

letters to the FOIA office of the activity that has the record. List other addressees to save time.

**§806.6 Processing requests under FOIA and Privacy Act (PA).**

Process requests under the Act that gives the most information. If the requester cites both Acts, address each in the reply.

**§806.7 Describing records.**

The requester is responsible for identifying the desired record. He or she should sufficiently describe the record to help locate it with a reasonable amount of effort. Generally a reasonable description contains enough information for an organized, nonrandom search. Offices must make reasonable efforts to find the records described. This means searching all activities and locations most likely to have the records, including staged or retired records. If the description is unclear, ask for more specific information. When possible, tell the requester what information would help.

**§806.8 Creating a record.**

(a) The Air Force is not required to create, compile, or obtain a record from outside the Air Force to fulfill a request. You may want to create a new record when it would be a more useful response to the requester or is less burdensome for the agency than providing an existing record and the requester agrees. Do not charge the requester more for creating a record than you would charge for the existing record.

(b) Apply a standard of reasonableness for electronic data when there is a question on whether you are creating, programming, or formatting a record. If you can respond with a "business as usual" approach, process the request, otherwise offer the requester appeal rights.

**§806.9 Special disclosure procedures.**

Some instructions have disclosure procedures for certain types of records. Refer to those instructions for specific disclosure procedures when you process FOIA requests. The only reason to deny a request is a FOIA exemption.

(a) Process FOIA requests from foreign citizens, foreign governments,

their representatives, or international commands under this part, and coordinate with your foreign disclosure office. If the command has no foreign disclosure office, refer the request to SAF/AAIS (FOIA) for SAF/IAD coordination through the MAJCOM FOIA office.

(b) If requests from foreign government officials do not cite the FOIA, refer them to your foreign disclosure office and notify the requester.

(c) If you have a non-U.S. Government record, coordinate with the record's originator before releasing it (see §806.10(e)(1)). This includes records created by foreign governments and organizations like the North Atlantic Treaty Organization (NATO) and North American Aerospace Defense (NORAD). Coordinate release of foreign government records with the U.S. Department of State through the MAJCOM FOIA office. Coordinate release or denial of Letters of Offer and Acceptance (LOA) and SAF/IA through SAF/AAIS (FOIA).

**§806.10 FOIA exemptions.**

Denial authorities may withhold records or information when an identifiable harm would result by disclosure, and the records are exempt under 5 U.S.C. 552(b).

(a) *Exemption 1—Classified Records.* Records properly and currently classified in the interest of national defense or foreign policy, as authorized by executive order and implementing instructions. Apply this exemption when disclosing information by itself or in the context of other information that could reasonably be expected to damage national security.

(1) To make a sound decision, review the record paragraph by paragraph for releasable information. Review all unclassified parts before release to see if they are exempt. Before releasing a reviewed and declassified document, draw a single black line through all the classification markings, so they are still legible and stamp the document "Unclassified." Review material, if appropriate, to determine if it should be classified, even though it was not classified when requested. AFI 31-401, Information Security Program Management (formerly AFRs 205-1 and 205-43), tells how to classify and declassify records. Check to see if information

from foreign sources is classified. Delete exempt parts of records and disclose the rest if it does not distort meaning and you can reasonably assume that a skillful, knowledgeable person could not reconstruct the information deleted. Denial letters must say that unauthorized disclosure of such information could reasonably be expected to cause damage to national security and cite the appropriate executive order paragraph(s) as authority for classification. When denying a whole classified record, release all unclassified parts that would cause no identifiable harm. Coordinate with the local information security specialist when invoking this exemption for consistency of classification policy and procedures.

(2) When simply knowing whether a record exists or not reveals classified information, use the “Glomar” (refusal to confirm or deny) response. Apply it consistently, not only when a record exists but also when a record does not exist. Otherwise, the pattern of using a “no record” response when a record does not exist, and a “refusal to confirm or deny” when a record does exist will disclose exempt information. Cite the FOIA exemption when you use the “Glomar” response.

(b) *Exemption 2—Internal Personnel Rules and Practices.* Exempt information falls in two categories:

(1) “High” 2 protects records which, if disclosed, would substantially hinder the effective performance of a significant function of the DoD by risking circumvention of a statute or Air Force instruction or policy.

(2) “Low” 2 is for trivial internal administrative matters of no genuine public interest and the process of releasing such records would constitute an unwarranted administrative burden. You can only use the “low” 2 exemption before fully processing the requested records. Otherwise, you may eliminate the administrative burden justification.

(c) *Exemption 3—Other Statutes.* Records of matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue of withholding or according to defined standards for withholding or referring to particular types of matters

we must withhold. When using this exemption, cite both exemption 3 and the specific statute.

(d) *Exemption 4—Confidential Commercial Information.* Records with trade secrets and commercial or financial information submitted by a person or entity outside the Federal Government on a privileged or confidential basis that, if released, is likely to cause substantial competitive harm to the submitter of the information or impair the government’s future ability to obtain necessary information. Examples of exempt information follow:

(1) Trade secrets that are commercially valuable plans, formulas, processes, or devices used for making, preparing, compounding, or processing trade commodities and are the product of innovation or substantial effort and were given in confidence.

(2) Commercial or financial information given in confidence, in connection with loans, bids, contracts, or proposals; or privileged information, such as trade secrets, inventions, discoveries, or other proprietary data.

(3) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, offered and given in confidence by a contractor or potential contractor.

(4) Personal statements made during inspections, investigations, or audits, if such statements are given in confidence by the individual and kept confidential, because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(5) Financial data private employers provide in confidence for local wage surveys, used to set and adjust pay schedules for prevailing wage rate employees of the DoD.

(6) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with a research grant application or with a report during research.

(7) Computer software qualifying as a record under this part that is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would adversely affect its market value.

(8) Technical or scientific data a contractor or subcontractor developed entirely with private funds and technical or scientific data developed with both Federal and private funds, which the contractor or subcontractor legally owns per 10 U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), chapter 2 of 48 CFR 227.4. You may withhold technical data developed entirely with Federal funds under Exemption 3 if the data meets the criteria of 10 U.S.C. 130.

(e) Before releasing information submitted from outside the Air Force:

(1) Write to the submitter of the data for views on releasability and include appendix b with your letter.

(2) Tell the requester that we must give the submitter of the data the opportunity to comment before the Air Force decides whether to release the information.

(3) Give the submitter a reasonable period of time (no more than 30 calendar days) to object to release and provide justification.

(4) If the submitter does not respond, write that you have not received a reply, tell the submitter of the decision to release with the reason and give the expected release date (at least 2 weeks from the date of your letter).

(5) If the submitter objects, but the Air Force disclosure authority considers the records releasable, tell the submitter before releasing the data. Include in the letter a brief explanation and a release date at least 2 weeks from the date of the letter.

(f) *Exemption 5—Inter- or Intra-Agency Records.* Intra-agency or inter-agency memoranda or letters that, according to recognized legal privileges are not routinely released to a party in litigation with the Air Force or DoD. If such a record or part of such a record would be made available routinely through the discovery process in the course of litigation with the agency, release it. In the discovery process, litigants get from each other information relevant to issues in a trial or hearing, if the information is only made available through the discovery process by special court order, then it is exempt. Release factual records or parts unless the information is privileged or otherwise exempt. Generally, release a di-

rection or order from a superior to a subordinate, though contained in an internal communication, if it forms policy guidance or a decision, but is not a discussion of preliminary or other matters that would compromise decision making. Consult your SJA about whether Exemption 5 material would be routinely available through the discovery process. Here are examples of exempt information.

(1) The deliberative process privilege—those parts of records with internal advice, opinions, evaluations, or recommendations that reveal Air Force or DoD deliberations.

(2) Those nonfactual parts of Air Force personnel evaluations of contractors and their products.

(3) Advance information of a speculative, tentative, or evaluative nature on such matters as proposals to buy, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, if such information gives private personal interests an unfair competitive advantage or impedes legitimate governmental functions. Generally, you cannot use this privilege to withhold factual information. However, you may withhold facts when they are so interconnected with deliberative information that disclosing facts necessarily discloses the Air Force's deliberative process or when facts and deliberative information are so interconnected that separating them would be uninformative or redundant.

(4) Official reports of inspection, audits, investigations, or surveys on safety, security, or internal management, administration, or operation of the Air Force.

(5) The attorney work product privilege—records an attorney prepares, or supervises the preparation of, in contemplating or preparing for administrative proceedings or litigation.

(6) The attorney-client privilege—confidential communication between an attorney and client. For example, a commander expresses concerns in confidence to his or her judge advocate and asks for a legal opinion. The legal opinion and everything the commander tells the judge advocate in confidence qualify.

(7) Unlike deliberative process privilege, you may withhold both facts and

opinions in attorney work product or privileged communications.

(8) Trade secrets or other confidential research, development, or commercial information the Air Force or DoD owns, whose premature release probably would affect the Air Force's or DoD's negotiating position or other commercial interests.

(9) Computer software qualifying as a record under this part which is deliberative in nature, if its release would inhibit decisionmaking. In this case, closely examine the use of the software to ensure its deliberative nature.

(10) Planning, programming, and budget information involving defense planning and resource allocation.

(g) *Exemption 6—Invasion of Personal Privacy.* Personnel, medical, and similar personal information in other files whose release to the public clearly invades personal privacy. To decide whether to release personal information, balance the privacy interest against what its release would tell the public about how the Air Force functions or about the conduct of an Air Force functions or about the conduct of any Air force employee (the public interest). Withhold records only when the privacy interest exceeds the public interest. Do not use this exemption to protect a deceased person's privacy, but you may use it to protect the privacy of the deceased person's family in rare instances. Generally let a person (or their representative) see their own personnel, medical, or similar files and withhold information from the subject only using 5 U.S.C. 552a, The Privacy Act of 1974 (see part 806b of this chapter).

(1) Withhold names and duty addresses of personnel serving overseas or in sensitive or routinely deployable units. Routinely deployable units normally leave their permanent home stations on a periodic or rotating basis for peacetime operations or for scheduled training exercises conducted outside the United States or U.S. territories on a routine basis. Units based in the United States for a long time, such as those in extensive training or maintenance activities, do not qualify during that period. Units designated for deployment or contingency plans not yet executed and units that seldom leave

the United States or U.S. territories (e.g., annually or semiannually) are not routinely deployable units. However, units alerted for deployment outside the United States or U.S. territories during actual execution of a contingency plan or in support of a crisis operation qualify. The way the Air Force deploys units makes it difficult to determine when a unit that has part of its personnel deployed becomes eligible for denial. The Air Force may consider a unit deployed on a routine basis or deployed fully overseas when 30 percent of its personnel has been either alerted or actually deployed. In this context, alerted means that a unit has received an official written warning of an impending operational mission outside the United States or U.S. territories.

(2) Sensitive units are primarily involved in training for special activities or classified missions, including, for example, intelligence-gathering units that collect, handle, dispose of, or store classified information and materials, as well as units that train or advise foreign personnel.

(3) Each MAJCOM and FOA will establish a system and OPR(s) to identify units in their command qualifying for this exemption. Appropriate OPRs could include Directors of Operations, Plans, and Programs, and Personnel. The resulting list of nonreleasable units will be reviewed and updated in January and July and provided to the MAJCOM or FOA FOIA office. This listing will be in ASCII format on a 3½ or 5¼ inch floppy disk (double sided, high density), which contains the unit's eight-position personnel accounting symbol (PAS) code, with 1 pas code per line (record) (8-byte record). The MAJCOM or FOA FOIA manager will forward an electronic copy of the list of nonreleasonable units to AFMPC/RMI to be included in the personnel data system. The MAJCOM and AFMPC FOIA offices will use it to determine releasable lists of names and duty addresses.

(h) *Exemption 7—Investigative Records.* Records or information gathered for law enforcement purposes but only when releasing these records would probably:

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(1) Interfere with enforcement proceedings.

(2) Deprive a person of the right to a fair trial or an impartial judgment.

(3) Invade personal privacy unnecessarily.

(4) Identify a confidential source, including a state, local, or foreign agency or authority or any private institution that gives confidential information.

(5) Disclose information 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) Disclose methods for law enforcement investigation or prosecutions.

(7) Disclose guidelines for law enforcement investigations or prosecutions if the release would probably encourage circumvention of the law.

(8) Endanger an individual's life or physical safety.

(i) You may use this exemption to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes.

(j) *Exemption 8—Financial Institutions.* Those records contained in or related to examination, operation, or condition reports prepared by, on the behalf of, or for the use of, an agency that regulates or supervises financial institutions.

(k) *Exemption 9—Wells.* Records with geological and geophysical information and data, including maps, concerning wells.

### § 806.11 FOIA exclusions.

(a) Under two limited situations, requests for law enforcement records are not subject to disclosure under FOIA:

(1) Requests for law enforcement records when the investigation involves a possible criminal violation, the subject is unaware of the investigation, and disclosing the record's existence could interfere with enforcement.

(2) Requests for informant records a criminal law enforcement agency keeps under the informant's name or personal identifier made by a third party using the informant's name or personal identifier, but only when the informant's status as an informant has not been officially confirmed.

(b) In these cases, do not use denial procedures; instead, say you found no records. Coordinate with the SJA on these cases. When you write to the requester, do not give the statutory citation for the exclusion nor state your reliance on an exclusion.

### § 806.12 Denials.

Only denial authorities may withhold information. Denial authority level is at the deputy chiefs of staff and chiefs of comparable offices or higher at HQ USAF, and MAJCOM and FOA commanders. These officials may name an additional official as a denial authority. Send SAF/AAIQ a letter with the position titles only. Only the Administrative Assistant to the Secretary of the Air Force can approve a request for more than one additional denial authority. Send those requests, with justification, to SAF/AAIQ.

(a) When denying information, delete only the exempt parts of a record, release what remains, and let the requester know that you are providing all reasonably segregable, releasable parts of the record. Clearly show the requester where you deleted information.

(b) Denial letters must include the reason for the denial and cite the statutory exemption. Only authorized denial authorities sign denial letters. FOIA managers may sign "no records" responses. Denial letters and "no records" responses must also include an appeal paragraph that:

(1) Tells the requester to address appeals to the Secretary of the Air Force, through the FOIA office of the activity that issued the denial or "no records" response.

(2) Tells the requester to appeal within 60 calendar days from the date of the letter and to include reasons for reconsideration.

(3) Asks the requester to attach a copy of the response.

### § 806.13 Freedom of Information Act annual report.

(a) MAJCOM and FOA FOIA managers submit a calendar-year report on 3½- or 5¼-inch disk using the FOIA System. Send the report by 10 January to SAF/AAIQ. The report control symbol (RCS) is DD-PA(A)1365.