

FOIA SOP Verifying Media Status

24 June 2009

(U) If you have a requester who states that he/she is media or freelance, you must verify his/her media status. Exceptions to this rule are: 1) an individual (or organization) who is a frequent or well-known media requester (such as National Security Archive or Richard Daly); and 2) a requester whose media status has recently been confirmed, i.e., within the last six months.

(U) In addition to tasking the library for media status, the case officer should do their own initial research using the internet to check the requesters' webpage and the News Media Yellow Book that is provided to us from the library. Many requesters will request "media status" because they blog or have web pages. An individual who posts documents received from federal agencies does not qualify for media status. In addition, topics that are not current events or current interest to the general public, these are not considered media – example UFOs. The following is an extract from the FOIA, 5 U.S.C. 552 (a)(4)(A)(ii):

"In this cause, the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience."

(U) To verify the media status of a requester, you must complete an Online Request Form and submit it to the Main Library at the following Intranet URL:



(b) (3) - P.L. 86-36

Instructions for completing/submitting:

1. Click on: Research and Geographic Requests and fill in the following information:
 - Classification
 - SID
 - Name
 - Organization
 - Secure Phone #
 - Black Phone #
 - Date/Time Needed: (usually ASAP)
 - Type of Request: check "Research Request"

2. In the "Request" field, fill in what you need, i.e., "need verification that Joe M. Newsman is employed with The Washington Hill Newspaper."

3. In the "Justification" field, explain why you need this work done, i.e., "Necessary to process a FOIA request, as stipulated by Federal law."

4. Hit the SUBMIT button

(U) You will receive an email that your request has been submitted to the Library. You will also receive your response by email (usually within the same day).

(U) If you have problems, or if the request form is not working, email DL MLIBRY or call them on 963-3258. For urgent requests or classifications higher than TS//SI, call the library on 963-3258.

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(b) (3) - P.L. 86-36

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(U) FOIA/PA SOP

(U) Procedures for Verifying Continued Interest

29 October 2009

(U) This SOP explains the steps for verifying the continued interest of FOIA/PA requesters whose cases have been on a backlog queue for a long period of time.

1. (U) If a FOIA/PA direct request has been inactive on a backlog queue for more than 1 year (i.e., no communication to or from requester), we need to verify the requester's continued interest in receiving the information prior to processing the request. (If the request was worked at the initial level for 6 months, then put on a queue and pulled 9 months later, verification would not be required.) There are some requesters for whom no verification is required, because they are always interested in receiving their material, no matter the age of the request (for instance, Matthew Aid, Jeffrey Richelson, Michael Ravnitzky, Jeremy Bigwood, James Bamford, the National Security Archive, and the Federation of American Scientists, to name a few). Their cases may be processed once pulled from the queue.

2. (U) If the initial letter indicated that the information was needed for a specific event that has already passed (e.g., a publication date that has passed, a ceremony that has passed, a court date, etc.), verification should be obtained from all requesters (including those listed above) even if it has not yet been a year. In addition, if the requester was a student or a media requester (or other similar situation) where it is likely that the information requested might no longer be needed, verification should be obtained if it's been 6 months since the last communication with the requester.

3. (U) If the requester is an NSA employee, the requester should be called to verify his/her interest if the request is older than one year. The call should be documented in the comments section of the case (date of the call, the requester's interest, and the reviewer who made the call). This should also be added to the final M/R.

4. (U) If the requester is not an NSA employee, and is a U.S. person, the reviewer may still call the person instead of sending a letter if he/she is comfortable doing that. Keep in mind that some requesters may have a history of being hard to deal with on the phone. If that is the case, a phone call is not recommended.

5. (U) For non-U.S. requesters and those requesters for whom there is no phone number available, or for those whom we choose not to call, a letter should be sent requesting that they verify their interest in the material. The template to be used is FOIA_verify_itr.dot. A copy of the original request will be included with the letter. You should indicate in the verify letter if the request was narrowed and/or clarified by the requester, so that it is clear what we are about to process. For example, "On (date) you narrowed your request to be for (X subject). Before processing your

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Approved for
Release by NSA on
04-21-2011, FOIA
Case # 60859

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request, we want to establish your continued interest in receiving a copy of (X subject).”

6. (U) You should also indicate in the verify letter if we have interpreted his request a particular way, so that it is clear what we are about to process. For example, we may get a request for the NSA investigation of the attempted assassination of a foreign leader. Even if we explained our interpretation of the request in the initial response, we would do so again in the verify letter. For example, “You requested records pertaining to NSA’s investigation of the assassination attempt against (foreign leader X). NSA coordinates, directs, and performs highly specialized activities to protect U.S. information systems and produce foreign intelligence information. NSA does not conduct external investigations. We have, therefore, broadly interpreted your request as one for records related to the assassination attempt against (foreign leader X). Before processing your request, we want to establish your continued interest in receiving records related to the assassination attempt.”

7. (U) Requesters can verify their interest telephonically (U.S. persons only), by facsimile (U.S. persons only), by U.S. mail, or over the Internet. All options are spelled out in the letter. Do not provide telephone or facsimile information in the verify letter to requesters outside the continental U.S.

8. (U) For PA cases that are over one year old in which an attorney has made the request on behalf of a client, we must go back to the client and ask for a current, signed authorization that authorizes NSA to release the client’s records to the attorney. If the client is a current NSA employee or we have a contact phone number, you may call the individual to verify continued interest and request that they forward the new authorization. If you need to send a written request, the request should be sent “Restricted Delivery.” If you are unable to locate the individual, send a “Restricted Delivery” letter to the attorney to verify continued interest and request that they obtain new authorization. An authorization form (template called PA_contintatt dot) should be included with the letter.

9. (U) For a case that has been partially processed, we should explain to the requester what is left to process so that he knows what he’s verifying his interest in. For example, “We provided you with fifteen documents related to the first part of your request on (date). All that remains to process in your request are historical documents related to the second part of your request. We expect that (one or some) of the documents will require coordination with other agencies. We want to establish your continued interest in receiving the material before we continue processing your request.”

10. (U) For migrated hardcopy-only cases where no work has yet been done on the case, other than the sending of a postcard or initial response letter, if there are a lot of documents, do not scan the documents in until verification has been received (to save the CPC the scanning and indexing of material that will never be reviewed). The case correspondence should be scanned in, as well as any search slips and backup material indicating the administrative process to date. That material may be needed if

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we get a future request for similar information. If no verification is received, the case can be closed, and the hardcopy documents should be held by the reviewer for 2 months, in case the requester comes back in late. The reviewer should note in the Comments that he/she is holding the documents. After the two months have passed, the reviewer can dispose of the documents, again noting in Comments.

11. (U) If initial work has been done on a migrated hardcopy-only case (i.e., referrals were sent out at the initial stage, or some previously released or unclassified documents were already sent to the requester), the case should be organized in a way that there is a good administrative record of the work done to date so that the senior reviewer can easily see what is left to process when the verify letter is reviewed. Common sense should prevail – i.e., all referred and released material should be scanned into the case at this point. (See paragraph 14 for additional information on scanning these documents in.) Even if the requester doesn't respond to the verify, we'd want a copy of what we've released/referred in the case file as a record of what's been done, in case the information is requested in the future.

12. (U) The reviewer should ensure that the document originators are readily evident from the document titles, so that a quick scan of the titles, along with the M/R, will tell what's already been taken care of and what's left to process. If there are only a few documents left requiring review, they should be scanned in as well so that the reviewers/approvers have an idea of what's left. If there are voluminous materials yet to be processed, the reviewer can capture that in the M/R, describing in general terms the types of records to be reviewed. The documents can be scanned in later if the requester is interested. As above, if the requester is no longer interested, the hardcopy documents should be held for 2 months, and then destroyed, with appropriate notations in the Comments. Even if the case is a case that was partially processed in the system by the Initial Processing Team, the final case reviewer needs to ensure that the case documents are in order and that the originators are evident before forwarding the verify letter so that there is a good administrative record for the approver to see and for when the case is closed.

13. (U) If a greased copy of the already-released document is in the case file, both the greased copy and clean copy should be scanned in as two separate documents. The title for the two documents should be identical. The following sticky note should be placed on the greased copy: "As released to requester, case 12345, date. No further release in this format should be made." This copy is not to be released to anyone in the future; it is for reference purposes for future cases, and for an administrative record of this case. The clean copy does not need to be redacted, since this requester has already been provided the document. However, if the document is requested in the future, the reviewer can drag the clean copy into the new case for redaction and use the greased copy to aid his/her review.

14. (U) In those cases where we've already referred documents to other agencies, and the requester either does not respond to the verify or advises us that they no longer need the information, the reviewer should make a courtesy call to the agencies to which we referred records and advise them that the requester no longer requires the

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information. If the other agency has not yet responded, they may be able to close their case. Note the details of the call in the case comments.

15. (U) If a case (migrated/hard copy or electronic) has only one or two documents for which it can easily be determined that a classification review is going to be needed, a verify letter (or call) should be sent. There is no reason to spend time reviewing documents for release if the requester no longer requires the information, even if it is easily processed product reports. We don't want to spend time reviewing/denying something if the requester doesn't want it.

16. (U) If, however, a case (migrated/hard copy or electronic) has only one or two documents for which it can easily be determined that a classification review is not going to be needed, verification of interest is not required. If a cursory review reveals that the information is unclassified and will be released, it is more reasonable just to prepare a granted in full letter and send the releasable document(s) out. That way, there is only one piece of correspondence being sent, and we can close the case immediately. (If we were to do a verify letter and they didn't respond, we would have to wait over 30/45 days before closing the case. If the requester did express an interest, we would have to generate a second letter.)

17. (U) If the releasable documents are over the 100 free pages and meet the \$25 threshold for charging, the reviewer should follow the procedures for completing the case and requesting payment prior to responding. In certain circumstances, such as if the case has taken a long time to be worked or if the requester is a frequent requester, the reviewer may send the documents to the requester and ask for payment in the letter. These circumstances should be checked with the Chief DJP4 before handling the documents in this manner. If the requester does not pay, we have processed his request, and can put him on the non-payer list. No future requests by that requester (including any others currently being worked or in the queue) would be processed until the bill is paid. The reviewer should pull the non-payer's other cases and send the requester a letter advising him because he has not paid outstanding fees, his other cases are going to be closed for non-payment.

18. (U) While waiting for verification on a case, the case should be suspended in CTS in the Suspense queue, with a note in the comments that it is suspended pending verification.

19. (U) If a requester calls in to verify his/her interest in continued processing, the person taking the call should note the date and time of the call in the Case Comments and indicate what the requester said. Be sure to include your sid. An email should be sent to the case officer advising him/her of the contact with the requester so that they may either close the case or continue processing.

20. (U) If the requester verifies his/her interest by mail, the person in DJP4 receiving the mail will send it over to be scanned and will also call or email the reviewer to let them know a response has been received. If it comes in by facsimile, or over the Internet, the CPC will advise the reviewer that it's been received. When

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the new correspondence is scanned into the case, it should also cause the case to move back to the case officer's Case File.

21. (U) Once a requester verifies his/her interest in receiving the material, the case should be the next one processed by the reviewer so that it doesn't sit inactive for several months again. Please notify the approval chain when it is sent forward that it is in response to a verified interest, so that it may be properly noted on the approval list (with a V).

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(b) (3) - P.L. 86-36

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FOIA/PA SOP
Requests for Records on an Individual
(or Group of Individuals)

24 June 2009

(U) This document is intended to provide guidance on the appropriate way to handle various requests for records on persons residing both in and outside of the United States. This may include US citizens, foreign nationals, and groups of individuals.

CITIZENSHIP

(U//~~FOUO~~) For FOIA purposes, there is no easy way to distinguish U.S. citizens from non-citizens. Therefore, a FOIA request for “records on me” or “surveillance on me” should be processed as though the person is a US citizen or a permanent resident of the US, whether or not the individual has a “foreign-sounding” name if he/she provides a Social Security Number or a U.S. address and does not openly state that he/she is a citizen of another country. Likewise, a FOIA request for “all records” on a third party individual or “surveillance” of a third party individual should be processed as if the named person was a U.S. person if the requester provides the individual’s SSN or provides information that implies the person may be U.S. and the requester does not openly state the individual is a citizen of another country. If a requester has a foreign address, we will assume the person is a foreign national if no amplifying information is provided.

FIRST PARTY REQUESTS
(“Records on Me”)

(U) There are five types of requests from persons asking for records on themselves: 1) all of my (NSA) employee records; 2) all records on me (with or without further amplification); 3) records pertaining to surveillance of me (or other similar wording, such as monitoring, wiretapping, etc.); 4) records concerning directed energy (or other physical actions) NSA is conducting against me; and 5) all records on me, a foreign national.

1. (U) All of my employee records – this request should be forwarded to the Privacy Act Team (Privacy Information Review and Outreach (PIRO) Team) for processing. The PIRO Case Officer will task Security to conduct a search for the individual’s records to see if he/she has ever been affiliated with the Agency. In this type of request, it is assumed that the person has been affiliated with the Agency at some point in time. Phrasing in the request might include: “I used to work for the Agency,” “I applied for work at the Agency,” or “I visited the Agency.” Some examples are PA Case numbers 57661, 57317, and 53479.

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[Redacted]

[Redacted] the PIRO Case Officer will contact the requester, either by phone or in writing, and request a notarized signature or signature accompanied with a "penalty of perjury" statement. The case should be placed into "suspense" for 30 days pending receipt of the signature. If signature is not received within the timeframe, the case is administratively closed (AC disposition) without a perfected date. If we do obtain the required signature, the case will get a perfected date, the PIRO Case Officer will contact Security again and ask them to forward records, and he/she will send search requests to any other offices we believe may have records. Then the PIRO Team will continue to process the documents and finish the case.

2. (U//~~FOUO~~) All records on me (with no further amplification) from a U.S.

person: Without additional details, we must assume that the individual is asking for all possible records, both employee (i.e., performance, medical, training) and any "surveillance" related records. The Case Officer should task Security to conduct a search. If no records are located, the proper response letter to use is a PA Negative GLOMAR. The PA portion conveys no records on the individual (i.e., no evidence that the person was ever affiliated with the Agency), and we must GLOMAR the implied surveillance. The MR template used in this case is the PA Neg GLO MR. [Redacted]

[Redacted] The disposition for this type of case is Full Denial (FD), as both portions of the request and types of possible records have been denied. Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected. See for example: Cases 57446 and 55233.

(U//~~FOUO~~) If Security finds any records indicating that the requester has been affiliated with the Agency in some way, the case should be reassigned to the PIRO Team to continue processing the request. [Redacted]

[Redacted]

[Redacted] we will continue to process the documents and finish the case, omitting the surveillance/GLOMAR portion that we include when no records are found. See for example: Case 57341.

3. (U//~~FOUO~~) Surveillance on me (from a U.S. person): For this type of request, the proper response letter to use is the US GLOMAR because the individual is asking for surveillance (monitoring, domestic collection, etc.) records on him/her that are held by the Agency. This case differs from "All records on me" in that the individual has asked solely for surveillance records, and not "all records," which would include personnel type records. The MR template used in this case would be the US GLOMAR MR. Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected, and the case closed with a GLOMAR disposition. The US GLOMAR letter and MR should be used

[Redacted] (b) (3) - P.L. 86-36

[Redacted] See for example: FOIA Case 57706.

(U//~~FOUO~~) If the requester asks for records on him/herself that are specific (related to surveillance) [REDACTED] (i.e., "I would like the records that you have on me about the protest that I participated in Washington, DC in 1973"), then use the GLOMAR letter [REDACTED] FOIA glomar ltr

[REDACTED] Again, case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected, and the case closed with a GLOMAR disposition. See for example: FOIA Case 54923.

4. (U) **Directed Energy (or other physical actions) NSA is conducting against me:**

(U//~~FOUO~~) Sometimes, a requester will ask for all records on him/herself, ***to include*** records on the directed energy activities that NSA is conducting against/at him/her. Other wording may include torture, mind control, implanting devices, stalking, harassing, experimenting on, etc. Since the request specifically states "all records" and "to include (the activity)," the case officer should task Security to conduct a search in the affiliates database. If there are no records on the individual, we would respond with a PA Negative/Non-Purview/GLOMAR response. Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected, and the case closed with a Full Denial (FD) disposition. This response letter is named "PA Neg NP GLO" in the letter templates. The same rules as above apply [REDACTED]

[REDACTED] when Security finds no records on him/her. See for example: FOIA Case 57395.

(b) (3)-P.L. 86-36

(U//~~FOUO~~) If the requester only requests records pertaining to these types of activities being used against him/her, then the Case Officer should use the FOIA_Directed Energy letter and MR templates, and no search request to Security is required. The case would have a Non-Purview (NP) disposition. See for example: FOIA Case 57719.

5. (U//~~FOUO~~) **Records on me (foreign national):** As stated in the CITIZENSHIP section above, we will make the assumption that a requester is a foreign national if he/she has a non-U.S. address and does not provide a SSN or other information identifying him/her as a U.S. person.

(U//~~FOUO~~) Foreign requesters occasionally make Privacy Act requests for records on themselves, or cite the Privacy Act, or their requests contain a PA statement. If we receive a request in which the individual clearly indicates that he/she is a citizen of another country, we must inform him/her that the Privacy Act only applies to US citizens or aliens lawfully admitted for permanent residence to the United States. (See for example: FOIA Cases 54134 and 56171). We would then provide a GLOMAR response for the portion of the request that implies surveillance. Use the GLOMAR letter template and insert the PA Not Applicable paragraph (from the paragraph templates), and use the Foreign National GLOMAR MR. (See also: FOIA Case 52654, a straight FN Glomar not citing the Privacy Act.) Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected and the case closed with a GLOMAR disposition.

THIRD PARTY REQUESTS

UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~**(Records on Another Person)**

1. (U//~~FOUO~~) **All records on "John/Jane Doe" (with no further amplifying information)**: As in first party requests, as fully described above, since the requester does not provide any details, we must assume that they could be looking for either employment/affiliate records on the third party individual and/or intelligence/surveillance information on the individual. We will no longer task Security to conduct a search in the affiliates database until the requester provides us proof of death or a notarized, written authorization from the individual whose records are being sought. The Case Officer should use the FOIA_86-36 GLO_Auth_US GLO response letter and close the case with a GLOMAR disposition. Also, be sure to select case exemptions b1, b3(403), b3(86-36), and b3(798). This response letter explains to the requester that we can neither confirm nor deny whether someone is/is not an NSA employee/affiliate. The "Auth" portion gives the requester an opportunity to provide a notarized, written authorization from the individual or a proof of death. If such documentation is received, we will open a new case and task Security to conduct a search. Finally, the US_GLO portion explains to the requester that, if they were seeking intelligence records, we can neither confirm nor deny the existence or nonexistence of any such records on the individual. See for example: Case 58042.

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(b) (3)-P.L. 86-36

2. (U//~~FOUO~~) **All records on John/Jane Doe who died and proof of death is included, OR request is accompanied by the proper authorization from the individual AND no other amplifying information provided**: If a requester seeks records on a third party individual who is deceased and he/she either includes the proper written authorization OR proof of death OR the Case Officer can easily obtain proof of death through limited research, then we will task Security to conduct a search (NOTE: there are no Privacy Act implications and no harm in acknowledging an NSA affiliation for a deceased person). If no records are located, the Case Officer will prepare a PA Neg GLOMAR response and close the case with a Full Denial (FD) disposition. Be sure to select case exemptions b1, b3(403), b3(86-36), and b3(798). Please note: the PA Neg GLOMAR template has Privacy Act language to include or exclude, depending on whether the request is first party or third party. Be sure to use the proper language and delete any unused/unnecessary language from the template in your final response letter. If records are located, reassign the case to the PIRO Team for processing of the documents and final response.

(b) (3)-P.L. 86-36

(U//~~FOUO~~) If the request is for records on an individual who died [redacted] [redacted] accompanied by proof of death but containing no other amplifying information OR accompanied by authorization from the individual [redacted] [redacted] the Case Officer should task Security to conduct a search. If no records are located, use the PA_Neg_GLO [redacted] letter and MR templates and close the case with a Full Denial (FD) disposition. Again, be sure to select case exemptions b1,

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b3(403), b3(86-36), and b3(798). [REDACTED] (b) (3) - P.L. 86-36

[REDACTED]
[REDACTED] The GLOMAR language mirrors the standard GLOMAR language from the FOIA_glomar_ltr and MR templates.

3. (U//~~FOUO~~) Records on Famous Individuals: If a request asks for all records on a famous or well-known U.S. deceased or living individual (i.e., Elizabeth Taylor or Samuel L. Jackson), we would provide a US Person GLOMAR response. We would not use the PA Neg GLOMAR response because it is generally assumed that these individuals have not been affiliated with the Agency. The MR template used in this case would be the US GLOMAR MR. However, discretion should be used depending upon who the famous or well-known person is. For example, Tom Clancy has written many books that use government agencies, such as the CIA and NSA, as part of the setting. There is a possibility that Mr. Clancy visited the Agency to give a talk. We would perform a search to see if we had a record of his visit (Security search), or perhaps an article detailing his talk (search of applicable offices). Another example is [REDACTED]

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procurement officer. Another possible scenario is the visit to NSA by well-known experts in the fields of mathematics, engineering or computer science. If we located any privacy records on famous individuals in a Security search, we will require the individual's authorization or proof of death prior to processing them for release (for example, records that would reveal personal information as in the case of Ms. Sykes). Records of an author's talk or seminar would not likely invade privacy and may not require authorization or proof of death (as in the example of Mr. Clancy). An example of a case where we assumed the possibility of a visit and conducted a PA search was FOIA Case 56131, for records on an Edward Said, professor and expert on the Middle East. In that case, the requester provided proof of death up front.

(U//~~FOUO~~) As a historical reference, we have also had several FOIA requests regarding Jane Fonda's visits to Vietnam in 1972. In those cases, we did not provide a US Person GLOMAR, but informed the requesters that we needed authorization from Ms. Fonda in order to continue processing the requests. That response was provided because the requesters asked for very specific records on a famous person whose activities were published by the media. They were not asking for personnel records and [REDACTED]

[REDACTED] (b) (3) - P.L. 86-36
[REDACTED] See for example: Cases 48366 and 49498, which were on Jane Fonda.

(U//~~FOUO~~) Always check the database to see if we have processed requests for information on these famous individuals in the past, as we need to be consistent (examples: Stokely Carmichael and Mother Theresa). See Paragraph #8, below.

4. (U//~~FOUO~~) Surveillance on "John Doe" (not much amplifying information, but we assume this is a US person): The Case Officer should prepare a US GLOMAR response letter and MR since the requester is specifically asking for surveillance records held by the Agency about another presumed U.S. individual. This response differs from "All records on John Doe," because the individual has asked solely for surveillance records, and not "all records," which would include personnel-type records. [REDACTED]

[REDACTED] use the GLOMAR Letter and MR. Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected and the case closed with a GLOMAR disposition. See for example: FOIA Cases 47985 and 57953.

5. (U//~~FOUO~~) Records on "John Doe" (enough amplifying information to assume that this is a Foreign National): We would respond with a GLOMAR letter and use the Foreign National GLOMAR MR because the requester is asking for records held by NSA on an individual who, in the context of the request, either explicitly or implied, is not a US citizen or a permanent resident of the United States. Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected and the case closed with a GLOMAR disposition. See for example: FOIA Cases 53656 and 57837.

6. (U//~~FOUO~~) Records on an individual with mention of a specific non-purview subject: Occasionally we receive requests for records on a third party, and the requester provides enough specifics or details in his/her request for us to determine that we are not likely to have responsive records due to the nature/subject of the request. For example,

[REDACTED]

(b) (3)-P.L. 86-36

[REDACTED] While the requesters in these cases provide *some* details about the third party, they don't specifically inform NSA about what types of records on the individual they want or why NSA would have any records on the individuals. They don't specify intelligence or surveillance on them, and they do not in any way make reference to an NSA employment affiliation. They provide us insufficient evidence for us to know which, if any, NSA offices might hold records and need to be searched. Therefore, based on the details that these requesters *do* provide, we state in our response letter how we are interpreting the request and that the subject matter is not within NSA's purview. We further explain that, if they were seeking intelligence information on the individual, we can neither confirm nor deny the existence or non-existence of such records. The Case Officer should use the FOIA_NP_US GLO template letter and MR. Case exemptions b1, b3(403), b3(86-36), and b3(798) should all be selected and the case closed with a GLOMAR disposition.

7. (U) Records on a National Security Agency Employee/Affiliate: This can be further broken down into three subcategories.

- (U//~~FOUO~~) A request for records on an NSA employee from someone who appears to be related. Sample wording of request might be: "I would like the award/promotion records of my father, John Smith, who worked at NSA from 1970-1990." This type of request should be assigned to the PIRO Team. The PIRO Case Officer will draft a PA_Relative_Auth letter and MR in order to obtain the needed authorization and/or proof of death. The case should be placed in suspense while waiting for the authorization or proof of death. If we do not receive the proper documentation, the case is not perfected and is closed with an

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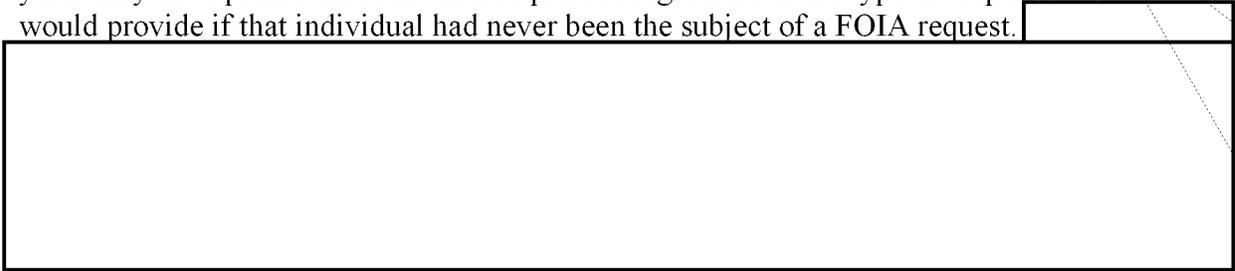
Administrative Closure (AC) disposition. If the documentation is received, the case is perfected and the PIRO Team will conduct the necessary searches, obtain the records, and process them for release.

- ~~(U//FOUO)~~ A request for records on an NSA employee from someone who does not appear to be related. This type of case may pertain to a current or previous NSA employee. For this type of case, since the requester mentions an NSA affiliation, we will assume that the requester only wants personnel/employment records (and not surveillance/intelligence records) on the NSA affiliate. The Case Officer should use the FOIA_86-36 GLO_Auth letter and MR templates. That letter explains that we can neither confirm nor deny whether a named individual is/was an NSA employee (pursuant to the NSA Act/P.L. 86-36, which allows us to protect the names of NSA employees). The Case Officer should suspend the case for 30 days pending receipt of an authorization or proof of death. If we do not receive the proper documentation, the case is closed with the GLOMAR disposition; it is a perfected request. Be sure to click the case exemptions button (P.L. 86-36 only). If we do receive the authorization/proof of death, the Case Officer should proceed by tasking Security to conduct search. See for example: FOIA Case 52597 (in this case, we did an NSA employee GLOMAR response as it was before we had an "authorization" paragraph in the letter).
- ~~(U//FOUO)~~ A request for records on an NSA employee who is deceased from someone who does not appear to be related. If a requester asks for records on a deceased, former NSA employee, we need proof of death prior to continuing to process the case. If we can verify through NSANet or the Internet, then the requester does not need to provide documentation. If we cannot verify, then we will ask the requester to provide a copy of the death certificate or an obituary, and we will suspend the case for 30 days. The request is not perfected until we receive the proof of death or verify it on our own. Once we receive proof of death, we will task Security to perform a search to see if the individual has been affiliated with the Agency. If Security does locate records, then all relevant offices should be tasked to search, depending on what the requester is seeking. Responsive records located should be processed by the proper team. For example, the PIRO Team would process any employment- or security-related documents. If "other" records are located, the FACO or DRAT may be the proper team to review them. For example: if we received a FOIA request for records on a former NSA employee (deceased) who was a highly regarded/well-known individual in the public, such as a leading scientist, mathematician or cryptologist for the Agency, and the types of records located were his/her technical writings/reports, etc. Please note: the proof of death is not necessary for non-personnel type records, as in this last example. See for example: FOIA Case 55750.

8. ~~(U//FOUO)~~ Records on an individual who has previously been the subject of a FOIA request: In this instance, we must provide the same type of response that was provided in previous requests for records on that individual, regardless of how many

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years may have passed since the first request or regardless of the type of response we would provide if that individual had never been the subject of a FOIA request.



(U) Content Owner: Marianne Stupar, DJP41

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FOIA SOP
Grant Proposals/Applications

15 May 2009

Steps for Processing FOIA Requests for Grant Proposals/Applications

This SOP covers the following:

- New Requests
- Disapproved Grant Proposals/Applications
- Approved Grant Proposals/Applications – Financial Arrangements Not Finalized
- Approved Grant Proposals/Applications – Financial Arrangements Finalized
- Proprietary Information Responses
- Releasable Information
- Protected Information

New Requests

After settling fee issues, the FOIA Access and Customer Outreach (FACO) Team tasks the search for records with the appropriate organization.

In the task memo, FACO requests the following information for each responsive grant proposal/application located:

- Was the proposal/application approved/accepted?
- If so, have financial arrangements been finalized?

If these questions are not answered when the case is in the queue assigned to a Document Reviewer (DR), the DR contacts the organization that provided the records to answer them.

Disapproved Grant Proposals/Applications

For personal privacy reasons, if a grant proposal/application is *not* approved/accepted, it is *fully exempt* from release pursuant to (b)(6) of the FOIA, per OGC 31 Oct 2003).

If a new request's search only locates *disapproved/unaccepted* proposals/applications, the FACO provides a final Full Denial response to the requester. The DR responds if the case is in the queue.

(b) (3)–P.L. 86–36

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Approved Grant Proposals/Applications – Financial Arrangements *Not Finalized*

If a grant proposal/application has been approved/accepted, but the financial arrangements *have not* been finalized, we must send a **release notification letter** to:

- the sponsoring institution (the Senior Contract and Grant Officer); and
- the submitter (the Principal Investigator),

to see whether the financial information (the total dollar amount, proposed institutional budgets, or cost estimates) is considered proprietary.

A template called **FOIA_release_notification_grants.dot** exists for this notification.

If it is a new request, the FACO prepares and sends the release notification letter. If the case has been on a queue and is ready to be worked, the DR prepares and sends the letter.

We redact (b)(3) P.L. 86-36 and (b)(6) information prior to sending the notification letter (see below for protected information).

Approved Grant Proposals/Applications – Financial Arrangements *Finalized*

If a grant proposal/application has been approved/accepted and the financial arrangements *have* been finalized, we look to see if the proposal language addresses proprietary information.

If the grant proposal/application says “Proprietary: None,” we do not need to worry about proprietary information in the proposal language (i.e., the intellectual property, such as algorithms, formulas, language developments, research, etc.). No release notification letter is required.

If the grant proposal/application indicates that there *is* proprietary information in it, *or if it does not address the issue*, we must send a **release notification letter** to:

- the sponsoring institution (the Senior Contract and Grant Officer); and
- the submitter (the Principal Investigator).

Depending on the age of the grant proposals/applications located, the reviewer may need to go to the institution’s Internet web site and verify that the staff members are still at the institution.

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A template called **FOIA_release_notification_grants.dot** exists for this notification.

If it is a new request, the FACO prepares and sends the release notification letter. If the case is on a queue and is ready to be worked, the DR will prepare and send the letter. We redact (b)(3) P.L. 86-36 and (b)(6) information prior to sending the notification letter (see below for protected information).

Proprietary Information Responses

If the institution and/or submitter responds that there *is* proprietary information in the proposal/application, we review their justifications with OGC upon receiving the response.

If the institution and/or submitter *do not* identify proprietary information, we continue to process the proposals/applications.

Releasable Information

In approved grant proposals/applications, we release the following:

- the grant applicant's name,
- the investigators' names, and
- the endorsers' names, as they are not considered personal in an approved grant proposal/application.

The proposal may also contain qualification listings. In weighing the public interest in understanding someone's qualifications to obtain government money, we release:

- courses taught,
- presentations,
- invited lectures,
- other grants, and
- lists of publications.

We release the grant salaries in approved grant proposals/applications where the financial arrangements *have been finalized*.

Protected Information

In approved grant proposals/applications, we protect, pursuant to (b)(6) of the FOIA:

- home phone numbers,
- home addresses,
- SSNs,

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- institutional salary (not the grant salary, but their usual salary from the institution).

Many grant proposals/applications also contain a *curriculum vitae* or "CV" (a biographical sketch) of the applicant. Personal information in a CV would also be protected, such as:

- education,
- academic positions held,
- fellowships,
- professional societies,
- professional service, and
- marital status.

If other unique information appears in grant proposals/applications, please notify this SOP's content owner so that it can be addressed.

As always, if classified or U//FOUO information appears in the grant proposal or application, it must be protected pursuant to current guidance.

Content Owner: DRAT/David

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UNCLASSIFIEDFOIA/PA SOP**FOIA Logs**

14 July 2009

REQUESTS FOR PREVIOUSLY RELEASED LOGS

1. (U) When processing a request for FOIA logs, first check case 43988 to see if the log has already been released. (Currently, logs for 1990, 1992, and 1995 through the present are in that case.) The processed and sealed logs covering the dates in the new request should be printed and provided to the requester in the current case (if the requester asks for a shorter period than is covered by a specific log, provide the entire log that includes those months). The logs do not need be dragged into the new case (see paragraph 3 for instructions on how to document this in the M/R). In addition, document RefID A3528348 (Updated FOIA Case Dispositions and Exemptions) should be printed and provided to the current requester. That is the page that defines the disposition codes used in the logs and is provided to all log requesters as a courtesy to help them understand the logs.
2. (U) The logs in 43988 that have been Sealed or Released are those that are ready to be provided. Any unsealed logs have either not been reviewed, or have not yet been approved for release.
3. (U) Prepare a partial denial letter in the new case. Be sure to include all exemptions used in the specific logs you are printing (this can be found by reviewing the Final MR in case 43988). Prepare the M/R in the new case by creating a blank M/R. Open the M/R in 43988 called "Final MR for Other Cases" and copy the general statements about how the logs were processed, the appropriate paragraphs that correlate to the log periods being provided, and the harm statement information. Since there are exemptions but no documents to place them on, click on the Case Exemptions button and select the proper FOIA exemptions for whatever FOIA log or logs is/are being printed and sent to the requester. At that point the case can be forwarded for approval. Be sure to note that the documents have already been approved for release. Identify (by RefID, DocID, and quarter) the logs that are being printed and provided in the current case.
4. (U) If a re-review of a previously released log is requested, and it is determined that changes must be made to release additional information, do not unseal the version in 43988 (because the DocID number provided in previous cases would not be maintained for those cases where we only printed from 43988 and didn't drag/drop). Instead, find the DocID of the in-work version and drag it into case 43988. Remove the redactions from the portions now being released. The new version will get a new stamp with a new approved release date and be sealed in case 43988. The old version can be removed from case 43988 so that it's not used in future log requests; however, that version will remain in ADMS for historical purposes and will be able to

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FOIA Case # 60859

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be located in a retrieval.

REQUESTS FOR LOGS THAT MUST BE REVIEWED/PROCESSED

1. (U) The logs are a print out from the FOIA database that generally contain the case number, requester's name, subject of the request, date of request, and disposition of the case. Generally, we attempt to negotiate with a requester to narrow the request to omit referrals and first party requests (PA requests). The standard format of the log report that is pulled from ADMS only contains direct requests that are logged as FOIA requests (it does not contain PA, PA/FOIA, referrals, or consultations). The log must still be reviewed carefully to ensure that first party requests handled as FOIAs are properly redacted from the log. Customized reports would have to be created for requesters who do not agree to accept just FOIA requests.
2. (U) The following charts should be considered when reviewing FOIA logs for release under the FOIA. The chart below labeled Personal Records should be used for FOIA requests for information relating to the requester, or for requests for information on another individual where the subject may contain personal information about the individual, and for PA requests, if they are included in the log. Use this chart when the subject of a request is: a) a U.S. citizen (assume U.S. citizenship unless there is reason to believe otherwise), b) specifically identified as personal records of a foreign national, or c) an IG/other personal report that gives details (who or what). A request for a rebuttal to an EEO investigation would indicate personal involvement and should be processed using the Personal Records chart for self.
3. (U) The chart below labeled Non-Personal Records should be used for most other FOIA requests. Use this chart when the subject of the request is for: a) information on the non-personal activities of a person or information about activities affecting him/her, (for example, business dealings, participation on boards/working groups, terrorist activities, assassination attempts on a person, information on Congressmen who may have had correspondence or business with the Agency, etc.) b) the writings of a person, e.g., oral histories and e-mails (unless those writings would be solely about himself, such as a biography), c) multiple items, and no part pertains to personal information on a person, or d) an IG/other report where only general, non-personal information is given to identify it (IG report on promotion trends, IG report on discrimination in the workplace).
4. (U) If a request has a disposition of Duplicate, find the original request and redact in the same manner.
5. (U) If a direct request has no disposition (the case is not finalized), and the redaction is disposition dependent, redact the entire entry using (b)(6) for personal cases, or redact either the names or the entire entry using (b)(3)/P.L. 86-36 for cases involving NSA employee names, as indicated in the chart.

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6. (U) If Referrals or Consultations are included in the log, the Personal Records chart should be used for PA referrals or FOIA referrals of personal records. The Non-Personal Records chart should be used for all other referrals and consultations.

7. (U) If a referral or consultation has no disposition (the case is not finalized), and the redaction is disposition dependent, redact the entire entry using (b)(6) for personal cases or (b)(1) and (b)(3)/P.L. 86-36 for other FOIA referrals or consultations.

8. (U) In older cases, comments were sometimes added to the subject line because the old database did not have enough space in comments. Those cases were migrated to the Case Tracking System with the comments still in the subject line. In those cases, comments should be redacted according to their content (i.e., classified information should be removed pursuant to (b)(1) and any other appropriate (b)(3) statutes; U//FOUO information should be removed pursuant to the appropriate FOIA exemption).

A. (U) If a term like GLOMAR was added to the beginning of the subject, it should be left in if the disposition was in fact a "Neither Confirm nor Deny." If not, it should be redacted (b)(5) and (b)(3)/P.L. 86-36. Other comments that have little significance ("General," "Dupe," notes that the requester narrowed, etc.) do not require redaction.

B. (U) All J numbers mentioned in comments in the logs should be checked [REDACTED]

[REDACTED] If they do, redact the J number (b)(3)/P.L. 86-36.

(b) (3) - P.L. 86-36

C. (U) Case officers often added a project name in parentheses after requests for contracts in order to identify what the contract was for. The project names should be looked up in the Cover Term database to see if they are valid project names and should be redacted using (b)(3)/P.L. 86-36. They do not need to be removed if the requester asks for them by project name, unless the entry has been marked as (U//FOUO) by the case officer, indicating that the project name's association with a specific contract is FOUO.

9. (U) SSNs, home addresses, email addresses, home phone numbers, place of birth, date of birth, and service numbers should be redacted under (b)(6), even if merely alleged by the requester.

10. (U) If Incident reports are included in the log (older logs), the entire entry should be redacted using the "Non-responsive" redaction code.

11. (U) If PA or 1st party FOIA requests are included in a log that narrowed the request to exclude them, redact those entries using the "Non-responsive" redaction code in addition to (b)(6). It's prudent to use the (b)(6) even if the requester agreed to omit those types of requests.

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because another requester may not, and we'll already have redacted it with the appropriate exemption.

12. (U) Requests relating to the Presidential TSP (post 16 Dec 2005) and other requests from individuals looking for information regarding spying or surveillance on themselves should be redacted (the entire entry). Although these requests are processed under FOIA, they are still considered first party requests. Redact using (b)(6) and Non-Responsive (that way, we can answer those who have agreed to omit 1st party requests by explaining the Non-Responsive redaction, and for those who did not agree to omit 1st party requests, the (b)(6) exemption applies).

13. (U) If you know that a case with a disposition has not yet been through approval and completed, redact the disposition (b)(5) and (b)(3)/P.L. 86-36.

(U) REQUESTS FOR PERSONAL RECORDS

(U) When redacting information pursuant to the chart below, in most cases, the entire entry in the log will be redacted (case number, requester, subject, date, disposition, etc.) Use this chart when the subject of a request is: a) a U.S. citizen (assume U.S. citizenship unless there is reason to believe otherwise), b) specifically identified as personal records of a foreign national, or c) an IG/other personal report that gives details (who or what). If the subject of the request contains personal information of any kind about the requester, or relates in a personal way to the requester in some way, the entire entry should be redacted.

(U) A request from an attorney representing a client or other authorized recipient should be treated as a first party requester. You may need to look up the original case to find out if a requester is an official representative of the individual on whom they're seeking records. In addition, the subject line may not indicate if the third party is dead or not.

(U) If the person was a scientist or mathematician with a reasonable likelihood for the Agency to have had some interest in his work or a Congressman or other public representative with whom we may have had a business relationship, then it should be considered a request for non-personal records. In addition, a request for information on an Agency Senior (for example a request for their biographies) would be a non-personal request since it's likely looking for work-related information.

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<p>REQUEST IS FOR:</p>	<p>CIVILIAN/MILITARY DEAD/MISSING (Includes Personal Details of any kind) OR NON-VIETNAM MILITARY POW/MIA (Unless the person or incident has been widely publicized in the media)</p>	<p>VIETNAM MILITARY POW/MIA</p>	<p>CIVILIAN/MILITARY DEAD (no personal details)</p>	<p>NOT IDENTIFIED AS DEAD (no personal details)</p>	<p>REQUEST THAT INCLUDES PERSONAL DETAILS (of any kind, including information that shows requester eccentricities) OR IG/OTHER INVESTIGATION OF A PERSONAL NATURE</p>
<p>Self (PA records, all records, or surveillance) (Includes requests from attorneys or authorized representatives of individuals)</p>	<p>Not applicable</p>	<p>Not applicable</p>	<p>Not applicable</p>	<p>Protect entire entry (b)(6) (add Non-responsive since some requesters agreed to omit 1st party requests)</p>	<p>Protect entire entry (b)(6) (add Non-responsive since some requesters agreed to omit 1st party requests)</p>
<p>Family member (not a public person) (and family member is not an authorized representative)</p>	<p>Protect entire entry (b)(6) If request lists multiple items and only one is personal, redact requester name and personal subject (b)(6) and release remainder.</p>	<p>Name is on PNOK/ "Vietnam Conflict: No Names List Working Aid," protect entire entry (b)(6) and (b)(3)/P.L. 102-190 (unless multiple names listed, protect only PNOK name) Name not on PNOK list, then release</p>	<p>Protect entire entry (b)(6) unless the person and/or incident has been widely publicized in the media</p>	<p>Release</p>	<p>Protect entire entry (b)(6)</p>

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<p>Non-public person (and requester is not an authorized representative)</p>	<p>Protect entire entry (b)(6) If request lists multiple items and only one is personal, redact requester name and personal subject (b)(6) and release remainder.</p>	<p>Name is on PNOK/ "Vietnam Conflict: No Names List Working Aid." protect entire entry (b)(6) and (b)(3)/P.L. 102-190 (unless multiple names listed, protect only PNOK name) Name not on PNOK list, then release</p>	<p>Release</p>	<p>Release</p>	<p>Protect entire entry (b)(6)</p>
<p>Public person (and request is not from an attorney or other representative of the person)</p>	<p>Release</p>	<p>Release</p>	<p>Release</p>	<p>Release</p>	<p>Protect entire entry (b)(6) if IG or Other Investigation In other types of requests, protect only personal details in entry (DOB, POB, etc.)</p>

(b) (3) - P.L. 86-36

(U) REQUEST FOR NON-PERSONAL RECORDS

(U) When redacting information pursuant to the chart below, the entire entry in the log will be redacted (case number, requester, subject, date, disposition, etc.). Otherwise, only a name will be redacted and the rest of the entry line will be released. Use this chart when the subject of the request is for: a) information on the non-personal activities of a person or information about activities affecting him/her (for example, business dealings, participation on boards/working groups, terrorist activities, assassination attempts on a person, etc.), b) the writings of a person, e.g., oral histories and e-mails (unless those writings would be solely about himself, such as a biography), c) multiple items, and no part pertains to personal information on a person, or d) an IG/other report where only a number or general, non-personal information is given to identify it (IG report on promotion trends, IG report on discrimination in the workplace). Often, a request for IG reports with just a number are from NSA employees, as others would not likely know the number. Redact the requester's name under (b)(3)/P.L. 86-36 if that is the case. However, some lists of IG reports have been released under FOIA, so a requester may have obtained the number from one of those releases.

<p>REQUEST INCLUDES:</p>	<p>ACTION</p>
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Apparent NSA Employee mentions a live, non-public NSA employee as an integral part of the subject (see Example A)	Protect names of requester and subject (b)(3)/P.L. 86-36
Mentions a live, public NSA employee as an integral part of the subject (see Example B)	Release name in subject Protect requester name (b)(3)/P.L. 86-36 if apparently an NSA employee
Non-NSA requester alleges named person is an NSA employee (see Example C)	Release
Request for IG Report by Number Only	Check requester name to see if NSA employee. If so, (or if personally known to be NSA employee) protect name (b)(3)/P.L. 86-36
Single-subject or multiple-subject requests with no individuals mentioned, or with no personal information requested about the individuals (topical request)	<i>Dependent on Case Disposition:</i> <div style="border: 1px solid black; height: 30px; width: 100%;"></div> All other DISPOS. release
Request for information on a person that is not personal in nature (a scientist or mathematician with a reasonable likelihood for the Agency to have had some interest in his work or a Congressman or other public representative with whom we may have had a business relationship – request for Senior Bios)	Release
Referral or Consultation	<i>Dependent on Case Disposition:</i> <div style="border: 1px solid black; height: 30px; width: 100%;"></div> No DISPO = protect entire entry (b)(1) and (b)(3)/P.L. 86-36 All other DISPOS. release.

(b) (3) - P. L. 86-36

(b) (3) - P. L. 86-36

(U) Example A: I request a copy of the Environmental Study that my colleague John Smith wrote when we both worked in R2. [In this example, the requester is apparently an NSA employee, so his name will be protected. John Smith is a non-public NSA employee, and his name will also be protected in the subject.]

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(U) Example B: I request a copy of the American Cryptology During the Cold War, written by Tom Johnson. [The requester is not apparently an NSA employee, so his name does not need to be redacted (even if you know him to be an NSA employee). Tom Johnson is a public figure, so his name can be released in the subject.] You could redact the requester name if you know him to be an NSA employee, and the subject requested is not obviously already in the public domain, to ensure protection of the name.

(U) Example C: Joe Blow alleges that John Smith works at NSA and asks for records verifying employment. The requester is not affiliated with NSA. Entry may be released, because if we can acknowledge something to a non-affiliate requester who is not the individual's representative, we can acknowledge to anyone else. If we cannot acknowledge, we would GLOMAR using (b)(3)/P.L. 86-36, and that type of response could also be released to others.]

(U) Content Owner: Pamela N. Phillips, Ch/DJP4
Updated by DRAT/Donna

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FOIA SOP

Congressional Records

4 March 2009

This SOP explains the steps for processing FOIA requests that contain Congressional Records that are responsive to the request.

1. Because Congress is not an Agency of the U.S. Government, as defined by the FOIA, it is not subject to the FOIA. Guidance from the Office of General Counsel indicates, however, that if we have a document in our possession, we should process the records. Congressional records responsive to a FOIA request should be processed as NSA records, as long as they do not contain a Congressional release caveat. Release caveats may be similar to those listed below:

“NOT RELEASABLE WITHOUT PRIOR APPROVAL BY *(name of committee)*, coordination of the release of the records must be made with the originator”

“Duplication or copying of this transcript by photographic, electrostatic, or other facsimile means is NOT AUTHORIZED. Copies available, when authorized by Committee, only through Official Reporters.”

2. Many Congressional documents that we may have in our possession will have been created for dissemination to the public. For those documents, and any others that do not contain a release caveat, treat the documents as NSA documents and review them for any NSA equities. Follow the normal guidelines for consulting with other agencies, as necessary, if the documents contain another agency's equities. Once a final release determination is made, either withhold the document in full, or release the document in whole or in part to the requester.

3. If the Congressional document contains a release caveat, we must receive the appropriate Congressional organization's approval prior to release of the document. Coordination/referral of the document is not necessary if NSA requires the document/information be protected in its entirety for our own reasons (i.e., release of the information would cause harm to this Agency's mission/activities). We will use our exemptions and rationale to support the withholding, and we will prepare a declaration for Court if litigated justifying the redactions.

4. If NSA does not plan to protect the document/information in its entirety, and it contains a Congressional release caveat, we must receive the appropriate Congressional organization's approval prior to release of the document. Prepare a review memo (template called FOIA_Congressional_review.memo) for the Legislative Affairs Office (LAO) FOIA POC and provide a sealed copy of the document as we intend to release it to the public. Advise LAO which committee originated the document, if known. The LAO POC will coordinate with Congress, and respond to us once release approval (or denial) is received. (Contractor reviewers will reassign their case to the Government Releaser to get the document sealed. The Government Releaser will print the memo and document for LAO and reassign the case back to the contractor for suspense.)

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04-21-2011, FOIA Case # 60859

5. If Congress approves release of the document, prepare the appropriate response to the requester (granted in full or partial denial).
6. If Congress does not authorize release of the document, prepare a full denial letter that indicates our actions on the document (e.g., we identified some classified or other information that must be withheld pursuant to certain FOIA exemptions). Add the following language (found in the paragraph template named Congressional_para):

“We are not authorized to release this document without the approval of the U.S. Senate (*or U.S. House of Representatives*). We have coordinated with the (name appropriate Congressional committee or organization), and they have not agreed to release the document.”

Do not provide appeal rights for the information we are withholding, since ultimately any decision we have made is superseded by Congress's actions. There are no appeal rights for the Congressional action.

Content Owner: Pamela Phillips, DJ4

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FOIA SOP
FOIA CASE CHECKLIST FOR REVIEWERS

12 July 2004

FOIA Case: _____

Preparing Case for Review:

- _____ Retrieve case from EQ or HQ (for now, obtain from Ch/DJ4). Notify Pamela Phillips to update queue lists.
- _____ Go to Keywords/Comments tab and read processing suggestions or instructions/notes provided by previous processors or management, if any
- _____ Review Requester's Profile to ensure all data is correct and make changes, as needed. If it is a migrated (hardcopy) case (and the requester has had no subsequent requests since CTS was installed, you will need to enter the data from the requester's letter. Correct migrated cases that have both the first and last name in the First Name field by moving the last name to the Last Name field.
- _____ Check all data on the Case File Tab for accuracy. Subject, fee waiver, expedite, other-agency referral number, origination date, receive date, etc.)
- _____ If a referral from another agency is actually a second referral (i.e., CIA referred a document to DIA who subsequently referred it to us), list the original agency and its referral number in the Keywords. The DIA number would go in the Referral Number field on the Case File tab, and the CIA referral number would go in the Keywords.
- _____ Verify that the full subject of the request is entered correctly on the subject line. Omit the preceding language such as "all records on" or "copies of all information relating to," etc. If the subject has been narrowed or clarified, so note (See Processing Notes - 13 Nov 2003 for additional information on the CTS Subject Field).
- _____ If a migrated case for which we only have hardcopies, sort through all background material and send over to be scanned into correspondence chronologically (earliest to latest):
- All letters to and from NSA
- All search estimates & responses
- All searches & responses (with actual search costs)

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Any other background notes or research that should be a permanent part of the case file

_____ If the case is a migrated Direct Request, remove "NULL" from the "Referral From" field.

_____ Ensure that search estimate costs and actual costs are entered onto the Fee Manager Tab in CTS (See CTS Fee Manager SOP).

_____ Was requester previously notified of search costs?

_____ If so, did requester pay or agree to pay those costs?

_____ If yes, continue processing.

_____ If not, reassign case to Initial Processing Team to prepare a search cost estimate letter to requester. If requester pays or promises to pay, the case will be reassigned to you to continue processing.

_____ If either expedited processing or a fee waiver were requested, the appropriate block needs to be checked. If they were not addressed in the initial response, address in the follow-up or final response. If the case is a referral, most often the other agency doesn't advise how a case was handled. Check "not addressed," unless the other agency specifically advises us that the request has been expedited or fees have been waived.

_____ If a significant amount of time (more than 1 year) has passed with no communication with the requester, verify continued interest (See Verifying Continued Interest SOP).

_____ If no longer interested, and there are no cases 'piggy-backing' this case, close the case (AC if the requester didn't respond, WD if he responded and indicated no more interest).

_____ If no longer interested, and there are cases 'piggy-backing' this case, first ensure that all responsive documents from this case are scanned/dragged into the 'piggy-backed' case, and make a note in the comments of both cases. Close this case (AC if the requester didn't respond, WD if he responded and indicated no more interest).

_____ If still interested, continue processing.

_____ Ensure all responsive documents have been scanned/dragged into the case file. In a migrated direct request, non-responsive documents do not need to be scanned in. If they're already in the case file, they may be removed. If there is a question that another interpretation may consider them responsive, leave them in the case file; annotate them as non-responsive, and indicate in the M/R that they were left in for completeness in case at some point in approval or on appeal they might be considered responsive. If there are

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non-responsive documents in a referral, leave them in the case file and annotate them as non-responsive.

_____ Verify case classification (Note: you will need to check this again during document review, as classification level may change from that initially assigned as the case is processed and documents are added)

_____ In the Comments section of the Keywords/Comments Tab, document major relevant case processing details and case movement (i.e., case forwarded for review or approval; case sent to suspense (include reason); case reassigned to another case officer, etc., with dates and sids). Detailed information and research belongs in the M/R.

Final Review of Documents:

_____ Verify that each document title in the Hitlist includes an originator (NSA: Title, CIA: Title, DIA: Title, etc.)

_____ Conduct searches to determine how we've handled previous requests for information on this same topic or document. Verify that the documents haven't already been processed in ADMS or for another request.

_____ Is the request for something we would GLOMAR (or did we GLOMAR in the past)? We may need to GLOMAR (b) (3)-P.L. 86-36

_____ Review other documents in ADMS to determine how to handle subject matter.

_____ Conduct research in TOOLKIT for classification guidance on the subject. If needed, search Intelink, CLASIDOC, NSA web, for additional information.

_____ Does document need a Directorate/Associate Directorate review?

_____ If yes, send out for review and merge redactions when complete. (For hard copy cases, scan OPI-marked documents in to the Documents tab with the same title as the original document. Annotate the document as SID (or other appropriate OPI) Review. If the OPI highlighted the document, you will need to bracket the information so that it shows up in ADMS.) Add all costs accrued by OPI (e.g., review, paper copy, etc.) to the Fee Manager Tab (See CTS Fee Manager SOP).

_____ Review and redact documents appropriately, using all appropriate exemption codes. If a document is fully denied, place an annotation on the first page of the document stating (Fully Denied, or FD). Highlight the document title and use the Exemptions button to select the applicable exemptions. Do not apply redactions to the document. If a

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document is granted in full, place an annotation on the first page stating "Granted in Full, or GF.

_____ Check Document Index Information for accuracy (e.g., originating agency, typos, etc.)

_____ Does case contain other agencies' documents, or do documents contain other agencies' equities?

_____ If yes, remember to prepare a "Referral To" memo to other agencies, as necessary, when preparing correspondence.

_____ Place an annotation on the first page of the NSA-originated referred documents that states "Referred to AGENCY."

_____ Highlight all agencies to which we refer documents in the "Referred To" field on the Case File Tab.

_____ If another agency's review has come back, scan their correspondence into the Correspondence tab and scan the marked up copy of the document into the Documents tab, using the same title. Annotate the first page of the doc as CIA (or other appropriate agency) Review. If the other agency highlighted the document, you will need to bracket the information so that it shows up in ADMS.

_____ In Document Index Information, remove or edit information on the UNCLASSIFIED Tab as explained in Processing Notes - 9 Jul 2003 under Unclassified Titles and Unclassified Memo #s.

_____ If the case contains more than five documents, create a Document Index listing to include in the case file (See Document Index SOP).

Preparing Correspondence for Approval:

_____ If requester has chargeable fees, have they been paid? If not, prepare fee letter for DJ4 signature.

_____ Draft a detailed supporting M/R that summarizes all case actions and provides rationale for redactions (harm statement and/or research) (See Memorandum for the Record SOP).

_____ Prepare a response letter by selecting appropriate interim or final response (and paragraphs) from available templates.

_____ Ensure that response addresses all points in Requester's Letter that haven't been previously addressed (may need to reiterate some)

_____ Check spelling and formatting on all correspondence (pay attention to split dates and quotes). (See Drafting Correspondence SOP)

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____ Ensure serial number on letter drafted is correct. Serial number on the first letter sent to requester is the same as the case number. Subsequent letters to requester will have a letter after the serial/case number (i.e., A, B, C, etc.). Serial numbers on Referral Letters are the case number and then -R1, -R2, -R3, etc., as appropriate. (See Drafting Correspondence SOP)

____ Contractors will add printing instructions to the bottom of the comments tab, as well as below the signature line on the M/R. The instructions will include which documents should be sealed/released, which documents will be packaged with referrals, which pieces of correspondence should be dated and/or printed, etc. Contractor may refer to Document Index in voluminous cases, rather than repeating it. (See Memorandum for the Record SOP for format.)

____ If fees are required, do not check dispositions, and forward the case to DJ4 for signature of the fee letter.

(b) (3) - P.L. 86-36

____ Once fees have been paid (or if fees were not assessable) check one final case disposition and forward the case for approval for signature of the final response. (See Disposition Codes SOP)

Finalizing and Closing Case:

____ When the case comes back approved, place a Stamp on the first page of each FOIA document being sent to the requester with the release date. (Contractors will reassign to the Government Releaser for this function.)

____ Seal and release the documents, as appropriate (see Seal and Release SOP). (Contractors will reassign to the Government Releaser for this function.) Document in the CTS Fee Manager Tab the total number of pages provided to the requester (see CTS Fee Manager SOP).

____ Add a send date to the signed letter and print on NSA/CSS letterhead (contractors will reassign to the Government Releaser for this function). Give to the DJ Secretary to mail. (Attach a note on it with your name so that the secretary can return it to you if there are any questions.)

____ Enter Keywords in the Keywords/Comments Tab, as appropriate, to aid future searches

____ Verify that *one* final disposition is on case before closing
 (See Disposition Codes SOP for more instructions.)

(b) (3) - P.L. 86-36

____ Forward the case to the appropriate location (Suspense if waiting for payment or referrals to come back (include reason), Closed Cases if all actions are completed).

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Content Owner: Pamela Phillips

FOIA/PA SOP
Queue Criteria

January 2009

(U) Subject matter, number of documents/pages, amount of coordination, classification and complexity are all factors used to determine Queue placement. Since there are so many variables that affect the Queue determination, the following systems are used.

(U) Privacy Act (PA) Queue Criteria

(U) PA cases will be placed in one of three Queues: Super-Easy, PA Easy or Voluminous. Super-Easy cases will be processed upon receipt. If there are more than 200 pages but the pages are primarily unclassified it will most likely be placed in the PA Easy Queue.

(U) PA QUEUE CRITERIA CHART		
Types of Records	PA Easy Queue	Voluminous Queue
Volume of material		
200 pages +/- 50 pages	200 or less	200 or more
Kind of Material		
IG Reports		X
Medical Records	X	
Security Records	X	
EEO Records	X	
Applicant Records	X	
Field Tours	1 tour	2 or more tours

(U) Freedom of Information Act (FOIA) Queue Criteria

(U) FOIA cases will be placed in one of three Queues: Super-Easy, FOIA Easy or Complex. The following point system is used to determine Queue placement:

Super Easy	0-1 point
FOIA Easy	2-3 points
Complex	4 or more points

(U) The threshold number of points is subjective and dependent upon each case. The flexibility to transfer a request from one Queue to another is necessary. When Reviewers feel that a case should be transferred to a different queue, it will be their responsibility to bring this to the attention of their supervisor. If the Queue is being changed, a letter to the requester may be in order and the change should be documented within the case M/R.

UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~**(U) FOIA QUEUE CRITERIA CHART**

	<u>Points</u>
Volume of Material	
Pages -	
More than 200	2
50 - 200	1
Fewer than 50	0
SIGINT Product Reports -	
Fewer than 200	0
More than 200	2
Multiple/Variety of Subjects	1
External Agency	
Referrals	0
Consultations	1
Required Internal Coordination	1
Material Content	
Military Unit Histories	2
Historical Summaries	1
Non-Product Reports	1
Biographies	1
Oral Histories	1
VENONA	1
Multimedia	
Video, tape, content/location	2
New material related to a previous release	
Previous release w/in 2 years	0
Previous release older than 2 yrs	1

(U//~~FOUO~~) Content Owners: Dawn Owens/Sally NicholsonUNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~

FOIA/PA SOP
FEE PROCEDURES
Categories, Waivers, and Collection

2 December 2009

This SOP applies to individuals on the FOIA Access and Customer Outreach (FACO) Team, the Privacy Act (PA) Team, and the Document Review and Analysis Team (DRAT) (both contractor and government). It explains fee categories, fee waivers and collection of fees from FOIA requesters.

PA vs. FOIA REQUESTS

If a case is strictly a PA case, there will be no fees. However, when a requester submits a request for personal information on another individual (not himself), the request will be processed solely under the FOIA. The PA Team will process this type of request due to the "personal nature" of the responsive records (security, medical, personnel, and suitability). The below fee procedures will apply for this type of case.

FEE CATEGORIES

Fee status under FOIA is broken into four (4) separate categories: commercial, media, academic, and all other. Review the FOIA request and determine if the requester asks for a specific fee category. If yes, does he/she qualify for that category? Start by checking previous cases from that requester to see what status she/he was given. Once determined, it still needs to be verified that it is appropriate for this particular request. It is possible for a requester to fall into two separate fee categories for different requests, depending on the nature of the request. For example, if Mr. Newsman from WTOP News is requesting information on an NSA program for his news radio program, he would qualify for media status. If, however, he wishes to obtain all records we hold on him, he would be an "all other" for the purpose of that request because it is a request of a personal nature.

A *commercial* requester is anyone who would benefit monetarily by receiving the records he seeks in his FOIA request. The most common example is a company that would like to do business with NSA (or has, in the past, done business with NSA). Perhaps the company bid on a contract but was not awarded the contract. That company may submit a FOIA request for the awarded contract so that they can learn the final contract award amount to determine if their bid was too high, etc. Due to the latest FOIA amendment (December 2007), commercial requesters will probably not have to pay for searches unless the documents requested do not require submitter notification OR the case is determined to be voluminous (this will be determined on a case by case basis). Commercial requesters will still pay for all review time and duplication. If commercial status is warranted, click Commercial under the Fees Manager tab in CTS.

An author of a book is not automatically considered a commercial requester, even though there may be financial gain from the sale of the book. The purpose of the FOIA is to increase the public's understanding of the activities of the government, and an author is usually considered capable of doing that. If, however, the information that the author is requesting has nothing to do with the activities of the government, we may be able to place him/her in the commercial or "all other" category.

A *media* requester (representative of the news media) is defined as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience." A freelance journalist may be considered a member of the media if he/she can prove his/her ability to be published (has a contract or letter from a magazine, newspaper, etc.) or "demonstrate a solid basis for expecting the information disclosed to be published by a news organization." If the individual submits the request on official letterhead from a "news" publication, you can assume him/her to be media. If he/she only claims to be *media* or asks for media status, send an inquiry to the NSA Main Library (see the [Verifying Media Status SOP](#)). You should also check previous cases from same requester to see what status was given. If media status is verified, click Media under the Fees tab in CTS.

In order to qualify for the *academic* category, two factors must be shown by the FOIA requester: that the educational institution to which he/she is affiliated conducts scholarly research **and** that his/her request is on behalf of the institution (i.e., the institution has asked him/her to conduct the scholarly research). Academic status has only been granted in a few cases because of this narrow definition.

Media and academic requesters do not pay for search or review time, and they receive the first 100 pages of records free (unless we have granted a fee waiver). (See **Fee Waivers**, below.)

If the FOIA requester does not fit into any of the categories listed above (i.e., if the requester is just "John Q. Public" or "Jane Doe"), then he/she is an *all other* requester. This category of requesters pays for search time in excess of 2 hours and for duplication in excess of 100 pages, unless we have granted a fee waiver). (See **Fee Waivers**, below.) *All other* requesters do **not** pay for review time.

FEES

Fees are assessed in accordance with DoD Regulation 5400.7-R, which states that search time and review time are computed at \$44.00 an hour and duplication is \$.15 per page. (Fees prior to 1 July 2002 were assessed at \$25.00 per hour. Searches in many of the old cases processed before that time will still be assessed at the old rate for search.) The example below shows how the fees charged would be distributed in all four categories. In this example the completed case consisted of 4 hours of search, 1 hour of review, and the duplication of 350 pages.

Fee Category	Search Fee	Review Fee	Duplication	Total Fee Due
Media	No search fees	No review fees	350 pages minus 100 free pages = 250 pages @ \$.15 = \$37.50	\$37.50
Educational	No search fees	No review fees	350 pages minus 100 free pages = 250 pages @ \$.15 = \$37.50	\$37.50
Commercial	No Search fees are charged unless case is voluminous	1 hr. @ \$44.00 = \$44.00	350 pages @ \$.15 = \$52.50	\$96.50
All Other	4 hrs. minus 2 free hrs. = 2 hrs. @ \$44 = \$88.00	No review fees	350 pages minus 100 free pages = 250 pages @ \$.15 = \$37.50	\$125.50

Please note that we have established a minimum threshold of \$25.00. If the **total** fees for a case are \$25.00 or less, the fees will not be assessed. We will complete the processing of the case and provide the documents (if any) at no charge. The rationale for this is that it costs the government more than \$25.00 to process a check.

FEE WAIVERS

Anyone can request a fee waiver, regardless of his or her fee category.

A fee waiver may be granted if it is in the public interest to do so. To reach this decision we examine several factors (each is considered incrementally): (1) whether the subject of the requested records concerns the operations or activities of the government; (2) whether the disclosure is likely to contribute significantly to an understanding of specific government operations or activities; (3) whether disclosure of the requested information will contribute to the understanding of the public at large, i.e., the general public must benefit from disclosure; and (4) whether the requester has a commercial interest the magnitude of which is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily" in the requester's commercial interest.

Occasionally, a fee waiver is granted for humanitarian reasons. The most common is a requester seeking information on a family member who is/was a prisoner of war or missing in action (POW/MIA). Again, anyone can ask for a fee waiver and we may grant it, but this is not a common occurrence for an "all other" unless for humanitarian reasons.

Most often, the fee waiver determination is made at the initial processing stage. If a fee waiver is granted there are no fees of any kind (search, review, or duplication).

DETERMINING FEES

The FOIA Access and Customer Outreach (FACO) Team is the starting point for determining fees. When a request is first received, the Customer Representative either tasks out a search memo (for media requesters) or a cost estimate memo to the appropriate organizations. Any time an estimate exceeds the free amount allowed a requester, a fee estimate letter is sent to the requester advising him of the anticipated fees. If the estimate is under \$250.00, the requester is advised that they must pay one-half of the estimated search costs or provide a statement regarding their willingness to pay all assessable fees upon completion of processing. If the estimate is over \$250.00, we require payment of one-half the search costs before any search is done, unless the requester has a prompt payment history.

Requests for contracts are typically received from commercial requesters who are responsible for all review and duplication fees. We will not charge the commercial requester for search fees unless the contract is voluminous and will require a lengthy search. We calculate review time at 2 minutes per page for contract material; however, this time could vary. If the estimate is under \$250.00, the requester is advised that they must pay one-half of the estimated review costs or provide a statement regarding their willingness to pay all assessable fees upon completion of processing. If the estimate is over \$250.00, we require payment of one-half the review costs before any review is done, unless the requester has a prompt payment history.

Please note: In some instance we provide the documents before payment is received for both "all other" and "commercial" requesters (e.g. requester is an NSA employee, if the requester has agreed to pay the fees and we've verified via phone, if it's a small amount of money, if the requester has an established payment history).

We need to ensure that our estimates are as accurate as possible, so we will not have to provide refunds to the requester. Refunds come out of NSA funds.

FOIA requests that are similar in nature can be aggregated for fee purposes.

COLLECTING FEES FROM REQUESTER

The FACO may have to handle collected fees in the following-scenarios:
1) An initial fee estimate letter was sent, and the requester pays half of the estimated fees up front. 2) The processing of a case was completed, and the requester is required to remit total payment before the final response (and any associated records) is sent.
3) Case was completed and records were sent and now requester must remit total payment.

The Document Review and Analysis Team (DRAT) may have to handle collected fees if: 1) the requester promised to pay at the initial processing stage and processing is now complete. Payment must be received before a final response is sent. OR 2) the

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requester paid for the search up front, but the final number of pages to be released exceeds his free amount, as well as the \$25.00 threshold, and they need to collect the balance owed.

If the requester has not yet paid, you will need to prepare a letter using the "payment_required_ltr" template, giving 30 days (CONUS) or 45 days (OCONUS) for payment. Requesters will submit their check or money order directly to DJP4. When stating a dollar figure to a requester, concerning his fees, be sure to include the zeros for cents. Example: use "\$125.00" rather than "\$125."

Once payment is received for a FOIA case, make a copy of the check or money order to be scanned into the case correspondence in CTS. Update the fees tab in CTS (payments received). Send the check or money order to Finance, using the "payment_processing_memo" template, and indicate that it is for a FOIA request. The Customer Representative or Reviewer is the POC for that particular payment/FOIA Case should the Finance Office have any questions or problems. The check or money order should be sent through inter-office mail to BF231, Accounts Receivable, FANX 2, Suite 6860.

You do not have to wait until the check has cleared to complete the processing of the request. If Finance has any trouble collecting on a check (i.e., it bounces), they will notify us, and the Customer Representative or Reviewer will add the requester's name to our Non-Payers list (currently located on the shared drive). Please first notify Chief DJP4, FACO team leader, and DRAT team leader of the status, so that they can verify that this requester is truly a non-payer. Then conduct a search in CTS for any other open cases this requester may have because no current or future cases will be processed for that individual until payment of any past due amounts has been made.

Ask for the open cases to be assigned to you. For direct requests or referrals sent to us for direct response, annotate in the comments section of any open cases that the case is being closed because the requester has failed to pay incurred fees for FOIA case #####. Also note that the requester has been placed on the Non-Payers list. Select the FEE disposition for the final case disposition and close the case. The same process is used for a requester who does not pay in response to a "payment_required_ltr." The Customer Representative or Reviewer will annotate the comments, close the current case as FEE, and request any other open direct requests (or referrals sent to us for direct response) by that requester to close as FEE.

(b) (3) - P.L. 86-36

For open referrals from this requester sent to us for consultation and return to the originating agency, advise [redacted] of the case numbers and ask her to contact the originating referral agencies to advise them of our issue with non-payment of fees. She will advise them that we do not intend to process any of the requester's outstanding requests and find out how they want us to handle the referral. In some cases, we may need to continue processing documents for the other agency if they need it to complete their cases. Check with Pamela for further guidance if that is the case (we may process but not give appeal rights or cite exemptions).

If the other agency chooses to withdraw the referral, note in comments that

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because the requester is a non-payer for this Agency in FOIA case #####, we contacted the other agency and they have withdrawn the referral. Note the date and the person at the other agency we spoke to. Close the case as WD.

For any questions about fees, please seek guidance from Pamela or Marianne. If you have any questions for Finance on payments or refunds, address them to:

BF231, Accounts Receivable
FANX2, Room A1527, Suite 6860
968-8115

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(b) (3) - P.L. 86-36

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**FOIA SOP
FOIA Access and Customer Outreach (FACO) Checklist**

13 April 2009

FOIA Case: _____

Preliminary Review of a New Case Assigned:

_____ Read Requester's Letter.

_____ Check all data on the Case File Tab for accuracy (subject, waiver, expedite, etc.).

_____ Review Requester's Profile to ensure all data is correct and make changes, as needed.

_____ Go to Keywords/Comments tab and read processing suggestions or instructions provided by Team Leader, if any.

_____ Determine if the request is valid, if so, enter the Perfected Date, which is the date the request was received. (For this step, refer to SOP: New ADMS FOIA/PA Case Fields – Decision Process)

_____ Determine Requester's Fee Category (read his/her letter to determine if a specific fee category was requested). Select proper category in the Fee Manager's tab. (See Fee Procedures SOP and CTS Fee Manager SOP)

_____ If Media category is requested, request verification of media status from Library (See Verifying Media Status SOP). Occasionally, additional research is needed and/or contacting other agencies to see how they categorize the requester.

_____ If Media status granted, provide copy of request and final response letter to the Public & Media Affairs Office and SID. (See FOIA/PA Points of Contact Listing in TOOLKIT for where to send these requests).

_____ If request is from member of Congress, provide copy to LAO.

_____ Check the Delinquent Payer's List (on the shared drive) to determine if this Requester has ever failed to pay for costs incurred.

_____ Verify case classification (Note: classification level may change from that initially assigned as case is processed and documents are added).

_____ Select a queue type (usually FOIA Super Easy during initial processing).

Search and Processing Steps:

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Approved for Release
by NSA on
04-21-2011, FOIA
Case # 60859

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_____ Search CTS for the following:

_____ Has Requester previously requested information under FOIA? (Note: you should search CTS on the requester's last name. If no hits, enter the requester's last name in the first name position and search again. In our old system [WACO], the last name was sometimes entered in the first name position).

_____ Has Requester ever requested info on this same topic?

_____ Has another Requester asked for this same information?

_____ When necessary, check previous FOIA cases on same subject to determine what was said or given. This is especially important for GLOMARs, no records, non-attributions, and partial denials. This may involve pulling hard copy case from closed case files or retrieving it from Records Center. (If needed, see Records Management SOP (once it is created) for recalling boxes from storage – SAB2.)

_____ Search CTS, and ADMS for any OTHER type cases on this same subject (i.e., Pre-Pubs, MDRs, or Declas cases).

_____ Search NSA Web (intranet) and TOOLKIT for info on the subject of request.

_____ If needed, search Intelink for information on the subject of request. NOTE: Case Officer can also use the Internet for obtaining background information on the subject of the request, but see Team Leader for precautions, first.

_____ Is the request for something we would GLOMAR (or did we GLOMAR in the past)?

_____ Send Search or Cost Estimate memoranda to appropriate Agency Directorates.

_____ Enter Fee Category and all actual and estimated fees on Fee Manager Tab (includes duplication and payments received, if any). (See CTS Fee Manager SOP.)

_____ Search in ADMS for responsive documents and drag and drop them into Documents Tab of case, if applicable. (Some documents may not be ready for dragging if they are still pending in another case.)

_____ Receive documents from Agency Directorates, check them for responsiveness, and send them to the CPC to be scanned in. Double-check them after scanning (for accuracy, page count, etc.).

If FACO Team will be doing Final Review of Documents (i.e., standard contract documents or under 10 Anchory docs or super easy FOUO dos onl), follow these instructions:

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_____ Conduct searches to determine how we've handled previous requests for information on this same topic (or the same document).

_____ Review other releases in ADMS to determine how to handle the subject matter.

_____ Conduct research in TOOLKIT for classification guidance on the subject. If needed search Intelink for additional information.

_____ Review and redact documents appropriately, using all appropriate exemption codes.

_____ If the case contains more than ten documents, create a Document Index listing to include in the case file (see Document Index SOP).

Preparing Correspondence for Approval:

_____ Prepare a response letter by selecting appropriate response type and paragraphs from available templates.

_____ Draft a detailed supporting M/R that summarizes all case actions and provides rationale for protection (harm statements and/or research). (See Memoranda for the Record SOP). (EXCEPTION: There are 3 types of cases for which no MR is needed: GF, NP and Substantive Questions. Seek guidance from Team Leader.)

_____ Ensure that response addresses each portion of the request.

_____ Check spelling and formatting on all correspondence (pay attention to split dates and quotes). (See Drafting Correspondence SOP). Note to activate spell check use the following steps:

- Control 5 to highlight the document
- Tools
- Set Language
- English
- Ensure the 'Do Not Check Spelling or Grammar Is Not Checked'
- Ensure the box 'Detect Language Automatically' is checked and click ok

_____ Ensure case number on letter drafted is correct [serial number on the first letter sent to requester is the same as the case number). Subsequent letters to requester will have a letter after the serial/case number (i.e., A, B, C, etc.). Serial numbers on letters to Contract Submitters are the case number and then – S1, S2, S3, etc., as appropriate. (See Drafting Correspondence SOP).

Additional Steps Needed before sending case forward for approval, sending a case to easy or hard queue, or closing case:

_____ Enter Keywords in the Keywords/Comments Tab, if appropriate, to aid future searches.

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_____ In the Comments section of the Keywords/Comments Tab, document relevant case processing details and case movement (i.e., case forwarded for review or approval; case sent to suspense (include reason); case reassigned to another case officer, etc., with dates and sids). Detailed information and research belongs in the M/R.

_____ Select one of these dispositions, if needed to move the case through the proper approval workflow (GF, NR, NP, PD, FD, or GLOMAR) and check off "yes," "no," or "not addressed" for expedite and fee waiver, as appropriate (See Disposition Codes SOP). Complete fee waiver and/or expedite adjudication fields (see ADMS Case Fields – Decision Process SOP). Also, ensure that the proper Case Exemptions codes are listed on the first CTS screen for Glomar cases and Full Denial cases with no documents.

_____ Complete any necessary Tolling Dates when clarification or fee issues were pending. (See ADMS Case Fields – Decision Process)

_____ Check the classification level and correct it, if needed.

_____ Forward for approval.

_____ When case is returned from approval authority with signed letter, enter a "send date" on CTS Response Letter screen. (Open letter to confirm date was entered in the proper place).

_____ If the FACO Case Officer is providing documents to the requester at this time, stamp the documents with the release date and seal and release the documents, as appropriate (see Seal and Release SOP). When printing documents, using the PRINT OPTIONS, be sure to print DOC ID number on all documents being sent to the requester. Document in the CTS Fee Manager Tab the total number of pages provided to the requester, whether or not it was "released" in CTS. (See CTS Fee Manager SOP)

_____ Print the letter and mail to the requester. If you are providing documents to the requester, a second review must be performed by a peer/team member before mailing the outgoing packet.

_____ If closing the case, ensure that one final disposition is on the case before closing (See Disposition Codes SOP for more instructions.) You must enter the Close Date before the case can be closed.

_____ Forward the case to the appropriate location (Suspense if waiting for referrals, reviews, or payment (include reason)), FOIA Easy queue, or FOIA Complex queue, or Closed Cases if all actions are completed). Notify Ch/DJP4 of the case number, origination date, and to which queue it was sent. (Refer to the Queue Criteria SOP to decide on placement of case in Complex, Easy, or Super Easy queues.)

(U//~~FOUO~~) Content Owner

(b) (3) - P.L. 86-36

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(U) FOIA SOP
(U) Contract Cases

(U) December 2008

(U) Change Number: 02
(U) Date: October 2009

Approved for Release by NSA on
04-21-2011, FOIA Case # 60859

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(U) This Standard Operating Procedure (SOP) explains the steps for processing a FOIA request for NSA contract documents and/or information derived from a contract. It covers the steps to take from receipt of the initial request to completion and closing of the case. Included are listings of the type of information that *generally* may or may not be protected under FOIA. Definitions and past legal advice are sometimes provided as examples of information that may be releasable or withheld pursuant to the FOIA. Finally, a glossary of contract-related terms is included at the end of this SOP.

(U) This SOP is meant only as general guidance and is not meant to substitute or replace factually specific legal advice. The guidance provided is intended only for NSA government and contractor employees who process FOIA cases. Also, sources for Contract/Acquisition related information is contained on web pages "go ACQWEB," and "go BA3." These web pages are maintained by the BA organization.

(U) This SOP is organized as follows:

I. Background Information (4-6)

- A. Numbering System for contracts (what the parts of a contract # mean)
- B. Types of Contracts/Contract Terms Defined

II. Processing a Contract Case (6-11)

- A. Initial Processing
- B. Review of Contract Documents
- C. Finalizing Case

III. Government Information (11, 12)

- A. Gov't Info Generally Protected
- B. Gov't Info Not Generally Protected

IV. Company Information (12, 13)

- A. General Discussion
- B. Company Info Generally Protected
- C. Company Info Not Generally Protected

V. Additional Terms and Release Guidance (13-22)

(alphabetical listing of terms we see most frequently in contract cases, plus guidance we have received on any of the listed terms)

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UNCLASSIFIED//~~FOR OFFICIAL USE ONLY~~**I. (U) BACKGROUND INFORMATION****A. (U) Numbering System for Contracts**

1. (U) When a requester submits a FOIA request for a contract, he/she will either ask for the contract by contract number, common name (project or program name) (such as "Groundbreaker"), company name (to whom the contract was awarded), or category (such as "travel services"). If the request states the contract number, it should look similar to this:

MDA904-01-C-0451

or

H98230-05-C-0629

2. (U) The "MDA904" or "H98230" (part 1) designates the contract as an NSA contract. If it does not start with "MDA904" or "H98230," it is not an NSA contract, and there are two options for responding to requester. First, call the requester and explain it is not an NSA contract. More than likely, the requester will withdraw the request and the case may be closed. Second, prepare a response to requester stating that the contract number does not reflect NSA's contract numbering scheme and administratively close the case. If you know whose contract it is, provide the FOIA address and refer the requester to the proper agency.
3. (U) The "01" (part 2) designates the fiscal year.
4. (U) The letter "C" (part 3) stands for Contract. If the letter "R" appears here, it is a Request for Proposal (RFP) number. (NOTE: an RFP number does not normally match the corresponding last four digits of the subsequent contract numbers.) The letter "A" here refers to a Blanket Purchasing Agreement (BPA). The letter "G" refers to a Basic Ordering Agreement (BOA), which will require a Job Order number (e.g., H98230-04-G-1234, Job Order (JO)0001) to further identify the action. The letter "F" is a GSA contract, a contract placed with or against contracts by other government agencies. The letter "P" refers to a Purchase Order; "D" refers to an Indefinite Delivery Indefinite Quantity (IDIQ) contract, which will require a Delivery Order number (e.g., H98230-05-D-1234, D.O. 0001); "T" refers to an RFP of a small dollar amount; "X" is a credit card order; and the number "1" here refers to a grant. In alphabetic order, for ease of reference, they are:

A	BPA / Blanket Purchasing Agreement
C	Contract
D	IDIQ (Indefinite Delivery Indefinite Quantity)
F	GSA/contract placed with/against another agency
G	BOA / Basic Ordering Agreement
P	Purchase Order
R	RFP / Request For Proposal
T	RFP for small dollar amount

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X	Credit Card Order
I	Grant

5. (U) The last 4 numbers (part 4) represent the sequential numbering system used by the Contracts Office for control and tracking purposes. **Note:** Prior to year 1975, NSA contracts were awarded from Fort Monmouth, NJ. If the fiscal year is "74" or earlier, BA3 may not have the records, but you should still check.

B. (U) Types of Contracts/Contract Terms Defined

1. (U) General Discussion - The government is required, with certain limited exceptions, to promote and provide for full and open competition when soliciting offers and awarding government contracts, pursuant to the Competition in Contracting Act (CICA), enacted in 1984. NSA has an exception to "Full and Open Competition under 10 USC 2304 (c)(6). However, NSA is encouraged to utilize competitive acquisition procedures to the maximum extent practicable from as many potential sources as is practicable.
2. (U) Competitive Acquisition – is a procurement procedure in which two or more sources are solicited for the goods or services needed. The benefits of a "competition" are reduced costs, expanded contractor base, enhancing performance and quality, and improving government/industry relationship.
3. (U) Sole Source – A contract for the purchase of supplies or services that is entered into or proposed to be entered into by an agency after soliciting and/or negotiating with only one source. The "Sole Source" provider is chosen because a Competitive Acquisition would not meet the government's needs in an efficient/effective manner due to cost, schedule, or performance constraints, i.e., it's in the best interests of NSA to go Sole Source. A Sole Source Justification document (CICA recommendation) is required to be written in this instance.
4. (U) Request for Proposal (RFP) – is a solicitation used in negotiated acquisitions to communicate Government requirements to prospective contractors and to solicit proposals. The RFP is the agency's notification to the public of our intention to acquire the goods or services.
5. (U) Proposal – This is the document that a vendor/offeror/bidder/company submits to the agency in response to the RFP. The Proposal is the vendor's attempt to win the contract. (See additional guidance on Proposals in Section IV.)
6. (U) Statement of Objectives (SOO) – The SOO is a government prepared document incorporated into the RFP that states the overall solicitation objectives. The document is used within a performance based acquisition strategy. The SOO is replaced at contract award with the contractor written SOW. See MIL-HDBK-245D for additional information on the SOO or SOW. Also, even though the contractor, i.e., submitter, writes the SOW in this scenario, the SOW becomes a government document at contract award (see #7 below).

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7. (U) Statement of Work (SOW) - The complete description of work to be performed under the contract, encompassing all specifications and standards established or referenced in the contract. An NSA authored SOW is not provided to the submitter at Release Notification. A contractor authored SOW (following a SOO) is provided to the submitter at Release Notification.
8. (U) Modification – Any change to the terms of a contract. A bilateral modification (a.k.a. supplemental agreement) is a modification that is mutually agreed upon by the contractor and the Contracting Officer. A unilateral modification is one that is issued or directed unilaterally by the Contracting Officer. Formal written modifications are usually sequentially numbered, starting with “P0001” and continuing (P0002, P0003, etc.).
9. (U) Technical Task Orders (TTOs) – A Task Order is an order for services placed against an established contract or with Government sources. These TTOs further define the scope of work that the contractor must perform. They are seen as “mini-contracts” as they have their own well-defined SOW, proposed labor hours/labor mix, period of performance and pricing. [Note that contractors have recently raised concerns that release of task order information may reveal specially negotiated unit prices/hourly rates that may be proprietary.
10. (U) Economy Act Order (EAO) / Military Interdepartmental Purchase Request (MIPR) These are used to order goods and/or services from other federal agencies, to include Military Departments and Defense Agencies, and to pay the actual costs of the goods and/or services. The EAO/MIPR can either be incoming (NSA is tasked) or outgoing (NSA tasks another agency). The basics of the EAO/MIPR are to transfer money between agencies to acquire something. Non-DoD orders are executed by issuance of the EAO; within DoD, the MIPR is used. **Note:** The BA3 contracts office is not involved with outgoing EAO/MIPRs. For an example of a request involving an outgoing EAO, see case 59195 (NSA tasked NIH).

(U) II. PROCESSING A CONTRACT CASE (Also reference process flow charts 1 & 2)

A. (U) Initial Processing

1. (U) A FOIA request is received for one or more contracts. Case is scanned into CTS and assigned to a Case Officer on the FOIA Access and Customer Outreach (FACO) Team. Generally, a contract case is one company seeking the contract NSA entered into with a different company. Therefore, the requester is generally considered “commercial” for fee purposes. (See Fee Procedures SOP.)
2. (U) If a FOIA requester asks for a contract “and all supporting documents,” he/she is seeking the Contract, all modifications, the SOW, the proposal, and the TTOs. (NOTE #1: Some contracts have no mods or TTOs.) (NOTE #2: Section J of most contracts contains a list of attachments to the contract. BA3 should provide all of the listed attachments.) Most contractor proposals are exempt from disclosure under FOIA (see additional guidance on Proposals throughout this SOP). However, if a proposal is specifically requested, Case Officer incorporates language from the “Proposal”

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template letter into the initial letter to the requester. Please note that a request for “all documents related to the contract” might include “correspondence.” However, because “correspondence” could entail voluminous material to review (i.e., all emails pertaining to a contract), Case Officer should ask the requester to clarify or specifically identify the documents he/she is seeking.

(b)(3)-P.L. 86-36

3. (U//~~FOUO~~) Because of the new FOIA legislation (December 2007), generally speaking, agencies can no longer charge search fees for FOIA cases that are not completed within the 20-day deadline. Because contract cases require submitter notification, they cannot be completed in the timeframe, and this Office will no longer seek search fees from the requester unless the documents are voluminous and the requester does not wish to narrow. Therefore, the Case Officer should prepare a Search Memo and send it (via email) to the Contracts Office (BA3). [REDACTED] is the current point of contact (POC) in BA3. If the documentation for your specific contract is not voluminous, the POC should conduct the search and provide the records. If the documentation will be extensive, the Contracts POC should contact the Case Officer to discuss the volume of material, and the Case Officer will need to contact the requester to determine willingness to narrow. Provide BA3 seven working days to respond, or five days for response if expedited processing is granted. (However, be aware that contract cases are rarely, if ever, expedited.) Record the BA3 search fee in “Search Costs Contract Cases” document within “DJ4 Working Lists” folder on shared drive Gregorian; do not record this fee within the case Fees Manager tab.

NOTE: The Search Request memo includes a paragraph asking that the Contracts Office also provide to DJP41 a copy of the RFP and the “Dear John letter,” the letter that the Contracts Office sends to all losing bidders. These items are needed when the Case Officer is determining which information can/cannot be protected. These items can be scanned into the case file as correspondence, or scanned into the Documents tab and titled “Non-Responsive – For Reference Purposes Only.”

4. (U) Once the volume of responsive records has been determined, the Case Officer can prepare an initial response letter and MR to address fees and determine the Requester’s willingness to pay. Since review and duplication costs sometimes fluctuate from the estimate to the actual costs, the initial response letter can request remittance of only one-half of the estimated review/duplication costs or a “willingness to pay” statement. Case Officer can estimate the review time by actually reading 1-5 pages of the contract documentation and extrapolating the time it would take to review all of the pages. The review may be 1-4 minutes per page and will depend on the complexity of the documents and possible coordination with the Program Management Office. If the documents are complex or voluminous and a DJP42 Reviewer will actually be conducting the review and release determination, then the Case Officer should consult with the Review Team to estimate the review time that will be charged to requester. Case Officer will send the initial letter explaining fees and preliminary processing information to requester, who has 15 calendar days in which to reply. This step is considered a “Toll Period” with toll data entered in the appropriate Highview data fields.

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5. (U) If the requester does not reply within the time frame, case is administratively closed with a FEE disposition (close the toll period also, to match case closed date). If the requester responds with a payment or willingness to pay statement (in accordance with the Fee Procedures SOP), then Case Officer may begin to review the documents.

NOTE: (U) The Case Officer should review the responsive contract documents for difficulty level and consult with FOIA Chief or Team Leader, if necessary. (You can also use the Queue Criteria SOP as a guide.) If the difficulty and volume of material are not excessive, then the FACO Case Officer continues to process the case. If, however, the difficulty and/or volume is/are great, then document review should be conducted by the DJP42 Review Team.

B. (U) Review of Contract Documents

1. (U) Case Officers should keep track of the time they spend reviewing the contract documents so that the proper fees can be charged to the requester. The first review of contract documents that must be done is a review to remove any NSA information that requires protection. This includes the names of NSA employees, project or program names (as applicable), sensitive functions and activities of NSA (see section III), prices for background investigations (see section V), and classified information. Generally, project or program names are protected; however, program names that have been publicly discussed (such as Groundbreaker and Trailblazer) in press releases, etc., do not require protection. For classified contract documents, seek assistance from and coordinate with the OPI, Review Team, etc.

NOTE: (U) When the contract documents are available in the Documents tab, see the SOP "Document Processing/Naming Contract Cases," for guidance on the naming conventions used at each processing step within a contract case.

2. (U) Using the CTS online redaction system, the Case Officer conducts a page-by-page review of the responsive records that have been scanned into the case. NSA information that requires protection is redacted and the appropriate exemption is noted.
3. (U) **Information** that is **required** from submitters in order to engage in contracting with the government may be protected if release would: 1) impair the government's ability to obtain similar information in the future; or 2) cause substantial competitive harm to the submitter. Information that is **voluntarily provided** by a submitter, and is not customarily released to the public, can usually be protected. While it may be considered a voluntary action for a contractor to enter into business with NSA, once that voluntary decision is made, there is certain information from the contractor that is required in order for them to do business with the government. NSA must first notify a submitter before releasing contract documents.
4. (U) When review and redaction of NSA information have been completed, Case Officer prepares a "Release Notification" letter. This is a letter that NSA sends to the submitter (the company with which NSA has entered into the contract) to explain that their contract has been requested under FOIA. If the responsive records include resumes of company employees, add the "resume" template paragraph to the letter. Prior to sending the "Release Notification" letter, Case Officer should call the submitter

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to verify the proper address, point of contact, and their facsimile number and e-mail address. Many times, a company has headquarters in one location (possibly out of state) and satellite offices in one or more other locations (sometimes with an office close to NSA for convenience). If we simply use the address on the contract documents, we risk having the documents sent to the wrong location and being re-routed. When we call to verify an address, the company can provide the name and address of the proper person who needs to review the documents. This avoids unnecessary delays and extensions to the deadline. If there is no phone number on the contract, contact the Contracting Officer for the contract, as he/she may be able to provide a phone number for the company. The Program Management Office (PMO) may also have the necessary contractor information. After the contact information is confirmed, the Case Officer sends this letter along with a sealed copy of all of the responsive contract documents showing the NSA redactions (**RelNot** documents). **Note:** This notification will be through facsimile (if under 30 pages) or e-mail (if over 30 pages), AND regular mail. The submitter has 15 days from the date of the letter (calendar days) in which to request and justify any information that they want withheld under exemption (b)(4). This step is not considered a toll period. Pursuant to the latest DoD Manual 5400.07-M, "DoD Freedom of Information Act (FOIA) Program," the Case Officer should notify the Requester when NSA notifies the submitter of a FOIA request and asks for their comments.

5. (U) If NSA does not hear from the submitter within those 15 days, then the contract is releasable with NSA redactions only. **Note:** The Case Officer should contact the Submitter a few days after the facsimile or e-mail has been sent to verify receipt of the information.
6. (U) If the submitter replies and requests that NSA protect additional information, Case Officer sends submitter's reply and documents with requested redactions to the CPC to be scanned into the case. The letter is scanned into the case under "Requester Letters" and should be labeled "Submitter Response #1." The submitter's documents with requested redactions should be scanned into the Documents tab and labeled "Submitter's returned copy of Contract #_____." **Note:** any response from submitter is scanned into CTS whether they request redactions or not (in order to have a complete administrative record).
7. (U) Case Officer reviews the requested redactions and justification provided. Based on the guidance included in this SOP, Case Officer determines which of the submitter's requested redactions are valid in accordance with the (b)(4) exemption and can be supported by case law. If there is inadequate guidance on any particular items, Case Officer should provide copies of the requested documents and the submitter's response to the Office of General Counsel (Acquisition and Logistics) (D25) for (b)(4) guidance. The Case Officer may also need to consult with the Contracting Officer (CO) for that particular contract. The CO can provide additional insight and guidance on items within a contract that should or should not cause a company competitive harm. [**Note:** legal advice on exemptions other than (b)(4) should be requested of OGC/Lit (D28).]
8. (U) Using the submitter's supporting documentation and any OGC guidance obtained,

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Case Officer conducts another review of the responsive records. Submitter should include specific examples of competitive harm that will come to his/her company if certain information is released. If some of the submitter's redactions are valid (but not all), the Case Officer creates another version (from the "in work" version of the sealed **RelNot** documents) of the documents and names them with "**SorRel**" in the title; and then redacts any additional information that can be legally justified, marking it with the (b)(4) exemption. If NSA agrees to withhold everything that the submitter requested, then no additional correspondence with the submitter is required (the documents can be named "**FinRel**"), unless the submitter has asked for pre-release notification after NSA's final determination.

9. (U) However, if NSA does not believe some or all of the submitter's requested redactions can be justified, then a "Sorry Release" letter must be sent to the submitter. This letter tells the submitter that we are not withholding all that they have requested under (b)(4) because it does not meet the criteria or they did not provide adequate justification. This letter may require coordination with the Office of General Counsel (OGC/Acquisition and Logistics/D25); confer with the FACO Team Leader for help in this determination. As applicable, Case Officer should send D25 a copy of the "Sorry Release" letter, the documents as we plan to release them and the submitter's justification. OGC Litigation (the FOIA attorneys) should be copied on that email. Seal and print the **SorRel** documents and enclose them with the sorry release letter so that the submitter knows what is and is not being withheld: *Caveat Only print and provide the pages that contain (b)(4) redactions that we did not agree to.* Submitter has 15 days from the date of the letter (calendar days) in which to contact the FOIA Office and protest our decision or file a "reverse FOIA" lawsuit. If Case Officer does not hear from the submitter within those 15 days, the contract may be stamped, sealed, and released to the requester (see Item C below). This step is not considered a toll period. Pursuant to the latest DoD Manual 5400.07-M, "DoD Freedom of Information Act (FOIA) Program," the Case Officer should notify the Requester when NSA advises the submitter that the requested information will be released over the submitter's objections.
10. (U) If the submitter responds in writing to the "Sorry Release" letter, Case Officer should send the letter to the CPC to be scanned into the case under "Requester Letters," and it should be labeled "Submitter Response #2." Case Officer reviews submitter's additional justification and consults with Team Leader, FOIA Chief, and OGC, as necessary. If applicable, Case Officer unseals the **SorRel** documents and redacts any additional information that has been justified and reseals the document; final processing of the case can be completed. The final MR for the case should reflect the submitter's response (or non-response) to the "Sorry Release" letter.

C. (U) Finalizing Case

1. (U) All of the actual review and duplication fees need to be addressed in the final letter, which can be drafted and sent, along with the stamped, sealed, and released (**FinRel**) documents (see #2 below for exception). The **FinRel** documents are those created from the "in work" version of the **SorRel** documents, and documents that did not require submitter review. The requester has 30 days to remit the final payment. Once payment

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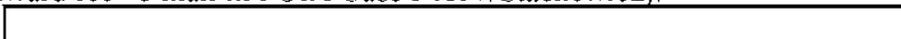
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is received, case can then be closed with the proper disposition. Most contract cases are closed with a partial denial (PD) disposition since there are usually NSA redactions (such as NSA employee names). Waiting for the final payment is a Toll period and the tolling data fields should be completed. In addition, create a document index as applicable for the **FinRel** documents.

- 2. (U) If the requester is a FOIA request clearing center (i.e., makes FOIA requests in order to “sell” the documents to interested parties or makes requests on behalf of anonymous requesters) (examples: Freedom InfoSource, INPUT, and Fed Sources), Case Officer drafts a “Payment Required” letter. **Note:** If this type of requester has a good payment history, the “Payment Required” letter would not be necessary. Once fees are paid within 30 days, the final letter can be sent with the stamped, sealed, and released documents. Case can then be closed as in #1, above.
- 3. (U) If fees are not paid, the case is closed with a “PD” disposition (since requester did not pay for costs actually incurred, and documents were provided) and the requester’s name, and company name if commercial, is added to the “Delinquent Payers List” on the shared drive (Dc34\$ on ‘gregorian’) in the “DJ4 Working Lists” folder. Close the toll period also; to match the case closed date.

(U) III. GOVERNMENT INFORMATION

A. (U) Government Information Protected Under FOIA

- 1. NSA/CSS employee names - (b)(3)/Public Law 86-36
- 2. Sensitive functions and activities of NSA – (b2) and/or (b)(3)/P.L. 86-36 (see note below for example)
- 3. Information that is pre-decisional and deliberative - (b)(5)
- 4. Classified information – (b)(1)
- 5. Performance Evaluation Board Reports, – (b)(5)/pre-decisional (See “OGC (b)(3)-P.L. 86-36 Guidance/Award fee” e-mail in FOIA Case 54859/Stachewicz).
- 6. (U//FOUO) 



B. (U) Government Information Not Protected Under FOIA

(b)(3)-P.L. 86-36

- 1. Handwritten or typewritten agency employee initials
- 2. Award Fee Determinations. These are documents discussing the award fees granted by the NSA Fee Determination Official (FDO). 



(b)(5)

~~UNCLASSIFIED // FOR OFFICIAL USE ONLY~~(U) IV. COMPANY INFORMATIONA. (U) General Discussion

In order for contractor information to qualify for withholding, the information must be either (1) a trade secret (as defined in **Trade Secrets** below); or (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. There are two prongs for determining if the commercial or financial information is “confidential” in order to apply the (b)(4) exemption. Commercial or financial information is “confidential” for purposes of 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. Determining if one of these two applies is sometimes called the “**two-prong test.**” The submitter must include a justification that fully explains how its information is exempt from release (e.g., explaining the competitive harm prong). The application of the two-prong test to determine confidentiality is for information whose submission was required. Information that is “voluntarily” submitted to the government is categorically protected as “confidential” provided it is not “customarily” disclosed to the public by the submitter. While it may be considered a voluntary action for a contractor to enter into business with NSA, once that voluntary decision is made, there is certain information that is required from the contractor in order for them to do business with the government. General categories of information that may be or may not be withheld are listed below. Each one will need to be looked at based on any justification provided. Additional information regarding withholdings is included in **ADDITIONAL TERMS AND RELEASE GUIDANCE** (below).

B. (U) Company Information That May Be Considered for Protection Under FOIA

1. Proposals - (b)(3)/10 USC 2305(g) – If Not Incorporated Into Contract (See additional guidance on Proposals in Section IV.)
2. Proprietary Information that would cause a company competitive harm in the marketplace - (b)(4)
3. G & A (General and Administrative) Rates - (b)(4)
4. Burden Rates - (b)(4)
5. Trade Secrets - (b)(4)
6. Unsuccessful Bids - (b)(4)
7. Company’s Tax ID Number (TIN) - (b)(3) (26 USC 6103, 6109). If a company is a sole proprietor, the TIN might also need to be withheld under (b)(6).
8. Individual’s Tax ID Number (TIN) - (b)(3) (26 USC 6103, 6109) and (b)(6)
9. Resumes of general company employees - (b)(6)
10. Voluntary Information not normally provided to the public - (b)(4) (examples include descriptive literature and prices we did not ask for)
11. Abstracts of Offerors - (b)(3) (USC 2305 (g)). (See “Bid” below for full details.)
12. Hourly Rates – on a case-by-case basis after submitter justification. See “Hourly Rates / Unit Prices” in **Additional Terms and Release Guidance** (below) for a more detailed explanation of what to protect.
13. Evidence of pricing strategy, such as corporate decrements.

C. (U) Company Information Not Protected Under FOIA~~UNCLASSIFIED // FOR OFFICIAL USE ONLY~~

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1. Company Employee Names
2. Company Employee Resumes (high level executives)
3. Contract Signatories (regardless of position)
4. Option Year Pricing (on a case by case basis)
5. Cost Plus Fixed Fee (CPFF) amounts (further defined below)
6. Cost Plus Award Fee (CPAF) amounts (further defined below)

(U) V. ADDITIONAL TERMS AND RELEASE GUIDANCE

(For any items listed below that indicate they can or should be protected, it should always be based on a submitter's justification for withholding following submitter notification of the FOIA request. If the submitter does not identify competitive harm or ask us to withhold the information, whether or not it would qualify is not at issue. [redacted])

[redacted]

(b)(5)

(U) Abstract – A list of all the bids submitted in response to an RFP. For details on release, see **Bid/Offer** below.

(U) Attachments (Section J) – The list of contract attachments are shown in Section J of the contract schedule document. Generally, the attachments will consist of the Contract Data Requirements List (CDRL), SOW, and DD254 (Contract Security Classification Specification), but will depend on the actual contract. Also, generally, most attachments do not require Submitter review, and some, like the Department of Labor (DOL) Wage Determinations, do not require any review (the DOL data is publicly available on the Internet, but we do provide the requester a copy of this attachment at Final Release). For an example of a lengthy Section J, see case 53453.

~~(U//FOUO)~~ **Background investigation (BI) services (or SSBI)** [redacted]

(b)(5)

[redacted]

(b)(3)-P.L. 86-36

~~(U//FOUO)~~ **Bid Protest** – losing bidders may file a formal protest if they believe a contract has been or is about to be awarded in violation of laws or regulations. When a company is notified that they are not the winning bidder, they have 10 days in which to file their protest. [redacted]

[redacted] DA32, Dec. 2004). If NSA receives a protest, the request by the protester for a proposal or contract information will generally come in to DA3 or OGC directly from the protester as information requested pursuant to the protest rather than be submitted as a FOIA request to the FOIA office. If FOIA requests are received pertaining to contracts in litigation (such as a protest or a contract claim), those requests should be referred to OGC.

(U) Bid/Offer – These two terms have the same meaning, but in FOIA cases, requesters use the term “bid” more frequently. In the discussion below, the term “offer” may be substituted for the term “bid” without changing the meaning.

(U) A bid (or an offer) is a response submitted by a company to a Request for Proposal (RFP) (also known as a “proposal”). It contains pricing (how much does the company need to be paid to do the work or provide the services) and other details. A bid is *not* voluntary; it is

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required in order to do business with the government (some submitters try to argue that their bid was voluntary and thus should be protected).

(U) Requesters may ask for an "abstract of bids," "bid abstract," "list of bids," or "all bids in response to solicitation (or RFP) #MDA904-01-R-####." Only the winning bid information can be released in response to these requests. Or, if the requester is one of the submitters and requests a bid abstract, we are permitted to give them a bid abstract showing only the winning bid information and their own bid. Bids are protected pursuant to FOIA exemptions (b)(3) (10 USC 2305(g)) and (b)(4) (proprietary information), the same way that proposals are protected. (For an example of an abstract released in part – see FOIA Case 55537, A3328848/page 24)

(b)(5)

~~(U//FOUO)~~ **Breakdown of Costs** – Such information includes general and administrative (G&A) costs, burden rates, profit, overhead, etc. This type of information is protected using exemption (b)(4).

[Redacted]

(b)(3)-P.L. 86-36

(U) Burden Rates - Those costs that cannot be attributed or assigned to a system as direct cost. Burden Rates typically include Overhead and G&A costs.

(U) Company Letterhead – the fact that a company submits something to the government on company letterhead does not necessarily make the document proprietary. A document written on company letterhead is releasable once classified, proprietary, and/or other FOUO information (such as NSA employee names) is redacted within the document.

(U) Compelled Information – Information that is compelled in response to an RFP; information that is required from a contractor in order to do business with (contract with) the government.

(U) Generally, compelled information is releasable unless justification is provided that demonstrates the competitive harm prong.

(U) Competitive – *(defined under the Section I Types of Contracts)*

(U) Competitive Harm – examples of competitive harm include information that, if released, might reveal a company's pricing strategy, profit margin, overhead costs, etc. Protect using (b)(4).

[Redacted]

(b)(5)

(U) Compliance Matrix – a compliance matrix (for the winning offer) is part of the evaluation of offers performed by the government prior to an award.

~~(U//FOUO)~~ In one FOIA case, the requester was seeking the "technical compliance matrix for the winning bid" and the "criterion to evaluate the technical portion of the bid." Both items were determined to be exempt under (b)(5) as they are pre-decisional.

[Redacted]

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(b)(5)

[Redacted]

(b)(3)-P.L. 86-36

(U) Corporate Decrement – Corporate decrement occurs when a company agrees to share the cost with the government, caps the cost, or otherwise absorbs certain contract costs as part of its bidding strategy to win a contract.

~~(U//FOUO)~~ A submitter asked that pricing structure be withheld as they had incorporated a “management reduction” (lower prices) to win the contract. If a submitter asks that this type of info be withheld, it should be withheld.

[Redacted]

[Redacted]

(b)(5)

~~(U//FOUO)~~ **Cost Incentives Awards for Performance** –

[Redacted]

[Redacted]

(b)(5)

(U) Cost Plus Award Fee* (CPAF) contract – Combines characteristics of CPFF and CPIF contracts (see FAR part 16-405-2). Usual elements include: a scope of work statement, the criteria against which the contractor’s performance will be evaluated, an estimated total cost, a minimum (base) fee, and a maximum fee. The quality of the contractor’s performance is usually evaluated quarterly by the Government with written reports (Award Fee Determination memorandums) furnished to the contractor calling attention to both meritorious work and to any deficiencies, offering opportunities for corrective action to improve subsequent performance. Contractor’s Award Fee for the period evaluated is determined subjectively by the technical element’s evaluation board. The Fee Determination Officer (FDO) sends a written memo to the Contracting Officer who then writes a modification to the contract denoting the Award Fee.

~~(U//FOUO)~~ In most cases, all of these figures can be released.

[Redacted]

[Redacted]

(b)(5)

(U) Cost Plus Fixed Fee* (CPFF) – Provides for negotiated estimate of costs and payment of a fixed dollar amount for fee (profit) to contractor; fee is adjustable only on a basis of change in work or service to be performed (e.g. additional tasks) (see FAR part 16.306). Contractor is paid allowable and allocable costs subject to the limit of estimated cost amount.

(U) In most cases, all of these amounts can be released.

(U) Cost Plus Incentive Fee* (CPIF) - Provides a target cost, a target fee, a minimum fee and a maximum fee, and a fee adjustment formula; all of which are established during initial negotiations (see FAR part 16.405-1). Upon contract completion, the formula is applied and subject to the minimum and maximum fee limits, the fee is adjusted. An INCREASE from target fee can be obtained when the contractor has actual costs that are less than target cost. A DECREASE from target fee would result when the contractor’s actual costs are more than target

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cost. May incorporate delivery and/or performance incentives, however, it must include a cost incentive provision.

(U) As of date of this SOP (30 September 2005), we have not had a request for this specific type of contract, and therefore, have no release guidance, to date.

***Note:** The term "Fee" does not equate to "Profit." It is the price to be paid to the company for carrying out the terms of the contract.

(b)(5)

~~(U//FOUO)~~ **Cumulative Not-To-Exceed Pricing** - This does not reveal individual pricing but instead represents the total dollar amount that an agency has obligated or allotted to the contract.

[Redacted]

(b)(3)-P.L. 86-36

~~(U//FOUO)~~ **Defunct Company** -

[Redacted]

[Redacted]

(b)(5)

~~(U//FOUO)~~ **Documentation (pertaining to a contract) that is 25 years old or older** - Refer to TOOLKIT - Local Guidance - Proprietary/Copyright/Patent (guidance provided by [Redacted] [Redacted] OGC, for Executive Order/25-year review).

(b)(3)-P.L. 86-36

~~(U//FOUO)~~ **Equipment Line Items** -

[Redacted]

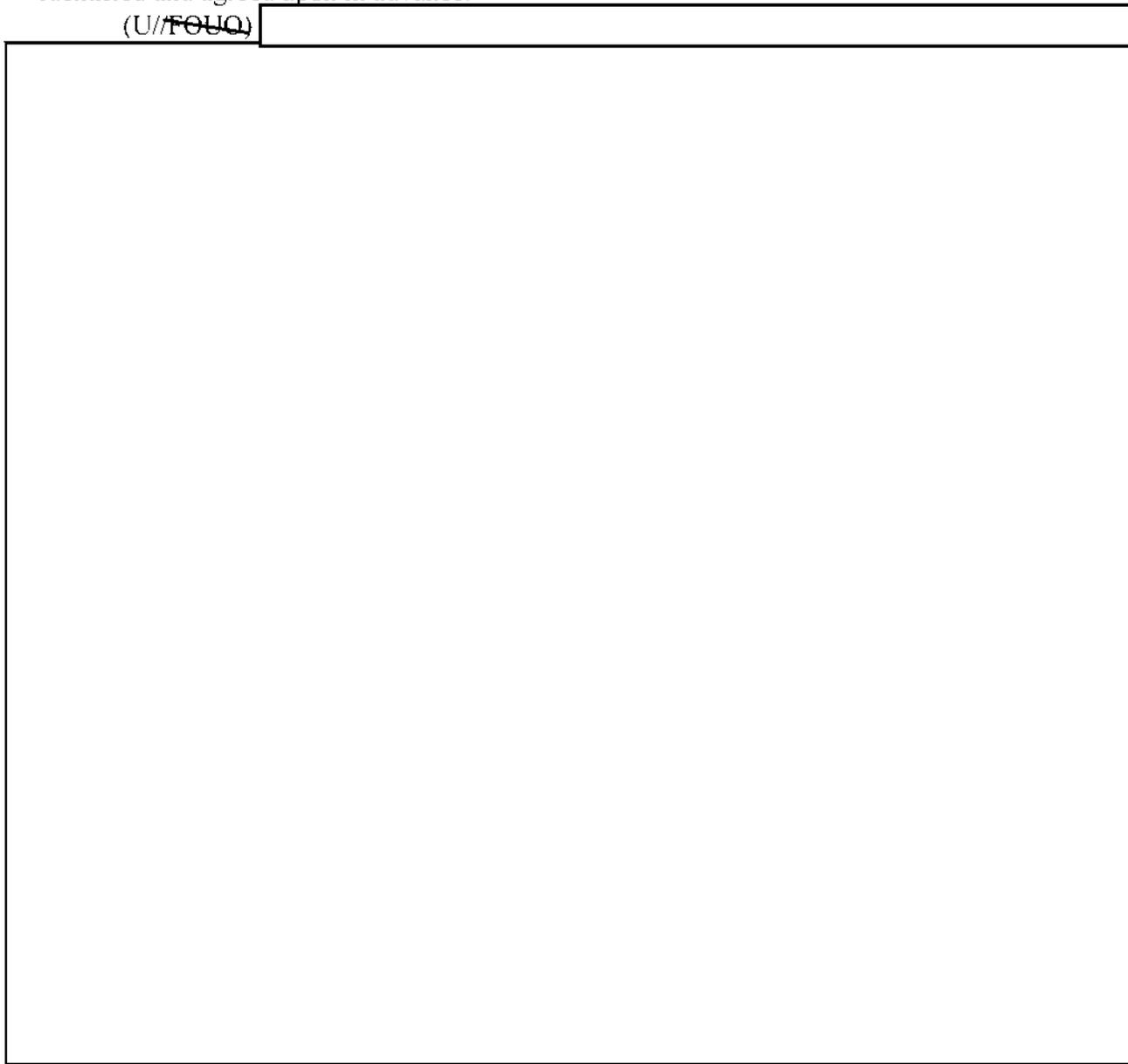
[Redacted]

(b)(5)

(U) **Fixed Price Level of Effort (FPLOE)** - An FPLOE-type of contract describes the scope of work in general terms, normally requiring submission by the contractor of reports which show the results achieved through application of required level of effort. However, payment is based on the effort expended, not on the results achieved. An FPLOE contract has fixed hourly labor rates, by labor category, along with estimated number of hours. The fixed hourly rates include direct labor cost, overhead costs, general and administrative costs, plus profit. It is most applicable when the work cannot be clearly defined and the level of effort desired can be

identified and agreed upon in advance.

(U//FOUO)



(b)(5)

(b)(3)-P.L. 86-36

Loaded rates are generally built up to include all of the contractor's costs and profits not reimbursed elsewhere under the contract. So a loaded rate might include the contractor's actual labor cost, plus site and home office overhead, plus profit, perhaps facility costs, general and administrative costs, etc., all aggregated together on an hourly or per unit cost. Any cost not otherwise provided for in the contract should be included in that aggregate rate. This is why, in a Time and Materials (T&M) contract, for example, we don't really give anything away by releasing the loaded rate, but if we release information that allows competitors to break that loaded rate into constituent components (such as profit and overhead) then the vendor's proprietary information has been compromised.

(U//FOUO) "For Use Under Government Contract" – This is a caveat that may appear on

documents originated by a company, such as a national lab, working under contract with the government.

[Redacted]

(b)(5)

~~(U//FOUO)~~ **General & Administrative (G&A) Rates (or expenses)** – Any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G & A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

(b)(3)-P.L. 86-36

(b)(5)

~~(U//FOUO)~~

[Redacted]

(b)(3)-P.L. 86-36

(U) Hourly Rates / Unit Prices – Some courts have held that hourly rates are the same thing as unit prices, and generally, unit prices cannot be protected. Since not all courts agree, we must still notify the submitter and obtain their input prior to release.

Service Contract Act (SCA) or Wage Determination Contracts – In terms of the submitter's actual bid rates, there is no distinction between SCA covered contracts and contracts not subject to SCA. In SCA contracts, Dept. of Labor issues minimum hourly rates for specific jobs. (For example, there may be a minimum hourly rate that DoL has set for NSA Blue Blazers.) These rates are available on the Internet and are often cited by the Agency within RFP's. For this reason, SCA rates are not proprietary and can be released.

[Redacted]

(b)(5)

(U) Modifications – *(defined under the Section I Types of Contracts)*

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~~(U//FOUO)~~ **Outdated Company Proprietary Information** – Outdated company information refers to older information related to a contract or a company (company still exists), but may also apply to information from or about a company that is now defunct (see also Defunct Company). Generally, the Contracts Office only maintains contract documentation for six years after conclusion of the contract. For purposes of Executive Order review of 25-year-old material, outdated information is protected. For FOIA purposes, we must attempt to determine what has happened to the defunct company (who bought it, who currently owns it) and contact the new company with submitter notification in order to obtain justification for withholding. If all attempts at identifying the new company fail, we can err on the side of caution as indicated here. The rationale for protecting seemingly outdated company information in Executive Order Reviews:

1. We must ensure that a company’s competitive position is not harmed by a government release. “Better safe than sorry” must be our motto. If challenged on the protection of information, action would be turned over to the FOIA office to pursue the need to protect with the company. (See also **Competitive Harm**)
2. How can technology be considered a trade secret after 25, 30, 50 years? There may be a modern day use for a technology that otherwise appears to have been superseded. Since we are not experts in these technologies and certainly do not know how they may affect a company’s current efforts, we must err on the side of caution. (See also **Trade Secrets**)
3. Profit margins may not have changed significantly with the passage of time. Therefore, revealing a company’s profit margin of 25 years ago may reveal profit margins the company enjoys today. (See also, **Breakdown of Costs** and **Competitive Harm**.)
4. Direct labor rates are releasable because labor rates have changed so dramatically over the least 25 years (e.g., the minimum wage is markedly higher today than it was 25 years ago).

[Redacted]

(b)(5)

[Redacted] Also the Department of Justice has issued guidance (See FOIA & PA Overview, dtd Sep. 1998, pp. 158-169) that has the practical effect of encouraging agencies to release labor rate information in the FOIA context. [Redacted]

(b)(3)-P.L. 86-36

[Redacted]

~~(U//FOUO)~~ **Overtime Rates** - In Case 43069, the submitter asked that we redact the overtime rates as they had made a management decision to lower their overtime rates to make them as competitive as possible and felt that release of this information would give another company insight into the strategic decisions they made and cause them competitive harm. [Redacted]

(b)(5)

[Redacted]

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~~(U//FOUO)~~ Past Performance Information (PPI) -

[Redacted]

[Redacted]

(b)(5)

(b)(3)-P.L. 86-36

(U) Proposals - Some requesters ask for the "Proposals" that were provided to NSA by the companies who bid on a solicitation. NSA withholds all proposals under the (b)(4) exemption, because they contain proprietary information, and under the (b)(3) exemption, because 10 USC 2305(g) exempts proposals from disclosure if they have not been "incorporated into the contract." NSA's standard practice is to not incorporate a proposal into a contract. We deny the proposals in the initial letter but still offer to search for and review them if the requester so desires and expresses his willingness to pay applicable fees. The reason a requester may choose this option is that he/she would like to have the required appeal rights to pursue further legal action. Case Officer must add language from the "proposals" template letter into the initial response letter.

(U) Proprietary Information - Information contained in a bid or proposal or otherwise submitted to the Government by a competing contractor in response to the conduct of a particular Federal agency procurement, or in an unsolicited proposal, that has been marked by the competing contractor as proprietary information with applicable laws and regulation.

~~(U//FOUO)~~ Regional Salary Data or Rates -

[Redacted]

[Redacted]

(b)(3)-P.L. 86-36

(U) Request for Proposal (RFP) - *(defined under the Section I Types of Contracts)*

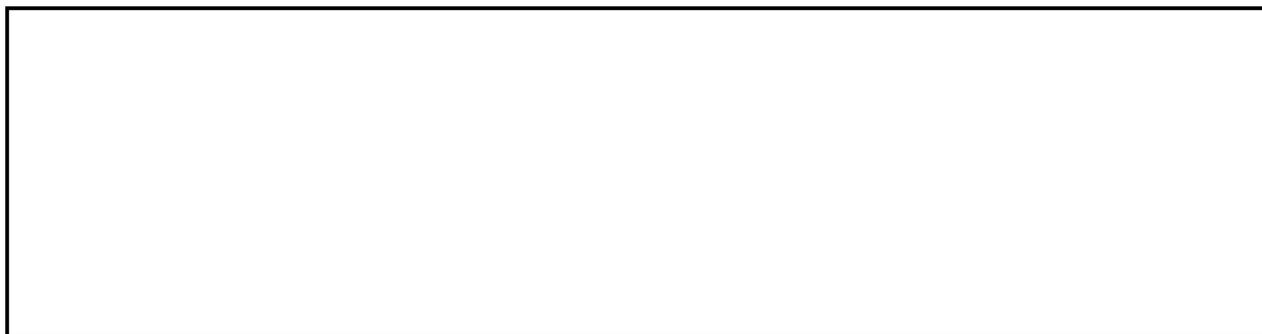
(b)(5)

~~(U//FOUO)~~ Security of a Company's Facility -

[Redacted]

[Redacted]

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(b)(5)

(U) **Sole Source** – *(defined under the Section I Types of Contracts)*

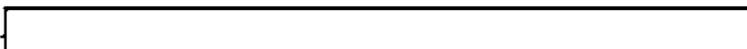
(b)(3)-P.L. 86-36

(U) **Source Selection Authority** - The Contracting Officer who makes the final determination of the successful offeror in an evaluated procurement.

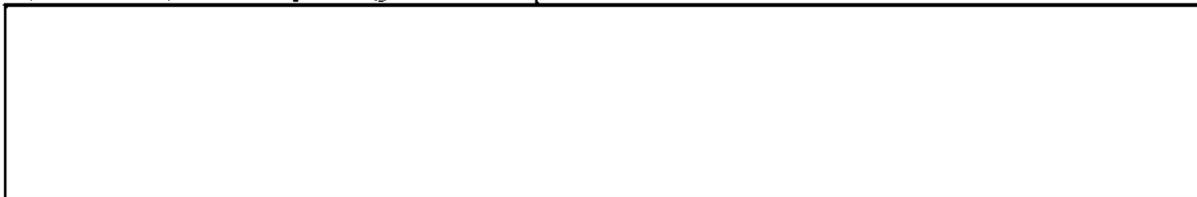
(U) **Statement of Work (SOW)** – *(defined under the Section I Types of Contracts)*

(U) **Technical Task Orders (TTOs)** – *(defined under the Section I Types of Contracts)*

(U//~~FOUO~~) **Tiered pricing structure**

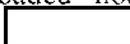


(b)(5)



(U//~~FOUO~~) **Time and Material and Award Fee Pool Not-To-Exceed** – Generally, the government does not consider the release of time and material costs and award fee pools to cause a company competitive harm. However, on a case-by-case basis, NSA may make a determination to withhold these. For example, in FOIA Case 43912, submitter asked that these costs be protected. In the contract, the Time and Material rates were broken into “Government Site” and “Contractor Site.” Contracting Officer was consulted because these figures are not usually protected. The CO replied that the Time and Material rates were “fully-loaded” hourly rates and that the T&M and Award Fee Not-To-Exceed rates should be withheld.

(b)(3)-P.L. 86-36



(b)(5)



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[Redacted]

NOTE: *There is additional discussion about "loaded rates" in the Fixed Price Level of Effort (FPLOE) section.*

(U) Trade Secrets – A trade secret, as defined by the courts for FOIA purposes, is “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.” In layman’s terms, a trade secret is any formula, pattern, device, or compilation of information used in a business to obtain an advantage over competitors who do not know or use it. A particular technology (“how to build a widget,” for example) may be a trade secret.

[Redacted]

(b)(3)-P.L. 86-36

(U//~~FOUO~~) Unit prices and quantities – FAR Part 15 sets out the presumption that unit prices and quantities will generally be released (example: 50 computers @ \$70 each) based on the assumption that the information does not reveal confidential business information. However, that presumption has been questioned by several U.S. court decisions. Therefore, even though we generally release unit prices, submitter notification should be given and the justification reviewed prior to deciding upon release, and release of unit prices may depend on the U.S. Federal Court Circuit in which a FOIA case is litigated.

(U) Voluntary Information - Information that is voluntarily submitted by a company responding to an RFP. Often constitutes “proprietary information.”
Generally, voluntary information is protected.

(U//~~FOUO~~) SOP Custodian:

[Redacted]

DJP41

(b)(3)-P.L. 86-36

Redaction Exemptions

This document is a compilation of different exemptions codes used during E.O. 12958, as amended, Freedom of Information Act (FOIA), and Privacy Act (PA) reviews.

1. **E.O. 12958, as amended**
2. **FREEDOM OF INFORMATION ACT**
3. **PRIVACY ACT**

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E.O. 12958, as amended, Exemptions (Main Menu)

There are nine (9) exemptions to the 25-year automatic declassification requirement:

[25X1](#) [25X2](#) [25X3](#) [25X4](#) [25X5](#) [25X6](#) [25X7](#) [25X8](#) [25X9](#)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X1: Reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States.

[\(return\)](#)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X2: reveal information that would assist in the development or use of weapons of mass destruction.

[\(return\)](#)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X3: reveal information that would impair U.S. cryptologic systems or activities.

[\(return\)](#)

UNCLASSIFIED

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X4: reveal information that would impair the application of state of the art technology within a U.S. weapon system.

(return)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X5: reveal actual U.S. military war plans that remain in effect.

(return)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X6: reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States.

(return)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X7: reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized.

(return)

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An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X8: reveal information that would seriously and demonstrably impair current national security emergency preparedness plans.

(return)

An agency head may exempt from automatic declassification specific information, the release of which should be expected to:

25X9: violate a statute, treaty, or international agreement.

(return)

UNCLASSIFIED

Freedom of Information Act (FOIA) Exemptions

(Main Menu)

I. Overview

II. There are nine (9) exemptions:

b(1) b(2) b(3) b(4) b(5) b(6) b(7) b(8) b(9)

Overview of the Freedom of Information Act's Nine Exemptions

This page provides a brief introduction to the Freedom of Information Act and its nine exemptions.

Introduction to the Freedom of Information Act

The Freedom of Information Act (FOIA) is a broad public disclosure statute whose intent is to make sure that federal government agencies are not creating secret law or making decisions in secret. FOIA attempts to fulfill the proposition that persons who have access to government information are better informed about what the government is up to. As a result, FOIA mandates that each federal government agency, including the National Security Agency (NSA), make available certain agency information in the Federal Register, or when information is not required to be in the Federal Register, it must be made available by an agency for public inspection and copying. Whenever a request from any person for information contained in agency records is not provided or made available in the foregoing formats, it must be provided by the agency to the requesting person.

Agency records are documents either created by or obtained by an agency, and the agency has used the documents in connection with its official and legitimate duties or pursuant to federal law. Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

The exception to the mandate that agencies provide information to requesters is FOIA's nine exemptions. These exemptions provide an agency with the authority to withhold information contained in an agency record when a valid exemption applies to the information. While these exemptions provide the authority to withhold information, FOIA, consistent with its disclosure posture, requires that agencies provide portions of a record which are not covered by a valid exemption, even though other parts may be covered by a valid exemption. The FOIA does not demand that agencies invoke exemptions to protect information. The use of exemptions is discretionary, and agencies may waive applying an exemption.

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FOIA's Nine Exemptions

First, two exemptions do not apply to NSA information. FOIA Exemption 8 states that FOIA does not apply to matters related to the condition of financial institutions, when such materials are provided to, obtained, or generated by an agency responsible for the supervision of financial institutions. 5 U.S.C. § 552(b)(8). FOIA Exemption 9 states that FOIA does not apply to geological and geophysical information and data, including maps, concerning well. 5 U.S.C. § 552(b)(9). Neither of these provisions have anything to do with NSA's missions. Therefore, they need not be further consulted or explained.

Second, Exemption 7 protects information compiled for law enforcement purposes if one of six identifiable types of harm can be shown. Law enforcement purposes encompass both civil and criminal statutes, as well as those statutes which authorize administrative or regulatory proceedings. For more detail on this exemption and its applicability to NSA records, contact N5P5.

FOIA EXEMPTION 1

5 U.S.C. § 552(b)(1) states that FOIA does not apply to 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, and are in fact properly classified pursuant to such executive order.

This provision means that NSA can withhold information that is "currently" and "properly" classified. "Currently" classified information means classified pursuant to Executive Order 12958. Executive Order 12958 provides the current structure for assuring that national security information is protected from unauthorized disclosure. Therefore, if information is classified pursuant to Executive Order 12958 it is "currently" classified.

"Properly" classified has two components: Procedural and substantive. "Properly" classified means that national security and foreign relations information has been reviewed by an appropriate classification authority, and this authority has determined that the disclosure of the information could reasonably be expected to cause damage to the national security.

The nature of the damage to the national security determines the classification level of the information, and determines who is the appropriate classification authority. E.O. 12958 §§ 1.3 and 1.4. For example, information classified at the TOP SECRET level involves information the disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. E.O. 12958 § 1.3. The appropriate classification authorities to classify information at the TOP SECRET level include the President, agency heads and officials designated by the President, and officials delegated this authority by the foregoing persons. E.O. 12958 § 1.4.

Equally important, information may not be classified to conceal violations of the law, to prevent embarrassment to a person or agency, to restrain competition, or prevent or delay the

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release of information that does not require protection in the interest of national security. E.O. 12958 § 1.8.

Exemption 1 may apply in the following example: Requester seeks information about NSA's field site locations, NSA's field site locations involve intelligence activities, a category of information which is available for classification, E.O. 12958 § 1.5(c). The disclosure of NSA field site locations, or even their existence, may reasonably be expected to cause damage to the national security. Therefore, field site information can be classified pursuant to E.O. 12958. As a result, the Agency may withhold the location of its field sites because the location is a currently and properly classified matter, or the Agency may state that a site's existence or nonexistence is a currently and properly classified matter.

An agency may, as the preceding paragraph states, refrain from disclosing the existence or nonexistence of certain information when this information's existence or nonexistence is classified. This process is called a Glomar denial. Glomar denials apply in other exemption categories, but they are prevalent in the Exemption 1 context.

FOIA EXEMPTION 2

5 U.S.C. § 552(b)(2) states that FOIA does not apply to matters that are related solely to the internal personnel rules and practices of an agency.

This provision means the Agency may withhold information when disclosure of the information would risk the circumvention of a statute or regulation. The foregoing information is known as "low 2" and "high 2" information, respectively.

The use of this exemption may occur when a requester seeks records from the Office of Security (S4) about his or her polygraph examination. A polygraph examination report may reveal certain testing or technical procedures used by S4 when it screens applicants and employees. The disclosure of this information may permit the requester to obtain information which would permit him or her to circumvent the polygraph examination process. This information is exempt from FOIA under the (b)(2) exemption.

FOIA EXEMPTION 3

5 U.S.C. § 552(b)(3) states that FOIA does not apply to matters that are specifically exempted from disclosure by statute, provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

This means that an agency may withhold information when other federal statutes permit non-disclosure. The NSA has its own non-disclosure statute. The National Security Agency Act of 1959, Public Law 86-36, Section 6, states that nothing in the National Security Agency Act of 1959 or any other law shall be construed to require the disclosure of the organization or function of the NSA, of any information with respect to the activities of the NSA, or of the names, titles, salaries, or number of the persons employed by the NSA. In short, the NSA may withhold

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information which would reveal its missions, activities, organizational structure, and information concerning its employees.

There are many other federal non-disclosure statutes. But Public Law 86-36 is the Exemption 3 non-disclosure statute the Agency uses to withhold information related to it.

The use of Exemption 3 together with Public Law 86-36, Section 6 may occur when a requester seeks an Agency record that contains the following information: Francis O. Iannini (a hypothetical Agency employee) and medical review of Mr. Iannini for a PCS to NSA field site, Maverick (fictional site). The foregoing sentence contains an Agency employee's name and an Agency activity (field site), coupled with an Agency function (PCS medical review). This information may be withheld by the Agency. The name of the employee and medical information, however, would be releasable to the Agency employee, i.e., Francis Iannini, if the Agency record is requested by the employee.

This illustrates how the FOIA cannot be used to withhold information releasable under the Privacy Act. This is a significant issue when reviewing FOIA requests. It is raised here only for informative, rather than explanatory purposes. If you desire further explanation of this point, please contact NSP5.

The foregoing also illustrates when two exemptions may overlap. The existence or nonexistence of the field site, Maverick, may be classified and, therefore, Exemption 1 would also cover it.

FOIA EXEMPTION 4

5 U.S.C. § 552(b)(4) states that FOIA does not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged and confidential. Therefore, this exemption has two components: (1) trade secrets, and (2) information which is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential.

Trade secrets, within the FOIA context, have been described by the federal courts as a secret, commercially valuable plan, formula, process, or device which is used for the making, preparing, compounding, or processing of trade commodities and which may reasonably be the end product of either innovation or substantial effort. In short, a trade secret is a thing unknown to the world of commerce, used to complete or make another thing, and the unknown thing is the product of a substantial amount of research and development monies or ingenuity. For illustrative purposes only, a trade secret might be a restaurant's secret sauce.

The second component of Exemption 4 protects information which is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. The first two prongs described above are self-explanatory, but the last component requires some explanation.

Information is confidential when disclosure of the information is likely to cause: (1) impairment of the government's ability to obtain necessary information in the future, or (2) substantial harm to the competitive position of the person who provided the information to the

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government. Most federal courts have combined "privileged" under "confidential" when considering whether commercial or financial information is privileged or confidential. In effect, no consideration is given to whether the information is privileged; what matters is whether it is confidential.

The use of the trade secret/exemption 4 non-disclosure theory may be used in a situation when a defense contractor submits technical data which reveals how the contractor can develop and use a new product, and no other defense contractor has this capability. The data associated with this capability is commercially valuable, unavailable to others, and it most likely is the end product of both innovation and substantial effort. As a result, the trade secret/exemption 4 non-disclosure theory would permit the Agency to withhold the data.

The use of the confidential information/exemption 4 non-disclosure theory may occur when an Agency consultant provides a report to the Agency recommending that the Agency obtain a cheaper and more efficient telephone system. This is commercial information, and receipt of this kind of valuable information by the government agency may be impaired if consultants believe that their reports or recommendations were freely available to the public.

The other use of the confidential information/exemption 4 non-disclosure theory may occur when a defense contractor submits a bid on a contract. The bid contains the contractor's business practices and bidding strategy. If the contractor's competitors request access to the bid, the contractor may contend that disclosure of the bid may cause it to suffer a substantial likelihood of substantive harm to its competitiveness. The Agency or a federal court may, if the contractor's evidence is sufficient, withhold the information.

FOIA EXEMPTION 5

5 U.S. C. § 552(b)(5) states that FOIA does not apply to matters that are inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.

This exemption means that agency records disseminated within the agency or to another agency may be protected from disclosure if they would be considered privileged documents within the civil litigation discovery context. Congress, the courts, and state agencies are not agencies under the FOIA.

Generally, three privileges arise most often in the civil discovery context: deliberative process privilege, attorney work product privilege, and attorney-client privilege. These privileges constitute the information available for protection under Exemption 5. The deliberative process privilege extends to deliberative records exchanged by and between agencies and by and between individuals or organizations within an agency. For the NSA, "agency" means the Department of Defense. These records are protected until an official agency decision is made. Then, the agency's decision together with its supporting evidence may be made available to the public, unless another FOIA exemption is available to prevent disclosure. In short, an agency's deliberations, thoughts, opinions, and preliminary decisions regarding a matter are protectable

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under FOIA Exemption 5. The facts relied on by the agency to support its decision, however, must be released, unless otherwise exempt.

The deliberative process privilege is intended to protect the free flow of ideas to, from, and between those responsible for official agency decisions. This privilege requires that the record be predecisional and that it be part of the deliberate process, e.g., it makes recommendations or expresses opinions on policy matters.

The attorney work-product privilege is applied to records which are prepared by an attorney in contemplation of litigation. There must exist some articulable claim that litigation is probably or imminent. The record does not have to be created by an attorney; records of the attorney's agents (experts, consultants, investigators, paralegals, etc.) may be protected under this privilege.

Next, the attorney-client privilege protects confidential communications between an attorney and her client about a legal matter for which the client has sought legal advice. There need not be any probable or imminent litigation. This privilege extends to facts, opinions and advice generated by, derived from, or based upon a client's communication to her attorney. As a result, communications between attorney and client and between attorney and her agents are protected from disclosure under the FOIA.

The following illustrates how all three privileges may apply to an agency record. The Director seeks a legal opinion about the validity of a proposed Agency regulation. The Director, the Deputy Director for Support Services, Chief S, and S2 personnel exchange several drafts of the proposed regulation. Comments from interested decision-making parties are given to the Office of General Counsel in a memorandum. The Office of General Counsel informs the Director that the regulation may be adopted and implemented. The Director issues the regulation.

A requester seeking any of the foregoing information would only be able to obtain the regulation. The deliberative process privilege does not protect final agency decisions. Consequently, the final regulation would not be protected. The drafts of the regulation would be protected because they were made prior to an agency policy decision and recorded the deliberations of agency personnel. The Office of General Counsel's legal opinion is protected by the attorney work-product privilege because it contains the mental impressions, personal beliefs, strategy, and legal theories of the Agency's attorneys. Last, each communication to the Office of General Counsel regarding this regulation is privileged under the attorney-client privilege and protectable under FOIA exemption 5 because they are communications from Agency personnel seeking legal advice from the Agency's legal representatives.

FOIA EXEMPTION 6

5 U.S.C. § 552(b)(6) states that FOIA does not apply to matters that are contained in personnel and medical files and similar files when their disclosure would constitute a clearly unwarranted invasion of personal privacy.

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This exemption means that information may be withheld when it identifies an individual, is contained in a personnel, medical, or similar file, and disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. The information must reveal, expose, or disclose an individual's identity. Personnel and medical files are self-explanatory. "Similar files" is liberally construed to include all information which applies to a particular individual, i.e., the individual is the subject of the information. Exemption 6 was invoked in the following case. The New York Times sought release of audio recordings of the last moments of the Space Shuttle Challenger crew. A federal appeals court determined that exemption 6 applied to protect these recordings because the recordings contained information which applied to a particular individual and, therefore, they were "similar" files. The information was the sound and inflection of the Challenger crew's voices during the last seconds of the mission.

Once the information is determined to be in a personnel, medical, or similar file, an agency must determine whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy. The outcome depends on a balancing of the public's right to disclosure against the individual's right to privacy. The public interest in disclosure is determined by considering whether disclosure of the information would reveal the performance, or lack thereof, of an agency's duties. The individual's right to privacy is determined by considering whether the individual is a living human being and whether she has a reasonable expectation of privacy. An individual's expectation of privacy must be a privacy interest that society is prepared to recognize or has already been established by law. If there is no public interest or, conversely, no right to privacy, there is no need to use the balancing test. If there is a privacy interest in disclosure, an agency must engage in the balancing test.

The balancing test attempts to answer which will be greater: the harm to the individual or the benefit to the public. Exemption 6 strongly favors the public benefit in disclosure because this exemption requires that the harm to the individual constitute a clearly unwarranted invasion of privacy. Still, federal courts scrutinize vigorously the impact of disclosure upon an individual's privacy.

The use of FOIA Exemption 6 may occur in the following situation: requester seeks the personnel records of a deceased Agency employee. These records contain, among other things, information concerning family counseling sessions, physical and emotional abuse within the family, etc. The deceased person no longer has privacy rights. The decedent's family, however, may have a privacy interest in information about the decedent. Next, assuming that a public interest exists in information about the decedent, the Agency must weigh the public and privacy interests as part of its "release or withhold" decision. The requester is a psychologist who is writing a book on stress. The requester's identity and purpose are noted here to illustrate and underscore the fact that agencies may not consider a requester's identity or purpose. The United States Supreme Court has made this very clear to all federal agencies. The Court's rationale is that FOIA states that any person may request records and no restriction, limitation, or condition is placed on this rule. Thus, the requester is not given any special consideration because he is requesting information for a "legitimate" purpose as opposed to a requester who does not share his motivation for requesting the records or one who does not have a motive.

CONCLUSION

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I hope that this memorandum has contributed to your understanding of FOIA's exemptions. If you have any questions regarding this subject, please contact N5P5 at 963-5827.



(b) (3) - P.L. 86-36

Attorney

Office of Assistant General Counsel
(Civil Litigation & Administration Law)

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FOIA Exemption (b)1:**May exempt information from release if contained in:****Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to such Executive Order.****(return)**

FOIA Exemption (b)2:**May exempt information from release if contained in:****Records relating solely to the internal personnel rules and practices of an agency.****(return)**

FOIA Exemption (b)3:**May exempt information from release if contained in:****Records which concern matters that a statute specifically exempts from disclosure, so long as the statutory exemptions permit no discretion on what matters are exempt; or matters which meet criteria established for withholding by the statute, or which are particularly referred to by the statute as being matters to be withheld.****FOIA Exemption (b)3:****May exempt information from release if contained in:****Records which concern matters that a statute specifically exempts from disclosure, so long as the statutory exemptions permit no discretion on what matters are exempt; or matters which meet criteria established for withholding by the statute, or which are particularly referred to by the statute as being matters to be withheld.****The following statutes used by NSA under the third exemption are as follows:****(a) Section 6 of the National Security Agency Act of 1959 (Public Law 86-36, 50 U.S.C. Sec. 402 note), which provides that no law shall be construed to require the disclosure of, inter alia, the functions or activities of NSA;****(b) The Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. Sec. 403-1(i), which protects information pertaining to intelligence sources and methods;****(c) 18 U.S.C. Sec. 798, which prohibits the release of classified information concerning communications intelligence and communications security information to unauthorized persons.****(d) 10 U.S.C. 130, which allows for the withholding of any technical data with military or space application if such data may not be reported lawfully outside the United States without approval, authorization, or license under the Export Administration Act of 1979 or the Arms Export Control Act;**

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(e) 10 U.S.C. 2305(g), which prohibits the release of a contractor proposal submitted in response to a competitive bid unless the proposal is set forth or incorporated by reference in a contract

(return)

FOIA Exemption (b)4:

May exempt information from release if contained in:

Records containing trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(return)

FOIA Exemption (b)5:

May exempt information from release if contained in:

Interagency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.

(return)

FOIA Exemption (b)6:

May exempt information from release if contained in:

Personnel and medical files and similar files, the disclosure of which, would constitute a clearly unwarranted invasion of personal privacy.

(return)

FOIA Exemption (b)7:

May exempt information from release if contained in:

Investigatory records compiled for law enforcement purposes.

FOIA Exemption (b)7:

May exempt information from release if contained in:

Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records:

(a) Could reasonably be expected to interfere with enforcement proceedings;

(b) Would deprive a person of the right to a fair trial or to an impartial adjudication;

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- (c) 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;
- (d) Could reasonably be expected to disclose the identity of a confidential source, including a source within NSA/CSS, state, local, or foreign agency or authority, or any private institution which furnishes the information on a confidential basis, or 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;
- (e) 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;
- (f) Could reasonably be expected to endanger the life or physical safety of any individual.

(return)

FOIA Exemption (b)8:

May exempt information from release if contained in:
Records 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.

(return)

FOIA Exemption (b)9:

May exempt information from release if pertaining to:
Geological and geophysical information and data, including maps, concerning wells.

(return)

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Exemptions to the Privacy Act - 5 USC 552 (Main Menu)

The following exemptions apply:

(b) (d)(5) (j)(1) (k)(1) (k)(5) (k)(6)

(b) applies to information concerning other individuals which may not be released without their written consent;

(d)(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding;

(j)(1) applies to polygraph records; documents or segregable portions of documents, release of which would disclose intelligence sources and methods, including names of certain Agency employees and organizational components; and documents or information provided by foreign governments;

(k)(1) applies to information and material properly classified pursuant to an Executive order in the interest of national defense or foreign policy;

(k)(5) applies to investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, or access to classified information, release of which would disclose a confidential source;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process.

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(Info On Another Person) Personal information about another person; e.g., SSN, that appears in the file is processed pursuant to the FOIA. Such information may be exempt pursuant to the (b)(6) provision of the FOIA
