

disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)).

(vi) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) Some examples of exemption 7 are:

(i) 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.

(ii) The identity of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States.

(iii) 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.

(3) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500) is not diminished.

(4) When the subject of an investigative report is the requester of the record and the report is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11R, and by exemption 7 of the FOIA.

(5) *Exclusions.* Excluded from the exemption in this paragraph (g), are the following two situations applicable to the Department of Defense (Components considering invoking an exclusion should first consult with the Department of Justice, Office of Information and Privacy.):

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceed-

ing 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 the FOIA. In such situation, the response to the requester will state that no records were found.

(ii) 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 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 5 U.S.C. 552(b)(7), the response to the requester will state that no records were found.

(h) *Number 8 (5 U.S.C. 552(b)(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.

(i) *Number 9 (5 U.S.C. 552(b)(9)).* Those containing geological and geophysical information and data (including maps) concerning wells.

[62 FR 35351, July 1, 1997, as amended at 62 FR 38197, July 16, 1997]

Subpart D—For Official Use Only

§ 286.15 General provisions.

(a) *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 (see subpart C of this part) 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. Additional information on

FOUO and other controlled, unclassified information may be found in DoD 5200.1-R.

(b) *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 exemptions apply, the record may nonetheless be released as a discretionary matter when it is determined that no governmental interest will be jeopardized by its release.

(c) *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.

(d) *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.

(e) *Distribution statement.* Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24⁸ shall bear that statement and may be marked FOUO, as appropriate.

§ 286.16 Markings.

Location of markings:

(a) An unclassified document containing FOUO information shall be marked "For Official Use Only" at the bottom on the outside of the front cover (if any), on each page containing FOUO information, 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. Individual paragraphs shall be marked at

the appropriate classification level, as well as unclassified or FOUO, as appropriate.

(c) Within a classified document, an individual page that contains FOUO information but no classified information shall be marked "For Official Use Only" at the top and bottom of the page.

(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.

(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. Exemption(s) applies/apply.

§ 286.17 Dissemination and transmission.

(a) *Release and transmission procedures.* Until FOUO status is terminated, the release and transmission instructions that follow apply:

(1) 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.

(2) 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 may qualify for exemption from public disclosure, pursuant to the FOIA, and

⁸See footnote 1 to § 286.1(a).