

the Office of the Secretary of the Air Force, through the MAJCOM or FOA FOIA office that denied the request. Requesters should attach a copy of the denial letter to their appeal and give their reasons for appealing.

(b) After coordinating with the local SJA (and the OPR, if appropriate), MAJCOM and FOA FOIA offices send all appeals, including late submissions, to Air Force Legal Services Agency (AFLSA/JACL) for determination, unless they have reconsidered and approved the request. MAJCOM and FOA FOIA offices give appeals priority. They do not have 20 workdays to process an appeal.

(c) Requesters must appeal denials involving Office of Personnel Management's controlled civilian personnel records to the Office of the General Counsel, Office of Personnel Management, 1900 E Street NW, Washington DC 20415.

(d) When sending appeals to AFLSA/JACL, attach:

(1) The original appeal letter and envelope.

(2) The initial request and any attachments.

(3) The denial letter, with an index of the denied material, if applicable.

(4) Copies of all records you have already provided; or if the records are massive (Several cubic feet) and AFLSA/JACL agrees, an index or description of released records.

(5) Copies of all administrative processing documents, including extension letters and opinions and recommendations about the request.

(6) Copy of the denied record or denied portions of it marked to show what you withheld. If the records are massive and AFLSA/JACL agrees, you may substitute a detailed description of the documents.

(7) A point-by-point discussion of factual and legal arguments the requester's appeal contains and, proof that the denial authority considered and rejected these arguments and why.

(8) An explanation of the decision-making process for intraagency documents denied under the deliberative process privilege and how the denied material fits into that process.

(e) Assemble appeal packages:

(1) Arrange attachments in the order listed in paragraph (d) of this section. Use tabbed dividers to separate attachments.

(2) List all attachments in your cover letter.

(3) Include the name of the person to contact and a phone number.

(f) AFLSA/JACL sends the appeal of the Office of the General Counsel, who makes a final determination. The law requires a final decision within 20 workdays after receipt of the appeal letter. The 20 days begins when the denial authority's FOIA office receives the appeal. The time limit includes processing actions by all levels. If a final determination cannot be made within 20 days, AFLSA/JACL writes to the requester to acknowledge the appeals' receipt and to explain the delay. If SAF/GC upholds the denial, in whole or in part, SAF/GC tells the requester, explains reasons for the denial, and tells the requester about judicial review rights. If SAF/GC grants the appeal, that office tells the requester in writing and releases, or directs the release of, the record.

(g) For "no records" determinations, search again, if warranted, or verify the first search. Include in the package you send to AFLSAS/JACL any letters that show you systematically tried to find records. Tell, for example, what areas or offices you search for how you conducted the search—manually, by computer, by telephone, etc.

(h) For appeals to denials of fee waiver requests, fully account for actual and estimated costs with a copy of the DD 2086 or DD Form 2086-1.

**§ 806.26 For Official Use Only (FOUO).**

FOUO is not a classification. Information marked FOUO must meet the criteria for exemptions 2 through 9, or you cannot withhold it. Do not consider or mark any other records FOUO.

(a) Originators mark records when they create them to call attention to FOUO content. An FOUO marking does not mean you must withhold a record under the FOIA. You still need to review a requested record. Examine records with and without markings to identify information that needs protection and is exempt from public release

or to decide whether discretionary release is appropriate.

(1) Information in a technical document that requires a distribution statement per AFI 61-204, Controlling the Distribution of Classified and Unclassified Scientific and Technical Information (formerly AFR 80-30), must show that statement. The originator may also mark the information FOUO, if appropriate.

(2) Mark an unclassified document containing FOUO information "For Official Use Only" at the bottom, on the outside of the front cover (if any), on each page containing FOUO information, on the back page, and on the outside of the back cover (if any).

(3) In unclassified documents, the originator may also mark individual paragraphs that contain FOUO information to alert users and assist in review.

(4) In a classified document, mark:

(i) An individual paragraph that contains FOUO, but not classified information, by placing "(FOUO)" at the beginning of the paragraph.

(ii) The top and bottom of each page that has both FOUO and classified information, with the highest security classification of information on that page.

(iii) "FOUO" at the bottom of each page that has FOUO but not classified information.

(5) If a classified document also contains FOUO information or if the classified material becomes FOUO when declassified, place the following statement on the bottom of the cover or the first page, under the classification marking: If declassified, review the document to make sure material is not FOUO and not exempt under this part before public release.

(6) Mark other records, such as computer printouts, photographs, films, tapes, or slides, "For Official Use Only" or "FOUO" so the receiver or viewer knows the record contains FOUO information.

(7) Mark FOUO material sent to authorized persons outside the DoD with an explanation typed or stamped on the document:

This document contains information EXEMPT FROM MANDATORY DISCLOSURE UNDER THE FOIA. Exemption(s) . . . . . ap-

plies (apply). (Further distribution is prohibited without the approval of (enter OPR)).

(b) DoD components, officials of DoD components, and authorized DoD contractors, consultants, and grantees send FOUO information to each other to conduct official DoD business. Tell recipients the status of such information, and send the material in a way that prevents unauthorized public disclosure. Make sure documents that transmit FOUO material call attention to any FOUO attachments. Normally, you may send FOUO records over facsimile equipment. To prevent unauthorized disclosure, consider attaching special cover sheets (i.e., AF Form 3227, Privacy Act Cover Sheet, for Privacy Act information), the location of sending and receiving machines, and whether authorized personnel are around to receive FOUO information. FOUO information may be passed to officials in other departments and agencies of the executive and judicial branches to fulfill a government function. Mark the records "For Official Use Only," and tell the recipient the information is exempt from public disclosure under the FOIA and whether it needs special handling. If the records are subject to the PA, refer to Part 806b of this chapter for PA disclosure policies.

(c) AFI 90-401, Air Force Relations With Congress (formerly AFR 11-7), governs the release of FOUO information to members of the Congress and AFI 65-401, Air Force Relations With the General Accounting Office (formerly AFR 11-8), governs its release to the General Accounting Office (GAO). Review records before releasing to see if the information warrants FOUO status. If not, remove FOUO markings. If the material still warrants FOUO status, mark the records FOUO and explain the appropriate exemption and marking to the recipient.

(d) When you use the US Postal Service, package records with FOUO information so their contents are safe. If FOUO information is not combined with classified information, individuals may send FOUO information by First Class Mail or Parcel Post. Bulky shipments, such as FOUO directives or testing materials, that qualify under postal regulations may be sent by Fourth Class Mail.

(e) Mark each part of a message that contains FOUO information. Unclassified messages containing FOUO information must show the abbreviation "FOUO" before the text begins.

(f) To safeguard FOUO records during normal duty hours, place them in an out-of-sight location if people who do not work for the government come into the work area. After normal duty hours, store FOUO records to prevent unauthorized access. File them with other unclassified records in unlocked files or desks, etc., if the Government or a Government contractor provides normal internal building security. When there is no internal security, locked buildings or rooms usually provide adequate after-hours protection. For additional protection, store FOUO material in locked containers such as file cabinets, desks, or bookcases.

(g) When a record is no longer FOUO, remove the markings or indicate on the document the markings no longer apply. Try to tell everyone who has the records that their status has changed.

(h) Destroy FOUO materials by tearing them up so no one can put them back together and throwing them into trash containers. When the information needs more protection, local authorities may use other methods. However, balance the expense of extra protection against the degree of sensitivity of the FOUO information in the records. You may recycle FOUO material. Safeguard the FOUO documents or information until recycling to prevent unauthorized disclosure. Recycling contracts must include agreements on how to protect and destroy FOUO and PA materials.

(i) Unauthorized disclosure of FOUO records is not an unauthorized disclosure of classified information. Air Force personnel must act to protect FOUO records under their control from unauthorized disclosure. When unauthorized persons gain access to these records, administrators find out who is responsible and take disciplinary action where appropriate. Unauthorized disclosure of FOUO information containing PA information may also result in civil or criminal sanctions against individuals or the Air Force. Tell the originating organization when its records are improperly disclosed.

#### APPENDIX A TO PART 806—GLOSSARY OF TERMS

*Appellate Authority*—The Office of the General Counsel to the Secretary of the Air Force, who decides FOIA appeals.

*Commercial Request*—A category 1 request from, or on behalf of, one who seeks information that furthers the commercial, trade, or profit interest of the requester or the person represented.

*Denial*—A determination by a denial authority not to disclose requested records in its possession and control.

*Determination*—The decision to grant or deny all or part of a request from the public for records.

*Disclosure*—Providing access to, or one copy of, a record.

*Disclosure Authority*—Official authorized to release records.

*Education Institution Request*—A category 2 request from a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates one or more scholarly research programs.

*Electronic Data*—Records or information created, stored, and retrieved by electronic means. Electronic records do not include computer software used as a tool to create, store, or retrieve electronic data.

*FOIA Manager*—The person who manages the FOIA Program at each organizational level.

*FOIA Request*—A written request for records from the public that cites or implies the FOIA.

*Functional Request*—A request for records that does not specifically cite or imply the FOIA.

*Glomar Response*—A reply that neither confirms nor denies the existence or nonexistence of the requested record. A "Glomar" response may be used with FOIA exemptions 1, 6, and 7(C).

*Initial Denial Authority (IDA)*—Persons in authority positions who may withhold records under the FOIA.

*News Media Request*—A category 2 request from a person whose job is gathering news for a publishing or broadcasting organization that supplies news to the public. News media also includes free lance journalists who can prove they have good reason for expecting a news organization to publish their work.

*Noncommercial Scientific Institution Request*—A category 2 request from a non-commercial institution that operates solely to conduct scientific research not intended to promote a particular product or industry.

*Other Request*—A category 3 request from anyone who does not fit into the Commercial category or the Noncommercial Scientific or

Educational Institutions or News Media category.

*Partial Denial*—Decision to withhold part of a requested agency record.

*Public Interest*—When releasing official information sheds light on how an agency performs its statutory duties and informs citizens about what their government is doing or reveals an Air Force official's conduct. Normally there is no public interest in personal information if it does not reveal a person's conduct in their job.

*Records*—The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the U.S. Government in connection with the transaction of public business and in the agency's possession and control at the time it receives the request. Records such as notes, working papers, and drafts kept as historical evidence of actions are subject to the FOIA, and may be exempt from release under 5 U.S.C. 552(b)(5) if an identifiable harm exists by their release. Computer software rarely qualifies as an agency record. Evaluate each case. Two examples of software as a record are:

a. Data embedded in the software cannot be extracted without the software.

b. Software that reveals information about DoD organization, policies, functions, decisions, or procedures, such as computer models used to forecast budget outlays, to calculate retirement system costs, or to optimize models on travel costs.

*Search*—To look for a requested record or a specific section of a record. You can search over the telephone, manually, or with computer searches.

*Statutory Time Limits*—The 10 workdays after receiving the request to tell the requester whether the records are released or denied. This term also covers the additional 10-workday extension allowed for reasons in § 806.15(a)(12). The 10 days begin when the FOIA manager receives a properly filed request with a reasonable description of the requested records and with the requester's stated willingness to pay fees or fees paid. If the requester disagrees with his or her category or wants fees reduced or waived, the 10 days begin after resolving these issues.

*Technical Data*—Information (including computer software documentation) that is scientific or technical in nature and recorded on any medium.

**APPENDIX B TO PART 806—REQUIREMENTS OF 5 U.S.C. 552(B)(4) (SEND WITH LETTER TO SUBMITTERS)**

(a) The Freedom of Information Act (FOIA) requires Federal agencies to provide their records, except those specifically exempted, for the public to inspect and copy.

(b) Section (b) of the Act lists nine exemptions that are the only basis for withholding records from the public.

(c) In this case, the fourth exemption, 5 U.S.C. 552(b)(4), may apply to records or information the Air Force maintains. Under this exemption, agencies may withhold trade secrets and commercial or financial information they obtained from a person or organization outside the government which is privileged or confidential.

(d) This generally includes information provided and received with the understanding that it will be kept privileged or confidential.

(e) Commercial or financial matter is "confidential" and exempt if its release will probably:

(1) Impair the Government's ability to obtain necessary information in the future.

(2) Substantially harm the source's competitive position or impair some other legitimate Government interest.

(f) The exemption may be used to help the source when public disclosure will probably cause substantial harm to its competitive position. Examples of information that may qualify for this exemption include:

(1) Commercial or financial information received in confidence 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.

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

(3) Personal statements given during inspections, investigations, or audits, received and kept in confidence because they reveal trade secrets or commercial or financial information, normally considered confidential or privileged.

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

(5) Information about scientific and manufacturing processes or developments that is technical or scientific or other information submitted with a research grant application, or with a report while research is in progress.

(6) Technical or scientific data a contractor or subcontractor develops entirely at private expense, and technical or scientific data developed partly with Federal funds and partly with private funds, in which the contractor or subcontractor retains legitimate proprietary interests per 10 U.S.C. 2320-2321 and 48 CFR 227.4.

(7) Computer software copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the

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disclosure of which would adversely impact its potential market value.

(g) If release of the subject material would prejudice your commercial interests, give detailed written reasons that identify the specific information and the competitive harm it will cause to you, your organization, or your business. The Act requires we provide any reasonably segregable part of a record after deleting exempt parts. So, tell us if deleting key words or phrases would adequately protect your interests.

(h) If you do not prove the probability of substantial harm to your competitive position or other commercial interests, we may be required to release the information. Records qualify for protections case by case.

**PART 806b—AIR FORCE PRIVACY ACT PROGRAM**

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APPENDIX A TO PART 806B—GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS

APPENDIX B TO PART 806B—PREPARING A SYSTEM NOTICE

APPENDIX C TO PART 806B—GENERAL AND SPECIFIC EXEMPTIONS

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SOURCE: 59 FR 53099, Oct. 21, 1994, unless otherwise noted.

**Subpart A—Overview of the Privacy Act Program**

**§ 806b.1 Basic guidelines.**

The Privacy Act of 1974 and this part apply only to information in Air Force systems of records on living United