

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 95-7

June 5, 1995

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: FOIA Update and Inventory Checklist

This update is an interim supplement to the existing guideline memoranda: GC 88-1, "FOIA Guidelines" (January 4, 1988); GC 88-13, "FOIA Guidelines" (October 21, 1988); OM 88-37, "New FOIA Fee Schedules and Fee Waiver Provisions and Guidelines" (May 13, 1988); and OM 92-30, "FOIA Guidelines" (April 22, 1992). A revised comprehensive FOIA guideline is being developed.<sup>1</sup>

1. In open cases, other than as discussed below, the Agency will continue to process documents as required by the previous guideline memoranda.

2. In closed cases, current practice is modified as follows:

(a) Board agent-prepared affidavits in closed cases should be withheld under Exemptions 5, 7(C) and 7(D) unless the affiant has brought a suit against the requester in another forum that raises the same or related issues as the Board proceeding.<sup>2</sup> In that event, the affidavit should not be withheld

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<sup>1</sup> FOIA personnel are urged to review the Department of Justice Freedom of Information Act Guide & Privacy Act Overview, particularly with respect to FOIA Exemptions 2, 4, 5, 6, 7(A), (C), (D), and 7(E) which are generally applicable to many of the documents contained in our investigative files. A review of the Guide will provide an understanding of the Exemptions and their applications to our documents. Each Region should be receiving a copy of this publication annually. Contact your AGC if you are not able to locate either the 1993 DOJ Guide (blue cover) or 1994 DOJ Guide (gray cover).

<sup>2</sup> Exemption 5 privileges from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." Exemption 7(C) protects from disclosure records

under Exemption 5 or 7(D). Rather, the FOIA requester should be advised that “apart from considerations under the FOIA, the General Counsel has elected to exercise his discretion and will disclose the affidavit.” The FOIA processor should then redact information in the affidavit pursuant to Exemption 7(C) to protect the privacy interests of others identified in the affidavit, as well as any significant privacy interests of the affiant.

(b) In applying Exemption 7(D)--protection of confidential sources-- it is important not to respond to the request in a manner that implicitly identifies the source. If a requester simply requests “all documents in a file,” this is not ordinarily a problem. Use Exemption 7(D) to deny any confidential source information and the requester ordinarily will not be able to tell who those sources were. However, if a requester identifies the individual whose affidavit is sought, and the affiant is not the charging party or some other individual whose provision of an affidavit is so well known as not to warrant protection as a confidential source, simply withholding the affidavit will have the unintended consequence of showing that the affiant did, in fact, supply an affidavit. In this event, the FOIA processor should respond by neither admitting nor denying that the named individual supplied the affidavit.<sup>3</sup> Along with the appropriate language for withholding affidavits under Exemptions 5, 7(C) and 7(D), the FOIA processor should state that, if such affidavit were in the file, it would be exempt from disclosure under those Exemptions.

(c) Non-Board agent-prepared witness statements, position statements, and attachments to Board agent-prepared affidavits should be disclosed with appropriate deletions to

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or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of personal privacy. Exemption 7(D) precludes such records where disclosure could reasonably be expected to identify a confidential source. The criteria for determining protected privacy interests are discussed infra, pp. 7-9.

<sup>3</sup> See Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976). It is important to follow this procedure whenever denying a request that seeks affidavits from named individuals, even if those individuals did not supply affidavits. Otherwise, savvy requesters would soon learn that a response neither admitting nor denying the existence of an affidavit means that an affidavit was supplied.

protect privacy interests, confidential sources, and/or material that is privileged from disclosure by Exemption 4.

3. In open and closed cases the Agency will release to all requesters:

(a) Formal documents and Exemption 2 "low 2" items. "Low 2" refers to trivial administrative material which does not affect the public or the ability of an individual to institute or maintain a proceeding before an agency. "Low 2" material may be routing slips, initials, case assignment cards, return receipt slips, NLRB casehandling forms, which includes CHIPS forms, and filing instructions. If the request is for all documents in the investigative file, the requester should be advised concerning formal and low-2 documents as follows:

**The file(s) contains formal documents including the charge, dismissal or denial letters, as well as routine administrative material including internal routing slips, NLRB casehandling forms, return receipt slips and envelopes which are not being forwarded at this time with the understanding that you do not seek such material. If this understanding is incorrect, said documents, with appropriate deletions, will be forwarded to you upon written request addressed to the Regional Director (or the undersigned).**

If a follow-up request is received, the FOIA processor should supply the above material with appropriate deletions to protect privacy and confidentiality interests privileged from disclosure by Exemptions 7(C) and 7(D), as well as information privileged by Exemption 5. The FOIA processor should not withhold or delete any material solely because it identifies Board personnel.

(b) "No go" Advice memoranda -- memoranda that direct the dismissal of all charge allegations addressed in the memoranda, and do not also contain other directions -- are to be disclosed in their entirety. "No-go" Advice memoranda will have been drafted in order to avoid clearly unwarranted invasions of personal privacy pursuant to 5 U.S.C. Sec. 552(a)(2)(C). Requests for all other types of Advice memoranda must be referred to the General Counsel's Freedom of Information Act Officer in Washington. These include "go"

memoranda, “casehandling”<sup>4</sup> memoranda, and “mixed no-go” memoranda, e.g., those that also contain “go” or “casehandling” instructions.

(c) “GC Memoranda” -- Memoranda in the format GC XX -- that contain the notation “Release to the Public” are, of course, to be released in their entirety. Requests for other GC Memoranda, as well as requests for any “OM Memoranda,” should be referred to the General Counsel’s FOIA Officer in Washington.<sup>5</sup>

(d) The FOIA processor should release any documents previously submitted by, or addressed or copied to, the requester (or its attorney) when such material had been provided by the requester during the course of the investigation or addressed or copied to the requester during the investigation. As with material discussed in 3(a) above, such material should not be released in the absence of a specific request. Where the request is for the entire file, in addition to the language set forth in 3(a) above, the requester should be initially advised that:

**We are not providing documents submitted by you or addressed or copied to you (or your client) during the investigation of this charge with the understanding that you already possess said documents.**

4. Recent case law requires that FOIA processors modify Agency practices respecting issues arising under Exemption 4 and in balancing protected privacy interests against the public interest in disclosure for purposes of applying Exemptions 6 and 7(C).

(a) Exemption 4 precludes the Agency from releasing to a FOIA requester trade secrets and commercial or financial

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<sup>4</sup> Casehandling memoranda are those that direct neither issuance of a complaint nor dismissal of a charge, but rather deal with some other intermediate aspect of the processing of a case. They include, for example, deferral memoranda, memoranda directing further investigation of a case, and all Section 10(j) memoranda.

<sup>5</sup> The General Counsel’s FOIA Office in headquarters maintains a list of GC and OM memoranda that have been released to the public. Often a phone call or E-mail to that office will suffice to determine whether the memoranda may be released. Contact either Beryl Rothman at (202) 273-3848 or John Hornbeck at (202) 273-3847.

information obtained by the Agency from a “person” where the information is privileged or confidential.<sup>6</sup>

In Critical Mass Energy Project v. NRC, 975 F.2d 871, (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1579 (1993), the Court drew a distinction for Exemption 4 purposes between commercial information that is secured by compulsion and commercial information that is voluntarily provided. With respect to information obtained under compulsion, the FOIA processor must apply a two part analysis: Whether “disclosure would be likely either (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 it was obtained.” Id. at 878, quoting National Parks and Conservation Ass’n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Although it is unlikely that disclosure would adversely affect the government’s ability to compel the disclosure of information, the court noted that the government would still have an interest in assuring the reliability of information which may be provided under compulsion in the future. However, with respect to information that has been voluntarily submitted to the Government, the non-disclosure test is more easily met: Exemption 4 precludes the Agency from supplying to a requester information that “is a kind that the provider would not customarily make available to the public.”<sup>7</sup>

The standard with regard to voluntarily submitted information is controlled by the practice of the individual provider, not the

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<sup>6</sup> “Person” is defined broadly for FOIA purposes: a “person” may be a partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. Sec. 551(2). Trade secrets, commercial and financial information are also broadly defined. Generally, information that relates to the provider’s business activities, including the activity of non-profit organizations, is commercial. See Critical Mass Energy Project v. NRC, 644 F. Supp. 334, 346 (D.D.C. 1986). Documents prepared by the Agency can come within Exemption 4 if they contain summaries or a reformulation of commercial information supplied by a person.

<sup>7</sup> Most of the documents in Board case files will have been voluntarily submitted. Documents obtained by subpoena or Board or court order, however, are not voluntarily submitted for purposes of Exemption 4 and the test for disclosure as set forth in National Parks, supra. should be applied.

general practice of an industry or an objective measure of what reasonably would be publicly disclosed. Further, the customary treatment standard allows for the provider to have made some disclosures of the information consistent with its own business interests, so long as those disclosures were not to the public.<sup>8</sup> Id. at 880.

It is important that FOIA processors take care in insuring that protected Exemption 4 material is not released to requesters, because release of such material may expose the Agency to litigation. Further, if the FOIA processor determines that documents or information arguably within Exemption 4 are disclosable, the Agency is required by Executive Order No. 12,600 to promptly notify the submitter prior to disclosure and provide the submitter an opportunity to comment on the proposed disclosure.<sup>9</sup> The submitter must be allowed a reasonable time, e.g. a week, to object to disclosure of the information. The FOIA requester also must be advised that the submitter is being given this opportunity to comment. As part of any objection to disclosure, the submitter should be asked to provide a description of its treatment of the information, including any disclosures that are customarily made and the conditions under which such disclosures occur. After receipt of the submitter's description of its treatment of the requested information, the FOIA processor should then make a determination as to whether the information "is of a kind that the provider would not customarily release to the public." If it is determined that information (1) voluntarily given the Board reveals information that the submitter would not customarily make available to the public, or (2) the provider would be substantially harmed by disclosure of information secured by the

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<sup>8</sup> The FOIA processor should be mindful of the fact that a given submission might contain information that is not customarily provided to the public by the submitter, as well as information that *is* customarily made public, such as a company's promotional materials or its public securities filings. Only the former information is covered by Exemption 4.

<sup>9</sup> The Agency has not yet developed regulations implementing the Executive Order. Until such regulations are finalized, the procedures set forth herein should be followed. Further, a telephone call to the submitter soliciting authorization for disclosure will often result in receiving such authorization. Such authorizations must be in writing.

Board by subpoena or court order, the information should be considered protected from disclosure under Exemption 4 and withheld. A decision to withhold under Exemption 4 must be promptly communicated both to the FOIA requester and the submitter. If the determination is to disclose commercial information over the submitter's objection, the submitter must be given a brief statement explaining the decision at least 5 days prior to a specified disclosure date.

(b) Exemption 7(C) permits an Agency to withhold information compiled for law enforcement purposes where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), the Court enunciated a new test for balancing protected privacy interests against the public interest in disclosure. In Reporters Committee, the Court held that Exemption 7(C) precludes disclosure of the contents of a FBI rap sheet to a third party. There are several elements of the Reporters Committee decision particularly relevant to Agency FOIA processors. First, concerning the identification of personal privacy, the Court held that the privacy interest protected by Exemption 7(C) is broader than that protected by Exemption 6,<sup>10</sup> in that Exemption 7(C) prohibits "unwarranted" invasions which "could reasonably be expected to constitute" an invasion of privacy and Exemption 6 prohibits only "clearly unwarranted" invasions which "would constitute" an invasion of privacy. Id. at 756. The Court explained that an individual's privacy interest in personal information is not vitiated by previous public disclosure where that disclosure has been for limited purposes and not readily obtainable. Specifically, the fact that a diligent search at multiple locations could turn up the information at issue would not justify release of information which linked individuals' names to private information. Id. at 770-771. Second, in determining whether an invasion of privacy would be warranted within the meaning of Exemption 7(C), the Court made clear that the identity of the requester and the purpose for which the request is made are generally irrelevant. Id. at 771. For example, the press has no stronger claim than would "a neighbor or

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<sup>10</sup> Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

prospective employer” in balancing the privacy interest against a public interest in disclosure. Id. The Court explained that because the FOIA “focuses on the citizens’ right to be informed about ‘what their government is up to,’” the public interest in disclosure may outweigh the personal privacy interest only in regard to “[o]fficial information that sheds light on an agency’s performance of its statutory duties . . .” Id. at 773. The Court emphasized that the purpose of the FOIA “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.” Id.

Finally, and importantly, the Court made clear that in balancing the public interest in disclosure against the privacy interest, it is appropriate to make “categorical decisions” and disregard “individual circumstances” when the information sought is of a type “in which the balance characteristically tips in one direction”.<sup>11</sup> Id. at 776. The Court went on to conclude that it is appropriate to conclude categorically 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’.” Id. at 780.

(c) In Reed v. NLRB, 927 F.2d 1249 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 912 (1992), the Court, applying the principles of Reporters Committee, privileged the nondisclosure of Excelsior lists under Exemption 6. The Court, noting that the term “similar lists” in Exemption 6 broadly applies to any Government records on an individual which can be identified as applying to that individual (citing U.S. Dept. of State v. Washington Post Co., 456 U.S. 595-601-602 (1982)), found a

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<sup>11</sup> In so holding, the Court modified its position in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), that, while it is appropriate to balance categorically under Exemption 7(A) (all witness statements in open cases), balancing under Exemptions 7(B)(C) and (D) must be done on a case-by-case basis. Although the Court’s modification in Reporters’ Committee applies specifically only to 7(C), the Court noted that it had approved categorical balancing under Exemption 5 in FTC v. Grolier, Inc., 462 U.S. 19 (1983). And see discussion infra of Exemption 6.

privacy interest in the names and addresses of individuals included in the Excelsior lists. *Id.* at 1251. The Court then found that the lists “revealed nothing about the Board’s conduct of representation proceedings or its performance of any other statutory duty” so as meet the Reporters Committee requirement of a public interest that would warrant disclosure. *Id.* at 1251-1252. Finally, as in Reporters Committee, the Court concluded that the Agency could withhold all Excelsior lists categorically without consideration of individual circumstances. *Id.* at 1252.<sup>12</sup>

(d) Consistent with these cases, FOIA processors, under Exemptions 6 and 7(C), should refuse categorically to honor requests which seek personal information, unrelated to the Agency’s mission, about individuals. However, the right to withhold categorically does not relieve FOIA processors from the obligation to segregate disclosable from undisclosable information. See n. 8 *supra.* and see Reporters Committee, 489 U.S. at 765-766. Where the requester seeks information that implicates privacy interests but also does “shed light on the agency’s performance of its statutory duties,” the information should be supplied where the redaction of all identifying information would be sufficient to protect privacy interests.

5. Exemption 7(E) protects from disclosure all law enforcement information which “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” The first clause of Exemption 7(E) provides “categorical” protection for “techniques and procedures” not already well known to the public. Even generally known procedures, however, have been protected from release where “[t]he techniques themselves may be known to the public, but the circumstance of their usefulness . . . may not be widely known.” Parker v. United States Dept. of Justice, No. 88-760, slip op. at 8 (D.D.C. Feb. 28, 1990), *aff’d in pertinent part*, 934 F.2d 375 (D.C. Cir. 1991). Exemptions 7(E)’s second clause separately protects “guidelines for law enforcement investigations or prosecutions if [their] disclosure

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<sup>12</sup> The General Counsel, apart from considerations under the FOIA and in the exercise of discretion, will disclose to a labor organization a copy of the Excelsior list that had previously been in the possession of that labor organization.

could reasonably be expected to risk circumvention of the law.” Under both clauses in Exemption 7(E), the FOIA processor must be careful to disclose all reasonably segregable, nonexempt information. Information contained in Operations-Management and General Counsel memoranda, which have not been released to the public, may contain information privileged from disclosure under Exemption 7(E).

6. The attached FOIA inventory must be completed whenever a FOIA or Privacy Act (PA) request is processed. The inventory should be forwarded to the Office of Appeals upon receipt by that Office of an appeal from a FOIA or PA determination. The items marked in the inventory with an asterisk (\*) are available to all requesters without redaction, regardless of whether the documents are contained in an open or closed case.

7. A response to a FOIA or PA request should identify the material sought by the request and the material disclosed as well as the FOIA processor’s determination with respect to fee category placement and the amount charged for processing the request.

If you have any questions regarding this memorandum, please contact the Director, Office of Appeals, by E-mail or by telephone at 202-273-3760. This memorandum, as well as the OM and GC memoranda which it references, are available on the “FOIA Bulletin Board” on E-mail.

F. F.

Attachment

Distribution:

- Washington - Special
- Regional - All Professionals
- NLRBU
- Release to the Public

**FOIA INVENTORY**

DATE OF REQUEST: \_\_\_\_\_

DUE DATE: \_\_\_\_\_

\_\_\_\_\_  
DATE OF RECEIPT: \_\_\_\_\_

EOT: \_\_\_\_\_

\_\_\_\_\_

CASE NAME	
CASE NUMBER	

NAME OF REQUESTER:	RELATIONSHIP TO CASE:
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### DOCUMENTS

Check if document in file	Items with one * are always disclosable without redaction in both open and closed cases.	Disclosed Yes/No	Partial Redaction -Y/N- (Retain copies of redactions)	Exemptions Claimed
	Charge *			
	Region's Acknowledgment Letter *			
	Notification to Parties that Charge filed *			
	Form NLRB 877 - Affidavit of Service *			
	Post Office Return Receipts *			
	Form NLRB 4701 - Notice of Appearance *			
	Form NLRB 4813 - Notice of Designation of Representative *			
	Form NLRB 4069 - Showing of Interest *			
	Form NLRB 5081 - Questionnaire on Commerce *			
	Service Sheet *			
	Case Assignment Sheet *			
	Telephone Log			
	Request for Withdrawal of Charge			
	Region's Letter Approving Withdrawal Request *			
	Region's Agenda Memo or FIR			
	Region's Advice Submission Memo			
	"Go" Advice Memo or casehandling memo			
	"No-go" Advice memo *			
Check if document in file	Items with one * are always disclosable without redaction in both open and closed cases.	Disclosed Yes/No	Partial Redaction -Y/N- (Retain copies of redactions)	Exemptions Claimed

	Affidavits -Board Agent Prepared (See next page)			
	Attachments to affidavits, including Board Affidavits (See next page)			
	Non-Board Agent Prepared Statements (See next page)			
	Board Agent Notes to File			
	Draft Memos			
	Position Statement(s) submitted by Charging Party, Charged Party or other (See next page)			
	Collective-Bargaining Agreement *			
	Arbitration Awards *			
	Newspaper clippings *			
	Union Constitution/Bylaws *			
	Articles of Incorporation *			
	Transcript of Board hearing before ALJ *			
	Leaflets/Flyers (See next page)			
	Copies of Board/Court Decisions (See next page)			
	Settlement Agreement *			
	Case Disposition			
	Region's Dismissal Letter *			
	Closed Case Form or Report			
	Comment on Appeal			
	Appeal to the General Counsel			
	Office of Appeals - Acknowledgment Letter *			
	Appeals Memo			
	General Counsel Minute			
	Office of Appeals - Letter to Charging Party *			
	Complaint and Notice of Hearing *			
	Notice Posting *			
	Briefs to ALJ/Board *			
Check if document in file	Items with one * are always disclosable without redaction in both open and closed cases.	Disclosed Yes/No	Partial Redaction -Y/N- (Retain copies of redactions)	Exemptions Claimed
	List All Other Documents In File, and identify each affidavit, statement, leaflet/flyer, Board, ALJ or Court decision			

