality To Witnesses Limited To Certain Types Of Investigations.** DAJA-AL 1977/5301, 7 Sept. 1977. In the course of a decision to replex weapons systems. Because the primary reason for denying requests for safety investigations has been to encourage witness cooperation by implying or promising confidentiality, exemption from release may no longer be claimed automatically for reports of safety investigations in which promises of confidentiality are not authorized.

[AL, Feb. 1978, at 6]

(Information and Records, Release and Access) **Certain Personnel And Pay Data Releaseable To Attorney Representing Former Wife Of Servicemember.** DAJA-AL 1977/5624, 19 Oct. 1977. An inquiry was made whether the name of the legal guardian of a servicemember, his unit of assignment, his entitlement to pay and allowances and his proposed referral to a physical evaluation board may be released to an attorney representing the servicemember's former wife in child support and property settlement matters. The Judge Advocate General noted that the Privacy Act permits release of personal information from systems of records where its release would be required by the Freedom of Information Act. There is no need to apply a balancing test to determine the releaseability of the name of the legal guardian of the servicemember or the unit of assignment as release of this type of information would normally not constitute a clearly unwarranted invasion of the individual's personal privacy. In applying the balancing test to the remaining items of personal information, it was decided that the individual's right to privacy must give way to the societal interests in having individuals support their dependents. Accordingly, because judicial proceedings were being held in abeyance pending final resolution of the servicemember's status in the military, the public interest was found to outweigh the privacy considerations involved. [AL, Mar. 1978, at 6]

(Information and Records, Release and Access) **Unclassified Weapons Systems Progress Reports Are Releasable.** DAJA-AL 1977/6235, 4 Jan. 1978. The Judge Advocate General advised that weekly Significant Activities reports published by a Research and Development Command are releasable under the Freedom of Information Act, 5 U.S.C. § 552 (1976). Among other items of information, the publications contained interim progress reports on weapons systems under evaluation and development; however, they were unclassified. It was noted that the reports constituted "records" within the meaning of the Act; the Command's characterization of the published reports as "working notes" was rejected. Neither was the potential for future security classification following additional development considered a basis for exemption from disclosure UP 5 U.S.C. § 552(b) (1976).

[AL, Sept. 1978, at 28]

(Information and Records, Release And Access) **FOIA Protects A Deceased Member's Records If Disclosure Would Constitute A Clearly Unwarranted Invasion Of The Member's Family's Privacy.** DAJA-AL 1978/1797, 17 Feb. 1978. In response to an inquiry from the Office of the Surgeon General, The Judge Advocate General noted that, while the Privacy Act ordinarily does not protect the records of deceased personnel from disclosure, the courts have applied a balancing test in determining whether disclosure of records would constitute a clearly unwarranted invasion of personal privacy within the meaning of the Freedom of Information Act. The public interest in disclosure is balanced against the individual's, or in the case of a deceased member, the family's right to privacy. Information in medical records which would be embarrassing to the next of kin may be withheld if no public interest outweighs the privacy interest involved. Nevertheless, any reasonably segregable nonexempt portion of the record must be disclosed. [AL, July 1978, at 26]

(Information and Records, Systems of Records) **A DA Form 751 Is Not A "Record" Under Particular Circumstances.** DAJA-AL 1978/2154, 30 Mar. 1978. Under the particular circumstances of use, it was the opinion of The Judge Advocate General that DA Forms 751, "Telephone or Verbal Conversation Records," did not constitute a "record" within the meaning of the Freedom of Information Act, 5 U.S.C. § 552. Use and retention of the forms was solely within the discretion of the employees. The forms were prepared personally by the individual involved, and they were used exclusively as memory aids. Circumstances which could dictate a different result would include whether mandatory use of the forms was required, retention was for a specified time, use of the forms in a manner other than as an extension of memory, and circulation of the forms to persons other than the preparers.

[AL, Dec. 1978, at 17]

(Information and Records, Release and Access) **Unsolicited Disclosure Of Suspected Criminal Conduct To State Authorities Found Not Appropriate.** DAJA-AL 1978/2481, 8 May 1978. A servicemember who was suspected of sexual abuse of a child on an area under exclusive federal jurisdiction was administratively separated UP of Ch. 10, AR 635-200. An unsolicited disclosure of this information to state authorities could not be made under the law enforcement routine use exception to the Privacy Act, 5 U.S.C. § 552a, because state authorities had no responsibility to investigate or prosecute criminal offenses on the enclave. Under such circumstances, disclosure may be made only if the records systems notice for the record in question authorizes such disclosure as a routine use or if a compelling public interest would be served by disclosure even though an invasion of personal privacy would result. [AL, Dec. 1978, at 16]

(Information and Records, Release and Access) **A Processing Office Must Make A Preliminary Determination Regarding Releaseability Before Referral Of A FOIA Request To An Initial Denial Authority.** DAJA-AL 1978/2535, 20 Apr. 1978. A request under the Freedom of Information Act for copies of three Army training video tapes was forwarded by the receiving office to the Initial Denial Authority "for review and final action." The letter of transmittal indicated that the receiving office had determined only that the films had not been approved for public exhibition by the Department of the Army as required by regulation. In returning the request to the receiving office, The Judge Advocate General advised that a receiving office must make a preliminary decision before referral of a request under the Freedom of Information Act to an Initial Denial Authority. The preliminary determination must be whether a withholding exemption applies and a legitimate purpose would be served by withholding. The Judge Advocate General also noted that as the Freedom of Information Act, 5 U.S.C. § 552, as implemented, governs the releasability of Army records, release will not be delayed subject to clearance requirements prescribed by other regulatory authority. [AL, Sept. 1978, at 28]

(Information and Records, Release and Access) **The Home Address Of A Former Servicemember May Not Be Disclosed Without Consent.** DAJA-AL 1978/2604, 30 May 1978. A private attorney representing the family of a civilian contractor's employee killed in an automobile accident requested the home address of a former servicemember who had been driving the opposing automobile. Ostensibly, the former servicemember was being sought as a witness for a workmen's compensation claim. Allied papers indicated, however, that a complaint in a civil suit had been prepared which named the former servicemember as a defendant. The Judge Advocate General concluded that, because no compelling public interest would be served by disclosure, the home address could not be released without the consent of the former servicemember. [AL, Dec. 1978, at 16]

(Information and Records, Release and Access) **Draft Revision Of Regulation And Allied Papers Constitute Predecisional Memoranda And Are Exempt From Release.** DAJA-AL 1978/2874, 5 June 1978. A Freedom of Information Act request was submitted for an "advance copy of revised AR 210-7" and all written material pertaining to the revision. With the exception of two documents, the request was denied by the Judge Advocate General in his capacity as the Initial Denial Authority. Both the draft regulation and the allied comments, opinions and recommendations were considered predecisional memoranda exempt from release (5 U.S.C. § 552(b)(5) (1976)). Consistent with legislative history and judicial interpretation, The Judge Advocate General concluded that withholding was necessary to protect the free exchange of ideas within the agency prior to the issuance of a decision. [AL, Dec. 1978, at 16]

(Military Installations, Regulations) **Publication Of A Local Command Regulation In The Federal Register Was Required.** DAJA-AL 1978/2898, 30 June 1978. A local command regulation established procedures governing entry upon certain Army training areas. It provided that entry was prohibited without the advance consent of the commander or his authorized representative and that violators would be subject to criminal prosecution under federal statutes 18 U.S.C. § 1382 and 50 U.S.C. § 797. The Judge Advocate General agreed with The Adjutant General's conclusion that this regulation should be published in the Federal Register.

The Federal Register Act, 44 U.S.C. § 1501 *et seq.*, requires publication of documents having general applicability and legal effect. Although the regulation merely restated the statutory penalties, publication was still required because the regulation prescribed "a course of conduct (1 CFR 1.1.)." Although promulgated by a local command, the regulation nevertheless established "substantive

rules of general applicability affecting the public" and thus, publication was required by the Freedom of Information Act, 5 U.S.C. § 552. Publication of the local command regulation was consistent with guidance contained in DOD Directive 5400.9 and AR 310–4.

[AL, Dec. 1978, at 18]

(Information and Records, Release and Access) **Creation Of A Record Is Not Required To Respond To A FOIA Request.** DAJA-AL 1978/3159, 13 July 1978. A FOIA request was submitted for a listing of all personnel having a particular church affiliation who were assigned to a specific military installation. The Judge Advocate General advised that, if substantial computer reprogramming or extensive manipulation of the data base were necessary to retrieve the information, such action could constitute creation of a new record. A record need not be created to respond to FOIA requests. The Judge Advocate General also was of the opinion that disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. [AL, Dec. 1978, at 16]

(Information and Records, Release and Access) **Report Of Administrative Investigation Releasable In Its Entirety.** DAJA–AL 1979/2831, 6 July 1979.

An administrative investigation concerning installation-level management practices was conducted pursuant to AR 15–6. The processing installation sought to withhold two portions of the report based upon Exemptions 5, 6 and 7 of FOIA.

The Judge Advocate General acknowledged that the discussion portion of the report nominally fell within Exemption 5. Normally Exemption 5 would permit withholding of predecisional matters used in the course of agency decisionmaking. However, the commander's actions vitiated any privilege which could have been asserted. By approving the report of investigation and telling the requestor what actions had been taken, the commander expressly adopted or incorporated by reference the predecisional report of investigation. The Judge Advocate General also noted that purely factual matters such as those contained in the discussion portion of the report could not be withheld under Exemption 5.

The second portion sought to be withheld was the summarized testimony of witnesses. Exemptions 6 and 7(C) were rejected by The Judge Advocate General on the basis that the nature of the information sought would not result in an invasion of privacy within the intent of the exemptions. The information also could not be withheld to protect the identity of the witnesses because their identities were already known to the requestor.

Finally, the investigating officer's assurance to the witnesses that their statements would be withheld did not provide a basis for withholding. While such promises are recognized under AR 340–21, the regulation implementing the Privacy Act, they are limited to compelling circumstances in specific types of cases. The investigation in question was considered not to be within the categories enumerated as it did not concern law enforcement, employment suitability determinations or promotion potential evaluations. Compelling circumstances were not present because the Investigating Officer's assurance of confidentiality was routinely made to every witness and there was no indication that the testimony would not have been obtained but for the promise of confidentiality. Because no exemption permitted withholding, the portions sought to be withheld were releasable in their entirety. [AL, Feb. 1980, at 45]

(Information and Records, Release and Access) **Privacy Act Access Provisions Inapplicable Unless Requested Information is Both Contained in a System of Records and Retrieved by Reference to the Requestor.** DAJA-OL 1979/2847, 26 June 1979. A soldier submitted a Privacy Act request for access to an AR 15-6 Report of Investigation (ROI). In response to an inquiry from the Access and Amendment Refusal Authority (AARA), the Judge Advocate General indicated that whether the records in question were susceptable to a Privacy Act request for access depends on two factors: whether the records are contained in a system of records *and* whether the records are retrieved by reference to the *requestor's* name or other personal identifier. Assuming that the ROI meets both these criteria, the request must be processed under AR 340-21 as a Privacy Act request and the documents must be released unless they are found to be withholdable under paragraph 2-6, AR 340-21. In such a case, any determination to withhold the documents must be processed through the AARA (in this instance MILPERCEN).

If the ROI did not meet both of the criteria discussed above, the request must be processed as a Freedom of Information Act (FOIA) request. Under FOIA, as implemented by AR 340-17, the documents must be provided unless exempt from mandatory disclosure pursuant to one of nine specified exemptions (5 U.S.C. 552 (b) and paragraph 2-12, AR 340-17) and a legitimate governmental purpose exists for nondisclosure (paragraph 2-1*a*(2), AR 340-17). Only where it is determined that withholding would be authorized IAW the above stated criteria are the documents referred to the responsible Initial Denial Authority (IDA), (in this case The Judge Advocate General) for review and appropriate action. The custodian of the record must release all nonexempt records which are considered responsive to the request (paragraph 2-6, AR 340-17).

Assuming that the request would be processed under the FOIA, The Judge Advocate General provided the following guidance:

a. The fact that a portion of a record is exempt from disclosure does not justify the withholding of the entire document. 5 U.S.C. 552 (b) and paragraph 2-1*a*(1), AR 340-17, require that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the exempt portions.

b. The DOD Privacy Board has held that disclosure of social security numbers (SSN) constitutes a clearly unwarranted invasion of personal privacy UP 5 U.S.C. 552(b)(6) (see also paragraph 2-12*f*, AR 340-17). In the present case, should the requestor modify his request, so as to exclude SSN's from the scope of his demand, excision of this personal identifier would not be considered a denial.

c. To the extent that the Investigating Officer's finding and recommendations have been approved by the appointing authority, it is doubtful that they could be withheld under 5 U.S.C. 552(b)(5) and paragraph 2-12*e*, AR 340-17. Any recommendations which have not been approved could technically fall within the purview of the above cited exemption. Nevertheless, a further determination would have to be made as to whether a legitimate governmental purpose is served by nondisclosure. Should such a purpose not be served, this part of the report would also have to be released.

d. The witness statements (DA Form 2823) would also appear releasable except as noted in para b above. Such statements are ordinarily disclosable except when confidentiality was essential to securing the information from the witness. In the instant case, however, this exception did not appear to have been present. Consequently, the statements did not fall within the purview of 5 U.S.C. 552(b)(5) or paragraph 2-12*e*, AR 340-17. [AL, Mar. 1980, at 15]

(Information and Records, Release and Access) **Computer Programs are not "Records" Subject to FOIA.** DAJA-AL 1979/3686, 24 October 1979. The Judge Advocate General concurred in the conclusion that computer programs, as well as the operator's manuals, are not "records" within the meaning of the Freedom of Information Act (FOIA). Citing section V.B.4 of DOD Directive 5400.7, it was noted that computer programs and their manuals are considered an "exploitable resource" not subject to FOIA. Coordination with the Office of the Assistant Chief of Staff for Automation and Communication was recommended because it was recognized that computer programs, even though not subject to FOIA, are releasable on a case-by-case basis as a matter of Department of Army policy. [AL, Mar. 1980, at 15]

(Information and Records, Release and Access) **Disclosure of an Individual's Home Telephone Number For Inclusion in Unit Alert Roster is Mandatory.** DAJA-AL 1980/1504, 10 April 1980.

The Adjutant General's Office requested an opinion from The Judge Advocate General as to whether the disclosure of an individual's home telephone number for inclusion in an alert roster is mandatory under the Privacy Act, and whether disciplinary sanctions can be imposed for refusal to disclose this information.

The Judge Advocate General opined that if the information is required to meet a bona fide need of the Government, or, in the case of the Army, a military necessity, disclosure of an individual's home telephone number is mandatory. Further, The Judge Advocate General stated that if after being advised through a privacy act statement that disclosure is mandatory the individual refuses to disclose the information, the commander is authorized to impose penalties for failing to respond. Military personnel who disobey an order to provide their home telephone number are subject to any of the prescribed disciplinary actions for failure to obey a lawful order. Disciplinary action may be taken against civilian personnel under Chapter 751, Federal Personnel Manual, for failure to disclose mandatory information.

[AL, Aug. 1980, at 22]



OFFICE OF THE SECRETARY OF DEFENSE

WASHINGTON, DC 20301

April 8, 1992

Administration
& Management

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
COMPTROLLER
GENERAL COUNSEL
INSPECTOR GENERAL
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1

This memorandum reissues the Defense Privacy Board Advisory Opinions. Former Opinions 14, 15, 28 and 40 have been withdrawn. Those opinions addressed Freedom of Information Act issues as opposed to Privacy Act matters. The enclosed opinions have been renumbered and should be substituted for those previously issued by the Defense Privacy Board.

D.O. Cooke
Director

Enclosure

DEFENSE PRIVACY BOARD

ADVISORY OPINIONS

DEFENSE PRIVACY OFFICE
1941 JEFFERSON DAVIS HIGHWAY
CRYSTAL MALL 4, ROOM 920
ARLINGTON, VA 22202-4502
(703) 607-2943
DSN 327-3943

TABLE OF CONTENTS

		Page
1.	PROVIDING WAGE AND EARNING STATEMENTS (W-2 FORMS) OF MILITARY PERSONNEL TO STATE AND LOCAL TAXING AUTHORITIES	1
2.	PRIVACY RIGHTS AND DECEASED PERSONS	1
3.	DISCLOSURE OF RECORDS FROM A SYSTEM OF RECORDS TO THE NEXT OF KIN OF PERSONS MISSING IN ACTION OR OTHERWISE UNACCOUNTED FOR	2
4.	CORRECTIONS OF MILITARY RECORDS UNDER THE PRIVACY ACT	3
5.	APPLICABILITY OF THE PRIVACY ACT TO NATIONAL GUARD RECORDS	4
6.	ASSESSING FEES TO MEMBERS OF CONGRESS FOR FURNISHING RECORDS WHICH ARE SUBJECT TO THE PRIVACY ACT	5
7.	DISCLOSURE OF HOME OF RECORD TO MEMBERS OF CONGRESS	5
8.	ACCOUNTING FOR DISCLOSURES OF RECORDS THROUGH MILITARY LEGISLATIVE LIAISON CHANNELS	6
9.	THE PRIVACY ACT AND MINORS	6
10.	DISCLOSURE OF IDENTITIES OF CONFIDENTIAL SOURCES FROM INVESTIGATIVE RECORDS EXEMPTED UNDER SUBSECTION (k)(2)	7
11.	APPLICATION OF THE PRIVACY ACT TO INFORMATION IN HOSPITAL COMMITTEE MINUTES	8
12.	ACCOUNTING FOR MASS DISCLOSURES OF RECORDS TO OTHER AGENCIES	8
13.	DISCLOSURE OF RECORDS TO STATE AGENCIES TO VALIDATE UNEMPLOYMENT COMPENSATION CLAIMS OF FORMER FEDERAL EMPLOYEES AND MILITARY MEMBERS	9
14.	DISCLOSURE OF RECORDS TO FINANCIAL INSTITUTIONS	9
15.	DISCLOSURE OF PHOTOGRAPHS IN THE CUSTODY OF THE DEPARTMENT OF DEFENSE	10
16.	DISCLOSURE OF RECORDS FROM SYSTEMS OF RECORDS TO A CONTRACTOR PURSUANT TO A CONTRACT	10
17.	DEFINITION OF AN "AGENCY OR INSTRUMENTALITY OF ANY JURISDICTION WITHIN OR UNDER THE CONTROL OF THE UNITED STATES"	11
18.	LOCATION OF PRIVACY ACT ADVISORY STATEMENTS	11
19.	PRIVACY ACT ADVISORY STATEMENTS FOR INSPECTOR GENERAL COMPLAINT FORMS	11
20.	RECRUITMENT ADVERTISEMENTS IN THE PUBLIC MEDIA	12
21.	INFORMATION REQUESTED IN THE PUBLIC DOMAIN	13
22.	IMPLICATIONS ON VARIOUS METHODS OF DISTRIBUTING LEAVE AND EARNING STATEMENTS	13
23.	THE APPEARANCE OF THE SOCIAL SECURITY NUMBER IN THE WINDOW OF AN ENVELOPE CONTAINING RECORD INFORMATION DOES NOT CONSTITUTE A DISCLOSURE	14
24.	WHAT CONSTITUTES A PRIVACY ACT REQUEST FOR ACCESS OR AMENDMENT FOR PURPOSES OF COMPLIANCE WITH PROCESSING AND REPORTING REQUIREMENTS	14

25.	INFORMATION PERTAINING TO THIRD PARTIES MAY NOT BE PROTECTED BY THE PRIVACY ACT	14
26.	DISCLOSURE OF SECURITY CLEARANCE LEVEL	15
27.	PRIVACY ACT APPLICABILITY TO LEGAL MEMORANDA MAINTAINED IN A SYSTEM OF RECORDS	15
28.	THE PRIVACY ACT DOES NOT APPLY TO FILES INDEXED BY NON-PERSONAL IDENTIFIERS AND RETRIEVED BY MEMORY	16
29.	DEPERSONALIZING COMPUTER CARDS AND PRINTOUTS BEFORE DISPOSAL	16
30.	NO SUPPLEMENTAL CHARGES MAY BE ASSESSED FOR UNLISTED TELEPHONE NUMBER SERVICE ON INSTALLATIONS WHERE NO COMMERCIAL SERVICE IS AVAILABLE	16
31.	THE PRIVACY ACT GENERAL EXEMPTION DOES NOT FOLLOW THE RECORD	17
32.	THE PRIVACY ACT SYSTEM NOTICE REQUIREMENT APPLIES TO COURT-MARTIAL FILES	17
33.	A ROUTINE USE IS NOT REQUIRED FOR DISCLOSURE OF DEPARTMENT OF DEFENSE RECORDS TO THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION AND TO THE GENERAL SERVICES ADMINISTRATION	18
34.	DEFINITION OF "ORDER OF A COURT OF COMPETENT JURISDICTION"	18
35.	RECORDS MAY BE DISCLOSED TO SERVICE-ORIENTED SOCIAL WELFARE ORGANIZATIONS PURSUANT TO AN ESTABLISHED ROUTINE USE	19
36.	PRIVACY ACT WARNING LABELS	19
37.	DISCLOSURE OF RECORDS CONCERNING CHARITABLE CONTRIBUTIONS OR PARTICIPATION IN SAVINGS BOND PROGRAMS	20
38.	PERSONAL NOTES AS RECORDS WITHIN A SYSTEM OF RECORDS	20
39.	REQUIREMENT FOR PRIVACY ACT ADVISORY STATEMENTS FOR ADMINISTRATIVE PROCEEDINGS	21
40.	ACCESS TO MEDICAL RECORDS BY INDIVIDUALS WHO COULD BE ADVERSELY AFFECTED	21
41.	NO REQUIREMENT TO PROVIDE PRIVACY ACT ADVISORY STATEMENTS TO LABOR ORGANIZATIONS	22
42.	INFORMATION ON FORMS ATTACHED TO SECURITY CONTAINERS OR FACILITIES IS SUBJECT TO THE PRIVACY ACT	22
43.	VERIFYING THE ACCURACY OF PERSONAL DATA IN A RECORD IS SUBJECT TO THE PRIVACY ACT	23
44.	ONE DEPARTMENT OF DEFENSE COMPONENT MAY DISCLOSE HEALTH CARE RECORDS TO ANOTHER WITHOUT A ROUTINE USE OR CONSENT	24
45.	DISCLOSURE OF THE ORIGINAL, PRE-1968, SERIAL NUMBER (SERVICE NUMBER) ASSIGNED TO MILITARY PERSONNEL	24
46.	THE SOCIAL SECURITY NUMBER ON BUILDING AND INSTALLATION BADGES	24
47.	USING BOTH GENERAL AND SPECIFIC PRIVACY ACT EXEMPTIONS FOR THE SAME SYSTEM OF RECORDS	25
48.	DISCLOSURE OF INFORMATION IN BLANKET ORDERS	25

1. PROVIDING WAGE AND EARNING STATEMENTS (W-2 FORMS) OF MILITARY PERSONNEL TO STATE AND LOCAL TAXING AUTHORITIES

A blanket routine use has been established for all Department of Defense (DoD) systems of records which permits disclosure of information contained in W-2 forms to state and local taxing authorities with which the Secretary of the Treasury has entered into agreements under 5 U.S.C. §§ 5516, 5517 and 5520. Accounting for disclosures made pursuant to this routine use is required by the Privacy Act. See 5 U.S.C. § 552a(c). Defense Privacy Board Advisory Opinion 12 contains guidance on accounting for mass disclosures.

2. PRIVACY RIGHTS AND DECEASED PERSONS

The Privacy Act and its legislative history are silent as to whether a decedent is an individual and whether anyone else may exercise the decedent's rights concerning records pertaining to him or her maintained by agencies. The Privacy Act's failure to provide specifically for the exercise of rights on behalf of decedents, coupled with the personal judgment implicitly necessary to exercise such rights, indicates that the Act did not contemplate permitting relatives and other interested parties to exercise Privacy Act rights after the death of the record subject. See Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28951 (July 9, 1975).

Whether access to records pertaining to a decedent should be permitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, depends on the circumstances in each particular case. The FOIA would permit an agency to withhold if:

a. In the case of "personnel and medical and similar files, the disclosure . . . would be a clearly unwarranted invasion of personal privacy" under 5 U.S.C. § 552(b)(6); or

b. In the case of law enforcement investigatory records, the disclosure would "constitute an unwarranted invasion of personal privacy" under 5 U.S.C. § 552(b)(7)(C).

Demise of a record subject (ending Privacy Act protection which permits disclosure only when required by the FOIA) does not mean the privacy-protective features of the FOIA no longer apply. Public interest in disclosure must be balanced against the degree of invasion of personal privacy. An agency need not automatically, in all cases, "disclose inherently private information as soon as the individual dies, especially when the public's interest in the information is minimal." Kiraly v. Federal Bureau of Investigation, 728 F.2d 273, 277 (6th Cir. 1984).

As a final point, a decedent's records may pertain as well to other living individuals, and to the extent that the records are retrieved by their personal identifiers, their Privacy Act rights remain in effect. As to any records of a decedent requested under the FOIA, the degree to which the personal privacy of the decedent's relatives, or anyone else to whom the records pertain would be invaded must be considered in the FOIA balancing test mentioned above. See DoD 5400.7-R, paragraph 3-200, no. 6.

In applying the FOIA balancing test to the records of those individuals who remain missing or unaccounted for as a result of the Vietnam conflict, the privacy sensibilities of their family members should be considered as a clear and present factor that weighs against the public release of information. The release of information regarding these records should be limited to basic information such as name, rank, date of loss, country of loss, current status, home of record (city and state), and any other privacy information that the primary next of kin has consented to releasing.

3. DISCLOSURE OF RECORDS FROM A SYSTEM OF RECORDS TO THE NEXT OF KIN OF PERSONS MISSING IN ACTION OR OTHERWISE UNACCOUNTED FOR

A legal guardian appointed by a court of competent jurisdiction for a member missing in action or otherwise unaccounted for would be in the position of the member and have the same rights as the member. 5 U.S.C. § 552a(h). In such a case, records contained in a system of records and relating to the missing member may be disclosed to third persons upon the written consent of the guardian. If no guardian has been appointed or an appointed guardian does not give written consent, such records may be disclosed only if authorized by 5 U.S.C. § 552a(b).

For example, information relating to persons missing in action or otherwise unaccounted for may be disclosed "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). [For a discussion of "order of a court of competent jurisdiction," see Defense Privacy Board Advisory Opinion 37.] In a case involving the families of military personnel missing in action, one court ordered, in part, that next of kin receiving governmental financial benefits which could be terminated by a status review be afforded "reasonable access to the information upon which the status review will be based." McDonald v. McLucas, 371 F. Supp. 831, 836 (S.D.N.Y. 1974). Since a status review is likely to require access to almost all significant information in a system of records pertaining to a member missing in action, this order constitutes sufficient authority under the Privacy Act for disclosure of almost any personal records of interest.

Information in a system of records also may be available to any person under the Freedom of Information Act (FOIA) if disclosure of the records concerned does not constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6); 5 U.S.C. § 552a(b)(2). In determining what information must be disclosed under this standard, a balancing test weighing the public interest in disclosure against the potential invasion of personal privacy should be conducted. See DoD 5400.7-R, paragraph 3-200, No. 6. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed.2d 11 (1976); Church of Scientology v. Department of Defense, 611 F.2d 738 (9th Cir. 1979). Because facts and needs will differ in each case, the balancing test may require disclosure of information in one circumstance but not in another. See Getman v. National Labor Relations Board, 450 F.2d 670 (D.C. Cir. 1971); Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973); Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco and Firearms, 502 F.2d 133 (3rd Cir. 1974).

Due to the unusual circumstances involved when a service member is missing in action or otherwise unaccounted for, next of kin may have a more compelling case for disclosure of a requested record than would other third parties. However, each request must be evaluated on its own merits.

Should the record subject's status be changed to "deceased," see Defense Privacy Board Advisory Opinion 2 concerning application of the Privacy Act and FOIA to decedents' records.

4. CORRECTIONS OF MILITARY RECORDS UNDER THE PRIVACY ACT

One main purpose of the Privacy Act is to ensure records pertaining to individuals are maintained accurately so informed decisions based on those records can be made. The Privacy Act amendment provision, 5 U.S.C. § 552a(d)(2), permits individuals to request factual amendments to records pertaining to them. It does not permit correction of judgmental decisions such as efficiency reports or selection and promotion board reports. These judgmental decisions may be challenged before the Boards for Correction of Military and Naval Records which by statute are authorized to make these determinations. 10 U.S.C. § 1552. If factual matter is corrected under Privacy Act procedures, subsequent judgmental decisions that may have been affected by the factual correction, if contested, should be considered by the Boards for Correction of Military and Naval Records.

5. APPLICABILITY OF THE PRIVACY ACT TO NATIONAL GUARD RECORDS

As defined in the Privacy Act, "maintain" includes various record-keeping functions to which the Act applies; i.e., maintaining, collecting, using,and disseminating. In turn, this connotes control over and responsibility and accountability for systems of records. 5 U.S.C. § 552a(a)(3); Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28954 (July 9, 1975) (OMB Guidelines).

Reserve components of the Army and the Air Force include the Army and Air National Guards of the United States respectively, which are composed of federally recognized units and organizations of the Army or Air National Guard and members of the Army or Air National Guard who are also Reserves of the Army or Air Force. 10 U.S.C. §§ 3077 and 8077. 10 U.S.C. § 275 requires the Departments of the Army and the Air Force to maintain personnel records on all members of the federally recognized units and organizations of the Army and Air National Guards and on all members of the Army or Air National Guards who are also reserves of the Army and Air Force. Such records are "maintained" by the Army or Air Force for the purposes of the Privacy Act. These records are not all located at the National Guard Bureau. Some are in the physical possession of the state adjutant general. However, records need not be physically located in the agency for them to be maintained by the agency. See OMB Guidelines. Records located at the state level are under the direct control of the Army and Air Force in that they are maintained by the state under regulations (NGR 600-200 and AFR 35-44) implementing 10 U.S.C. § 275, and promulgated by authority of the Secretaries of the Army and the Air Force under 10 U.S.C. § 280. Therefore, the records are Army or Air Force records and subject to the provisions of the Privacy Act.

That the records are subject to the Privacy Act does not mean they cannot be used by the members of the state national guards. The state officials using and maintaining the records are members of the reserves (members of the Army or Air Force National Guard of the United States). Disclosure to them in performance of their duties is disclosure within the Department of Defense not requiring a published routine use or an accounting.

6. ASSESSING FEES TO MEMBERS OF CONGRESS FOR FURNISHING RECORDS WHICH ARE SUBJECT TO THE PRIVACY ACT

The Privacy Act authorizes an agency to "establish fees to be charged, if any, to any individual for making copies of his record . . . ." 5 U.S.C. § 552a(f)(5). Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28968 (July 9, 1975) and DoD 5400.11-R each point out that a fee may be charged for only the direct cost of making the copy. This guidance also states that if copying is the only means whereby the record can be made available to the individual, reproduction fees will not be assessed.

Therefore, charging fees is discretionary. However, as a general policy, the Department of Defense should not charge Members of Congress for records furnished when requested under the Privacy Act, unless the charge would be substantial. In no event should a fee less than $30.00 be determined substantial. In the case of constituent inquiries involving a substantial fee, a suggestion may be made that the Member of Congress advise the constituent that the information may be obtained by writing the appropriate office and paying reproduction costs. Additionally, the record may be examined at no cost if the constituent wishes to visit the record custodian.

7. DISCLOSURE OF HOME OF RECORD TO MEMBERS OF CONGRESS

The blanket routine use provisions for Department of Defense (DoD) systems of records, first published on October 9, 1975, at 40 Fed. Reg. 47748, are sufficiently broad to permit the disclosure of home of record information to a Member of Congress or Congressional staff member who is making an inquiry of a DoD component at the request of the subject service member, even if the subject member's request did not concern that particular portion of the service record.

However, the service record entry for home of record is intended to reflect the member's home at the time of entry into service or order to active duty. The Member of Congress or Congressional staff member may be more interested in the service member's legal residence for voting purposes or as entered on a W-4 form and as reflected by the member's pay record. Disclosure of home of record information to a Member of Congress or a Congressional staff member should include a caveat that it reflects only the home address at the time of entry into service or order to active duty.

8. ACCOUNTING FOR DISCLOSURES OF RECORDS THROUGH MILITARY LEGISLATIVE LIAISON CHANNELS

Procedures and divisions of responsibility should be established by military departments to ensure preparation of required accountings when information concerning individuals is disclosed to Members of Congress. Whether disclosure is made pursuant to an established routine use or prior written consent of the record subject, an accounting must be kept. See 5 U.S.C. § 552a(c).

When a disclosure is made directly to a Member of Congress by the custodian of the record, that activity is responsible for keeping an appropriate accounting. However, a more difficult administrative problem arises when requested information is transmitted by the custodian to the legislative liaison activity for re-transmittal and the latter either deletes from or adds to information originally provided. In such cases it might be impossible for the custodian to keep an accurate accounting of what actually was disclosed to the Congressional office unless the legislative liaison office provides feedback.

The problem should not be resolved on a DoD-wide scale because the formulation of specific procedures for disclosure accounting will involve consideration of a number of factors which will vary among the military departments and other DoD components. The factors include internal organizational relationships, the components' prescribed methods and responsibilities for responding to Congressional inquiries, and possibly the characteristics of the particular records and record systems involved.

The liaison activity should prepare a disclosure accounting and forward it to the custodian. The accounting should contain the name and address of the person to whom the disclosure was made and the Member of Congress for whom he or she works, as well as the date, nature and purpose of the disclosure. The name, rank, title and duty address of the person making the disclosure also should be included. The accounting must be kept for five years or the life of the record, whichever is longer.

9. THE PRIVACY ACT AND MINORS

The Privacy Act applies to any "individual". Individual is defined in the Privacy Act as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). With respect to any rights granted the individual, no restriction is imposed on the basis of age; therefore, minors have the same rights and protections under the Privacy Act as do adults.

The Privacy Act provides that "the parent of any minor . . . may act on behalf of the individual." 5 U.S.C. § 552a(h). This subsection ensures that minors have a means of exercising their rights under the Privacy Act. Office of Management and Budget Privacy Act Guidelines (OMB Guidelines), 40 Fed. Reg. 28949, 28970 (July 9, 1975). It does not preclude minors from exercising rights on their own behalf, independent of any parental exercise. Parental exercise of the minor's Privacy Act rights is discretionary. A Department of Defense (DoD) component may permit parental exercise of a minor's Privacy Act rights at its discretion, but the parent has no absolute right to exercise the minor's rights absent a court order or the minor's consent. See OMB Guidelines, 40 Fed. Reg. 56741, 56742 (December 4, 1975). Further, the parent exercising a minor's rights under the Privacy Act must be doing so on behalf of the minor and not merely for the parent's benefit. DePlanche v. Califano, 549 F. Supp. 685 (W.D. Mich. 1982).

The age at which an individual is no longer a minor becomes crucial when an agency must determine whether a parent may exercise the individual's Privacy Act rights. With respect to records maintained by DoD components, the age of majority is 18 years unless a court order states otherwise or the individual, at an earlier age, marries, enlists in the military, or takes some other action that legally signifies attainment of majority status. Once an individual attains the age of majority, Privacy Act rights based solely on parenthood cease.

10. DISCLOSURE OF IDENTITIES OF CONFIDENTIAL SOURCES FROM INVESTIGATIVE RECORDS EXEMPTED UNDER SUBSECTION (k)(2)

If a system of records has been exempted under subsection (k)(2) of the Privacy Act, information that would identify a confidential source may be withheld from an individual requesting access to the record under the Privacy Act. 5 U.S.C. § 552a(k)(2). Only information that would not reveal the identity of a confidential source automatically becomes accessible under the Privacy Act when the record subject is denied a right, benefit or privilege.

The Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28973 (July 9, 1975), contain language from the Congressional Record suggesting that the record subject can learn the "substance and source of confidential information" if that information is used to deny him some right, benefit or privilege. However, such language does not refer to Privacy Act compliance. It refers to the possibility that revealing the identity of the confidential source might be required by due process or discovery rules in the course of an administrative or judicial challenge to an adverse action based on information supplied by the source.

11. APPLICATION OF THE PRIVACY ACT TO INFORMATION IN HOSPITAL COMMITTEE MINUTES

The Privacy Act grants access to records contained in systems of records. 5 U.S.C. § 552a(d)(1). To qualify as a "system of records," the information must be retrieved by an individual's name or other identifying particular. 5 U.S.C. § 552a(a)(5). Hospital committee minutes not filed or indexed under an individual's name or other identifying particular are not within a system of records subject to the Privacy Act. Hence, access to those minutes may be denied the individual requesting them under that statute.

12. ACCOUNTING FOR MASS DISCLOSURES OF RECORDS TO OTHER AGENCIES

It is inappropriate to enter into inter-agency support agreements negating the requirement to keep an accounting of disclosures made from systems of records. Except for disclosures made within the agency or pursuant to the Freedom of Information Act, each agency must keep an accurate accounting of all disclosures made from systems of records under its control. 5 U.S.C. § 552a(c).

Neither the Privacy Act nor the Office of Management and Budget Privacy Act Guidelines, however, specify a form for maintaining the accounting. See 40 Fed. Reg. 28949, 28956 (July 9, 1975). They require only that an accounting be maintained, that it be available to the individual to whom the record pertains, that it be used to advise previous recipients of corrections to records, and that it be maintained so a disclosure of records may be traced to the records disclosed. Individual records need not be marked to reflect disclosure unless necessary to satisfy this tracing requirement.

With respect to mass disclosures, if disclosures are of all records or all of a category of records, it is sufficient simply to identify the category of records disclosed, including the other information required under 5 U.S.C. § 552a(c), in a comprehensible form and make it available as required. Similarly, if disclosures occur at fixed intervals, a statement to that effect, as opposed to a statement at each occasion of disclosure, will satisfy the accounting requirement. If a mass disclosure is not of a complete category of records but, for example, of a random selection within a category, then the above information with a list of individuals whose records were disclosed could be maintained. Appropriate officials then could review this list to provide information to satisfy accounting provisions of the Act.

13. DISCLOSURE OF RECORDS TO STATE AGENCIES TO VALIDATE UNEMPLOYMENT COMPENSATION CLAIMS OF FORMER FEDERAL EMPLOYEES AND MILITARY MEMBERS

Federal agencies, under specific circumstances, are required to disclose records to state agencies administering unemployment compensation claims for former federal civilian employees and military members. Such information includes period of military service, pay grade or amount of federal wages and allowances, reasons for termination of federal service or discharge from military service, and conditions under which a military discharge or resignation occurred. 5 U.S.C. §§ 8506 and 8523; 20 C.F.R. § 614.

14. DISCLOSURE OF RECORDS TO FINANCIAL INSTITUTIONS

Information concerning a military member's rank, date of rank, salary, present and past duty assignments, future assignments which have been finalized, office telephone number, office address, length of military service, and duty status may be disclosed to any person requesting such information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and subsection (b)(2) of the Privacy Act, 5 U.S.C. § 552a, if the information is not classified and disclosure is in conformity with Defense Privacy Board Advisory Opinions 14 and 15.

The Federal Personnel Manual (FPM) authorizes disclosure of information concerning a federal civilian employee's present and past position descriptions, grades, salaries, and duty stations (including office address) to any person under the FOIA if the information is not classified. The FPM further provides that credit firms may be provided more detailed information concerning tenure of employment, Civil Service status, length of service in the agency and the federal government, and certain information concerning separation of an employee.

When disclosure of particular information requested by a credit bureau would not be authorized under provisions described above, information about individuals may be disclosed from military or civilian personnel records by Department of Defense components with written consent of the subject employee or military member specifically authorizing the disclosure of the requested information. 5 U.S.C. § 552a(b).

15. DISCLOSURE OF PHOTOGRAPHS IN THE CUSTODY OF THE DEPARTMENT OF DEFENSE

Photographs of members of the armed forces and Department of Defense employees taken for official purposes usually may be disclosed when requested under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a(b)(2), unless the photograph depicts matters that, if disclosed to public view, would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). Generally, award ceremony photographs, selection file photographs, chain of command photographs and similar photographs may be disclosed. Taking such photographs is not collection of information under 5 U.S.C. § 552a(e)(3), so a Privacy Act advisory statement is not required.

16. DISCLOSURE OF RECORDS FROM SYSTEMS OF RECORDS TO A CONTRACTOR PURSUANT TO A CONTRACT

When an agency contracts for operation of a system of records to accomplish an agency function, the contract must cause the Privacy Act to apply to the system of records. Thus, the contractor and the contractor's employees will be considered to be employees of the agency and subject to the provisions of the Privacy Act. 5 U.S.C. § 552a(m).

The Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28976 (July 9, 1975), state that the sole purpose of the contract might not be to operate a system of records, but the contract normally would provide that the contractor operate such a system as a specific requirement of the contract. If the contract can be performed only by operating a system of records, subsection (m) applies even though the contract does not provide expressly for operation of a system of records.

If the contract meets the requirements of subsection (m), the system of records operated by the contractor is deemed to be operated by the agency. Hence, disclosure of records to the contractor is authorized under 5 U.S.C. § 552a(b)(1) when the contract requires the contractor, explicitly or implicitly, to maintain a system of records to perform an agency function.

17. DEFINITION OF AN "AGENCY OR INSTRUMENTALITY OF ANY JURISDICTION WITHIN OR UNDER THE CONTROL OF THE UNITED STATES"

For purposes of nonconsensual disclosures of records from systems of records under 5 U.S.C. § 552a(b)(7), "agency or instrumentality of any jurisdiction within or under the control of the United States" includes any federal agency or unit wherever located and any state or local government agency or unit within the United States legally authorized to enforce civil or criminal laws. The types of agencies or units that may receive records under subsection (b)(7) are as numerous as the entities legally authorized to enforce civil or criminal laws. Such agencies or units may include a city dogcatcher charged with enforcing animal control laws, a county tax collector charged with enforcing county tax laws, a state governor charged with enforcing all state laws, and the Director of the Federal Bureau of Investigation charged with enforcing federal laws.

18. LOCATION OF PRIVACY ACT ADVISORY STATEMENTS

Placement of the the Privacy Act advisory statement in a form should be in the following order of preference:

a. Below the title of the form and positioned so the individual will be advised of the requested information,

b. Within the body of the form with a notation of its location below the title of the form,

c. On the reverse of the form with a notation of its location below the title of the form,

d. Attached to the form as a tear-off sheet, or

e. Issued as a separate supplement to the form.

19. PRIVACY ACT ADVISORY STATEMENTS FOR INSPECTOR GENERAL COMPLAINT FORMS

Under 5 U.S.C. § 552a(e)(3), a Privacy Act advisory statement is required for Inspector General complaint forms. The agency does not initiate a request for information from an individual, but asks for certain information in order only to respond to a complaint which was initiated voluntarily by an individual. Taking action based on information volunteered by an individual does not eliminate the need for a Privacy Act advisory statement.

Implicit in providing a Privacy Act advisory statement is the notion of informed consent. An individual should be provided sufficient advice about a request for information to make an informed decision about whether or not to respond. See Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28961 (July 9, 1975). The intent of the Privacy Act is to advise individuals requested to provide information about themselves for a system of records about the authority for collecting the information, the uses to be made of it, whether it is voluntary or mandatory to provide it, and the consequences of not providing it. Whenever an agency asks individuals for information about themselves for a system of records, a Privacy Act advisory statement must be provided. There is no difference between an Inspector General complaint which triggers a request for information and a medical form completed only after an individual voluntarily initiates a request for treatment. All agencies have determined that all medical forms require Privacy Act advisory statements.

20. RECRUITMENT ADVERTISEMENTS IN THE PUBLIC MEDIA

Published coupons and business return postcards are used as a means for an individual to request from the military service information concerning a particular recruiting program, and they usually contain blanks for the individual's name, address, telephone number, date and place of birth, level of education, degrees received, and the most recent previous educational agency or institution attended. If the coupon or postcard is used solely to fulfill the individual's request for information and then promptly is destroyed, the information is not entered into a system of records and a Privacy Act advisory statement is not required under 5 U.S.C. § 552a(e)(3) and DoD 5400.11-R.

If any information about an individual is maintained in a system of records; i.e., kept and retrieved by an individual's personal identifier, then a Privacy Act advisory statement is required. The individual must be told the authority that permits the agency to collect the information, whether it is mandatory to provide the information, the purposes and routine uses of the information, and the effects, if any, on the individual for not providing the information. Also, if the Social Security number (SSN) is requested, the individual must be told the federal statute or executive order of the President that allows solicitation of the SSN, whether it is mandatory to provide it, and the uses to be made of it.

For both the SSN and the other information about the individual, it will be voluntary for the individual to provide them, and the effects of not providing either may result in a delay or inability in providing information to the individual. The SSN will be used to retrieve information about the individual and to

verify the individual's identity. The remaining items of the Privacy Act advisory statement (authority, purposes, and routine uses) must be derived from the component's recruiting system of records notice as published in the Federal Register.

21. INFORMATION REQUESTED IN THE PUBLIC DOMAIN

DoD 5400.11-R requires giving a Privacy Act advisory statement whenever individuals are requested to supply information about themselves for a system of records; hence, the requirement is not avoided merely because the information is in the public domain or required to be disclosed under the Freedom of Information Act (FOIA). If information solicited from an individual is to be placed in a system of records, an advisory statement is necessary, regardless of whether the same information is in the public domain or would be disclosed under the FOIA.

22. IMPLICATIONS ON VARIOUS METHODS OF DISTRIBUTING LEAVE AND EARNING STATEMENTS

Three basic methods of distributing leave and earning statements (LES) in the Department of Defense are:

a. The LES is mailed to the individual's home address;

b. The LES is handed out by office clerical personnel, either with or without the pay check; or

c. The LES is handed out in an envelope by office clerical personnel either with or without the pay check.

The LES contains information about individuals that is protected by the Privacy Act. Distribution may be made in any manner so long as the information is not disclosed to persons other than those that have a requirement to process the statements in the course of their official duties. Hence, any of the methods indicated would be acceptable if the procedures preclude unauthorized disclosure to individuals outside the leave and earnings system.

23. THE APPEARANCE OF THE SOCIAL SECURITY NUMBER IN THE WINDOW OF AN ENVELOPE CONTAINING RECORD INFORMATION DOES NOT CONSTITUTE A DISCLOSURE

The appearance of the Social Security number (SSN) in a window envelope does not consititute a disclosure as contemplated by the Privacy Act. Prior to delivery to the recipient, the only likely disclosure is to personnel of the postal service who handle the letter in the performance of their official duties under agreement with the Department of Defense. However, when revising formats of the document or envelope, consideration should be given to preventing the appearance of the SSN through the window of the envelope.

24. WHAT CONSTITUTES A PRIVACY ACT REQUEST FOR ACCESS OR AMENDMENT FOR PURPOSES OF COMPLIANCE WITH PROCESSING AND REPORTING REQUIREMENTS

There is no requirement in the Privacy Act that a request specify or cite that law before it is to be processed or accounted for as a Privacy Act request. As a matter of policy, only requests which specify or clearly imply that they are being made under the Privacy Act receive the formal processing required by the law and implementing regulations and are reported as "Privacy Act requests." This avoids including routine record checks and requests to modify or update data elements in the annual Privacy Act report. This policy agrees with guidance issued by the Office of Management and Budget in Circular No. A-130, 50 Fed. Reg. 52730, 52739 (December 24, 1985). However, this does not mean that requests not citing the Privacy Act should not be honored.

25. INFORMATION PERTAINING TO THIRD PARTIES MAY NOT BE PROTECTED BY THE PRIVACY ACT

An individual's record is defined as "information about an individual that is maintained by an agency," and a system of records is "a group of any records from which information is retrieved by the name . . . or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4) and (5), respectively. Since 5 U.S.C. § 552a(e)(1) requires that agencies maintain "only such information about an individual as is relevant and necessary," all information in an individual's record must pertain to him or her. Therefore, when an individual seeks access to or a copy of records under 5 U.S.C. § 552a(d)(1), all records pertaining to him or her in systems of records must be disclosed, with certain exceptions not here germane.

A reference to subject A in a file retrieved only by subject B's identifier would not be available to subject A under the Privacy Act. However, if an indexing capability exists so that the same file also is retrieved by subject A's identifier, then subject A and B, both, would have access to the entire record. See Voelker v. Internal Revenue Service, 646 F.2d 332 (8th Cir. 1981); Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28957 (July 9, 1975).

26. DISCLOSURE OF SECURITY CLEARANCE LEVEL

If the information concerning an individual's security clearance is classified, it is protected from disclosure under the Privacy Act if the system of records has been exempted from access pursuant to 5 U.S.C. § 552a(k)(1) and it may be protected from disclosure under the Freedom of Information Act (FOIA) exemption for classified information, 5 U.S.C. § 552(b)(1). If the information is unclassified, the individual concerned will have access under the Privacy Act, but the determination as to disclosure to a third party who has submitted a FOIA request must be made under the FOIA, 5 U.S.C. § 552(b)(6). The determination would have to be made using the balancing test, balancing the public's right to know against the individual's right of privacy. See Department of the Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976).

27. PRIVACY ACT APPLICABILITY TO LEGAL MEMORANDA MAINTAINED IN A SYSTEM OF RECORDS

The Privacy Act specifically denies authority for individual access to any information compiled in reasonable anticipation of a civil action or proceeding. 5 U.S.C. § 552a(d)(5). Not only is an attorney's "work product" protected from access under the Act, but any information compiled in reasonable anticipation of a civil action or proceeding is protected. The term "civil proceeding" covers quasi-judicial and preliminary judicial steps which are the civil counterparts to criminal proceedings occuring before actual criminal litigation. Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28960 (July 9, 1975). Once information is prepared in reasonable anticipation of a civil action or proceeding, subsection (d)(5) continues to protect the material regardless of whether litigation is initiated, dropped or completed.

A determination as to whether material is prepared in anticipation of a civil action or proceeding must be made on an ad hoc basis for each document in question. In making this determination, all circumstances must be considered, including intent of the author at the time a document was prepared and the

presence or imminence of a civil action or proceeding. Note: This provision applies to access under the Privacy Act only and has no effect on access, if any, available under the Freedom of Information Act, 5 U.S.C. § 552, or rules of civil procedure. Further, this determination does not apply to work product not maintained in a system of records retrieved by a personal identifier.

28. THE PRIVACY ACT DOES NOT APPLY TO FILES INDEXED BY NON-PERSONAL IDENTIFIERS AND RETRIEVED BY MEMORY

Labeling of files by non-personal identifiers makes access requirements of the Privacy Act inapplicable unless such files actually are retrieved on the basis of an individual identifier through a cross-reference system or some other method. The human memory alone does not constitute a cross-reference system.

29. DEPERSONALIZING COMPUTER CARDS AND PRINTOUTS BEFORE DISPOSAL

A massive release of computer cards and printouts for disposal is not a disclosure of personal information precluded by the Privacy Act if volume of the records, coding of information in them, or some other factor renders it impossible to pinpoint any comprehensible information about a specific individual. Such computer products may be turned over to a Defense Reutilization and Marketing Office for authorized disposal by sale or recycling, without deleting names or other identifying data.

30. NO SUPPLEMENTAL CHARGES MAY BE ASSESSED FOR UNLISTED TELEPHONE NUMBER SERVICE ON INSTALLATIONS WHERE NO COMMERCIAL SERVICE IS AVAILABLE

An individual should have the opportunity to elect not to have his or her home address and telephone number listed in a base telephone directory of class B subscribers if no commercial telephone service is available. Individuals should be excused from paying an additional cost involved in maintaining an unlisted number if they comply with regulations providing for unlisted numbers.

31. THE PRIVACY ACT GENERAL EXEMPTION DOES NOT FOLLOW THE RECORD

A record created and maintained in a criminal law enforcement system of records and properly exempted under the general exemption of the Privacy Act, 5 U.S.C. § 552a(j)(2), may not retain that exemption when a copy of the record is permanently filed in a system of records maintained by a non-criminal law enforcement activity. Specifically, copies of records otherwise afforded a general exemption will lose their exempt character when permanently filed in nonexempt systems.

Invoking the general exemption should be limited to certain systems of records maintained by only Department of Defense (DoD) criminal law enforcement activities. Such activities include police efforts to prevent, control and reduce crime or to apprehend criminals and the activities of prosecutors, courts, correctional, probation, pardon or parole authorities. The general exemption is not for systems of records maintained by any other DoD activity that may have copies of reports of criminal investigations. Congress intended that only activities which perform criminal law enforcement functions are entitled to this general exemption for a record system. Merely filing a few criminal law enforcement records in one of its records systems will not entitle an activity not involved in criminal law enforcement to invoke a general exemption for the entire system.

Individuals seeking access under the Privacy Act to criminal law enforcement records in the temporary custody of a command or activity should be directed to the organization that created the records. However, any activity's files concerning adjudication or other personnel actions based on criminal law enforcement records are the records, without the general exemption, of the using activity which shall respond to all Privacy Act requests other than those seeking access to or amendment of the criminal law enforcement record.

32. THE PRIVACY ACT SYSTEM NOTICE REQUIREMENT APPLIES TO COURT-MARTIAL FILES

Procedures and policies regarding courts-martial are governed by the Uniform Code of Military Justice and the Manual for Courts-Martial. Congress recognized the unique nature of court-martial proceedings and exempted them from requirements of the Privacy Act by specifically excluding them from the definition of "agency." See 5 U.S.C. § 551(1)(F). Although courts-martial, themselves, are not "agencies" for purposes of the Privacy Act, records of trials by courts-martial are maintained by agencies long after the courts-martial involved have been dissolved. The Privacy Act requires each agency that maintains a system of records to "publish in the Federal Register upon establishment or revision a notice of the existence and

character of the system of records . . . ." 5 U.S.C. § 552a(e)(4). Hence, the requirement to publish a system notice applies to systems containing courts-martial records.

33. A ROUTINE USE IS NOT REQUIRED FOR DISCLOSURE OF DEPARTMENT OF DEFENSE RECORDS TO THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION AND TO THE GENERAL SERVICES ADMINISTRATION

The Federal Records Act of 1950, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, implemented by 36 C.F.R. Ch. XII and 41 C.F.R. Ch. 201, does not require a routine use notice for disclosure from Department of Defense (DoD) records systems. Such disclosures fall into three categories.

a. Records warranting permanent preservation for their historical or other value may be disclosed to the Archivist of the United States, or his representative, under the Privacy Act. See 5 U.S.C. § 552a(b)(6). Ownership of such records also may be transferred to the National Archives and Records Administration (NARA).

b. Records may be transferred to the various Federal Records Centers operated by NARA for temporary storage under the Privacy Act since such records continue to be maintained by the agency. See 5 U.S.C. § 552a(b)(1).

c. Records may be disclosed to the Archivist of the United States or the Administrator, General Services Administration, or their designees, to carry out records management inspections required by law. Such disclosures are authorized by the National Archives and Records Act of 1984. See 44 U.S.C. § 2904 and § 2906, as amended.

34. DEFINITION OF "ORDER OF A COURT OF COMPETENT JURISDICTION"

A subpoena signed by a clerk of a Federal or State court, without specific approval of the court itself, does not comprise an "order of a court of competent jurisdiction" for purposes of nonconsensual disclosures under the Privacy Act, 5 U.S.C. § 552a(b)(11). The overall scheme of the Privacy Act's nonconsensual disclosure provisions in subsection (b) is to balance the need for disclosure against the potential harm to the subject of the disclosure. Even though a subpoena signed by a clerk of the court is issued in the name of the court and carries with it the threat of contempt to those who ignore it, there is no guarantee that it is based upon a careful consideration of the competing interests of the litigant and the individual who is the subject of the record. It is common practice for a subpoena to be issued in blank by a court clerk to a party requesting it, who

then fills in the blanks as he or she chooses.

To allow nonconsensual disclosure pursuant to a subpoena--grand jury or otherwise--would permit disclosure of protected records at the whim of any litigant, whether prosecutor, criminal defendant, or civil litigant. Therefore, disclosure of records under subsection (b)(11) requires that the court specifically order disclosure. If there is a threat of punishment for contempt for ignoring a subpoena not approved by the court, the subpoena should be challenged by a motion to quash or modify.

35. RECORDS MAY BE DISCLOSED TO SERVICE-ORIENTED SOCIAL WELFARE ORGANIZATIONS PURSUANT TO AN ESTABLISHED ROUTINE USE

Disclosure of personal information from records systems to service-oriented social welfare organizations, such as Army Emergency Relief, Navy Relief, Air Force Aid Society, American Red Cross, United Services Organization, etc., is permitted pursuant to properly established routine uses. See 5 U.S.C. § 552a(a)(7), (b)(3), and (e)(4)(D). However, only such information as is necessary for the welfare agency to perform its authorized functions should be provided. Information can be disclosed only if the agency which receives it adequately prevents its disclosure to persons other than their employees who need such information to perform their authorized duties.

36. PRIVACY ACT WARNING LABELS

Using warning labels indicating that particular records are subject to the Privacy Act and require protection from unauthorized disclosure should be left to the discretion of each Department of Defense (DoD) component. In accordance with 5 U.S.C. § 552a(e)(10), agencies are required to establish appropriate safeguards for records and warning labels likely would be appropriate in many cases. However, no standard warning label produced within or outside the DoD appears to be entirely satisfactory for all DoD components in all cases. Therefore, each component in its discretion may adopt existing labels or design its own labels and prescribe their internal use.

37. DISCLOSURE OF RECORDS CONCERNING CHARITABLE CONTRIBUTIONS OR PARTICIPATION IN SAVINGS BOND PROGRAMS

Disclosure of information contained in systems of records concerning employees' or servicemembers' participation in charitable or savings bond campaigns may be necessary to those officers and employees of the Department of Defense components maintaining the systems of records who have a need for the information in the performance of their duties. 5 U.S.C. § 552a(b)(1). Disclosure under subsection (b)(1) is based on a "need-to-know" concept; consequently, disclosure would be authorized to those personnel requiring the information to discharge their duties, such as payroll and allotment clerks, key persons, and campaign aides who assist directly in implementation of the campaign. Disclosure to supervisors is neither related directly to any campaign requirement nor consistent with disclosure provisions of the Privacy Act. Disclosure should be restricted to personnel with a direct functional relationship to a campaign and for campaign purposes only. Personnel authorized to receive this information should be briefed on their responsibilities under the Privacy Act and warned against unauthorized disclosure.

38. PERSONAL NOTES AS RECORDS WITHIN A SYSTEM OF RECORDS

Personal notes of unit leaders or office supervisors concerning subordinates ordinarily are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as "a group of any records under the control of any agency . . . from which information is retrieved by the . . . [individual's] identifying particular . . . ." 5 U.S.C. § 552a(a)(5). One reason for limiting the definition to records "under the control of any agency" was to distinguish agency records from personal notes maintained by employees and officials of the agency. Personal notes that are merely an extension of the author's memory, if maintained properly, will not come under the provisions of the Privacy Act or the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

To avoid being considered agency records, personal notes must meet certain requirements. Keeping or destroying the notes must be at the sole discretion of the author. Any requirement by superior authority, whether by oral or written directive, regulation or command policy, likely would cause the notes to become official agency records. Such notes must be restricted to the author's personal use as memory aids. Passing them to a successor or showing them to other agency personnel would cause them to become agency records. Chapman v. National Aeronautics and Space Administration, 682 F.2d 526 (5th Cir. 1982).

Even if personal notes do become agency records, they will not be within a system of records and subject to the Privacy Act unless they are retrieved by the individual's name or other identifying particular. Thus if they are filed only under the matter in which the subordinate acted or in a chronological record of office activities, the Privacy Act would not apply to them. However, they likely would be subject to disclosure to a person requesting them under the FOIA.

Individuals who maintain personal notes about agency personnel should ensure their notes do not become records within systems of records. Maintaining a system of records without complying with the Privacy Act system notice requirement could subject the individual to criminal charges and a $5,000 fine. 5 U.S.C. § 552a(i)(2).

39. REQUIREMENT FOR PRIVACY ACT ADVISORY STATEMENTS FOR ADMINISTRATIVE PROCEEDINGS

Individuals from whom information about them is solicited during administrative proceedings must be provided Privacy Act advisory statements if records of the proceedings will be retrieved by their personal identifiers. 5 U.S.C. § 552a(e)(3).

40. ACCESS TO MEDICAL RECORDS BY INDIVIDUALS WHO COULD BE ADVERSELY AFFECTED

An individual must be given access to his or her medical and psychological records unless a judgment is made that access to such records could have an adverse effect on the mental or physical health of the individual. That determination normally should be made in consultation with a medical doctor.

When it is determined that disclosure of medical information could have an adverse effect upon the individual to whom it pertains, the information should be transmitted to a physician named by the individual and not directly to the individual. However, the physician should not be required to request the record on behalf of the individual. Information which may be harmful to the record subject should not be released to a designated individual unless the designee is qualified to make psychiatric or medical determinations. If the record subject refuses to provide a qualified designee, the request for the medical records should not be honored.

41. NO REQUIREMENT TO PROVIDE PRIVACY ACT ADVISORY STATEMENTS TO LABOR ORGANIZATIONS

A labor organization may furnish information obtained from its members to a Department of Defense (DoD) component to facilitate allotment of union dues, even though the employee-union member is not given a Privacy Act advisory statement before providing the information to the labor organization.

The Privacy Act, 5 U.S.C. § 552a, does not apply to labor organizations; hence, they are not obligated to meet the subsection (e)(3) requirement to provide Privacy Act advice to federal employees before obtaining information for a voluntary allotment of union dues. Any use of the Privacy Act advisory statement by a labor organization is voluntary and may result from express agreement with a DoD component or as a spontaneous union practice. The Standard Form 1187 used to authorize allotments from pay is required by the employee's finance office and information provided on the form will become part of a system of records from which information is retrieved using personal identifiers. If the employee furnishes the completed form to the DoD component, a Privacy Act advisory statement must be provided to the employee by the component. If the labor organization furnishes the completed form to the DoD component, no Privacy Act advisory statement is required unless the component and the labor organization have agreed otherwise.

42. INFORMATION ON FORMS ATTACHED TO SECURITY CONTAINERS OR FACILITIES IS SUBJECT TO THE PRIVACY ACT

Information consisting of names, home addresses and telephone numbers of persons designated as custodians of security storage containers or facilities, when contained in a system of records, is protected by the Privacy Act. Solicitation of such information is necessary to accomplish official Department of Defense (DoD) duties relating to protection of information stored in the containers or facilities, but it requires providing a Privacy Act advisory statement to individuals from whom and when the information is solicited. 5 U.S.C. § 552a(e)(3). This information, when appended to the exterior of a storage facility or container, is observable by any passer-by who may not be an officer or employee officially concerned with the activity. 5 U.S.C. § 552a(b)(1). Therefore, it is a disclosure subject to disclosure accounting requirements of the Act. 5 U.S.C. § 552a(c)(1). Such an accounting, however, would be impossible because of the difficulty of identifying all viewers.

The General Services Administration (GSA) has recognized that this information is subject to the Privacy Act and has revised Optional Form 63 to include a Privacy Act advisory statement and to instruct that the form be attached to the <u>interiors</u> of safes.

When such a tag is placed inside a safe, the disclosure is limited to those officers and employees who have a need-to-know and a disclosure accounting is not required. 5 U.S.C. § 552a(b)(1) and (c)(1).

Alternatives to the disclosure accounting requirements when the information is to be displayed outside the security container or facility are:

a. Request the individual's prior written consent for a single particular transaction; i.e., consent to disclosure of name, home address and telephone number for a particular safe, or

b. Require notification of appropriate duty personnel with access to a control roster containing the custodians' information so they may be contacted in the case of a security problem.

43. VERIFYING THE ACCURACY OF PERSONAL DATA IN A RECORD IS SUBJECT TO THE PRIVACY ACT

Requesting an individual to verify or certify the accuracy of information about him or her in a record or on a form constitutes collection of information about the individual and is subject to advice requirements of the Privacy Act, 5 U.S.C. § 552a(e)(3). Guidance on implementation of this subsection issued by the Office of Management and Budget supports this conclusion. Subsection (e)(3) is intended "to assure that individuals from whom information about themselves is collected are informed of the reasons for requesting the information, how it may be used, and what the consequences are, if any, of not providing the information." 40 Fed. Reg. 28961 (July 9, 1975)

Either of the following situations would invoke provisions of the Privacy Act:

a. Verifying a record requires the individual to examine and disclose whether the record is correct; thus, a request for verification is a request for the individual to republish as truthful the information about him or her; or

b. The individual is asked to identify any erroneous entries and furnish the correct data. When the request is soliciting corrections or additions to a record, it is soliciting information about the individual for a system of records.

44. ONE DEPARTMENT OF DEFENSE COMPONENT MAY DISCLOSE HEALTH CARE RECORDS TO ANOTHER WITHOUT A ROUTINE USE OR CONSENT

A record may be disclosed, without the record subject's consent and without a disclosure accounting, to those officers and employees of an agency who need the records in the performance of their official duties. 5 U.S.C. § 552a(b)(1). Since the Department of Defense (DoD) is considered a single agency within the meaning of subsection (b)(1), one component's health care records may be disclosed to another in connection with valid medical research programs under the authority of this subsection.

45. DISCLOSURE OF THE ORIGINAL, PRE-1968, SERIAL NUMBER (SERVICE NUMBER) ASSIGNED TO MILITARY PERSONNEL

The original serial number, later called the service number, which military services assigned to military personnel until 1968 when it was replaced by the Social Security number (SSN), does not constitute information which cannot be disclosed to third parties. The old serial/service number did not have the same significance or importance as the SSN. The serial/service number, in and of itself, is no longer a personal identifier. Unlike the SSN, it cannot be used to facilitate linkage, consolidation, or exchange of information about an individual through multiple data banks, even within the Department of Defense (DoD). Therefore, disclosure may be made of orders and similar documents which comprise listings of names and serial/service numbers without expunging such numbers, with no invasion of personal privacy. The old serial/service number should not be confused with the SSN which can unlock innumerable data bases and provide access to much information about the individual, both inside and outside DoD.

46. THE SOCIAL SECURITY NUMBER ON BUILDING AND INSTALLATION BADGES

A Social Security number (SSN) on a building or identification badge required to be prominently displayed or worn at all times by an individual constitutes information about the individual under the Privacy Act. The SSN, with an individual's name, is a record. 5 U.S.C. § 552a(a)(4). This information, when displayed on an exposed identification badge, is observable by any passer-by who may not be an officer or employee officially concerned with the intended use of the badge. It amounts to a constant verification by the individual that information about him or her being displayed is true. Therefore, unless the SSN on a building pass or identification badge is essential, it should not be included when such passes or badges are issued, reissued, or replaced.

47. USING BOTH GENERAL AND SPECIFIC PRIVACY ACT EXEMPTIONS FOR THE SAME SYSTEM OF RECORDS

The general exemption, 5 U.S.C. § 552a(j)(2), and the specific exemption, 5 U.S.C. § 552a(k)(2), ordinarily cannot be used for the same system of records. For example, subsection (j)(2) applies to law enforcement records of criminal law enforcement activities, whereas subsection (k)(2) applies to law enforcement records other than those covered by subsection (j)(2). Nonetheless, a single system of records maintained by a law enforcement activity may contain both criminal law enforcement records exempted under (j)(2) and personnel security records exempted under (k)(5). If the two types of records are clearly segregable within the single system of records, both exemptions would apply. Also, a system of records may qualify for exemption under more than one specific exemption under subsection (k). For any system of records, only exemptions established in accordance with DoD 5400.11-R may be claimed.

48. DISCLOSURE OF INFORMATION IN BLANKET ORDERS

Prior to implementation of the Privacy Act on September 27, 1975, some components issued single blanket orders or other official documents concerning such personnel actions as promotions, discharges, temporary duty orders, permanent change of station orders, etc. Those documents contained limited amounts of information about each of the individuals named in them, such as Social Security numbers, homes of record, home addresses, etc. Nevertheless, disclosure of the documents to the individuals named in them is not prohibited by the Privacy Act as long as:

a. The documents are filed in their official personnel records;

b. The documents previously were furnished to the named individuals; and

c. The documents were created prior to September 27, 1975.

Nothing in this advisory opinion should be construed as limiting access by an individual to third party information required to be disclosed under the Freedom of Information Act, 5 U.S.C. § 552. See 5 U.S.C. § 552a(b)(2).