

date of the initial denial letter. At the conclusion of this period, the case may be considered closed; however, such closure does not preclude the requester from filing litigation. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the requester receives the last such notification. A final determination on the appeal normally shall be made within 20 working days after receipt. If additional time is needed due to unusual circumstances, the final decision may be delayed for the number of working days (not to exceed 10), that were not utilized as additional time for responding to the initial request. If an appeal is denied, the Director, DNA, will notify the requester of the right to judicial review of the decision. Appeal procedures also apply to the disapproval of a request for waiver or reduction of fees.

(d) If DNA denies the requested document in whole or in part, the response must include detailed rationale for withholding information and the specific exemption that applies so the requester can make a decision concerning appeal. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. Denial letters must also include the name and title of the IDA, and cite the name and address of the Director, DNA, as the appellate authority.

(e) All final responses will address the status of fees collectible under the FOIA. Fees of \$15 or less will be waived, regardless of category of requester.

(f) A formal reading room for the public, as defined in 32 CFR part 286, does not exist at DNA (HQ, FCDNA or AFRRI) because of security requirements. However, the PAO will arrange for a suitable location and escort, if required, for members of the public to review DNA documents released under the FOIA. In addition, most reports released under the FOIA are sent to the National Technical Information Service (NTIS).

§ 291.8 Exemptions.

(a) *General.* Records that meet the exemption criteria listed in paragraph (b) below may be withheld from public disclosure and will not be published in the FEDERAL REGISTER, made available in a library, reading room, or provided in response to a FOIA request.

(b) *FOIA exemptions.* The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law. A discretionary release (see also § 291.4(e)) to one requester may preclude the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest.

(1) *Number 1.* Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations, such as DoD 5200.1-R.³ Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1-R, section 2-204f., apply. In addition, this exemption shall be invoked when the following situations are apparent:

(i) The fact of the existence or non-existence of a record would itself reveal classified information. In this situation, DNA shall neither confirm nor deny the existence or nonexistence of the record being requested. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no record" response when a record does not exist, and a "refusal to confirm or deny" when a record does exist will itself disclose national security information.

(ii) Information that concerns one or more of the classification categories established by executive order and DoD

³See footnote 1 to § 291.5(c)(9).

5200.1-R shall be classified if its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

(2) *Number 2.* Those related solely to the internal personnel rules and practices of DNA. This exemption has two profiles, high b2 and low b2.

(i) Records qualifying under high b2 are those containing or constituting statutes, rules, regulations, orders, manuals, directives, and instructions, the release of which would allow circumvention of these records, thereby substantially hindering the effective performance of a significant function of the DNA. Examples include:

(A) Those operating rules, guidelines and manuals for DNA investigators, inspectors, auditors, or examiners that must remain privileged in order for the DNA office to fulfill a legal requirement.

(B) Personnel and other administration matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(C) Computer software meeting the standards of paragraph 291.3(b)(2)(iii), the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be clearly examined to ensure a circumvention possibility exists.

(ii) Records qualifying under the low b2 profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include: Rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

(3) *Number 3.* Those containing matters that a statute specifically exempts

from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. Examples of statutes are:

(i) National Security Agency Information Exemption, Public Law 86-36, section 6.

(ii) Patent Secrecy, 35 U.S.C. 181-188. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(iii) Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

(iv) Communication Intelligence, 18 U.S.C. 798.

(v) Authority to Withhold from Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25.⁴

(vi) Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 U.S.C. 1102.

(vii) Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128.

(viii) Protection of Intelligence Sources and Methods, 50 U.S.C. 403 (d)(3).

(4) *Number 4.* Those containing trade secrets or commercial or financial information that DNA receives from a person or organization outside the government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate government interest. Examples include:

(i) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such

⁴See footnote 1 to § 291.5(c)(9).

as trade secrets, inventions, discoveries, or other proprietary data. See 32 CFR part 286h, "Release of Acquisition-Related Information."

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

(iii) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(iv) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

(v) Scientific and manufacturing processes or developments concerning technical or scientific data or other information, submitted with an application for a research grant, or with a report, while research is in progress.

(vi) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with title 10, U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4. Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 (refer to paragraph (b)(3)(v)).

(vii) Computer software meeting the conditions of section 4 (b)(3), which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(5) *Number 5.* Except as provided in paragraphs (b)(5)(i) through (v) of this section, internal advice, recommenda-

tions, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decisionmaking process of any agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)) or within or among DoD/DNA offices. Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(1) Examples include:

(A) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions or suggestions.

(B) Advice, suggestions, or evaluations prepared on behalf of the DNA by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(C) Those nonfactual portions of evaluations by DNA personnel of contractors and their products.

(D) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(E) Trade secret or other confidential research, development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(F) Records that are exchanged among agency personnel as part of the preparation for anticipated administrative proceedings by DNA, or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(G) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of DNA when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(H) Computer software meeting the standards of paragraph 291.3(b)(2)(iii), which is deliberative in nature, the disclosure of which would inhibit or chill the decision-making process. In this situation, the use of software must be closely examined to ensure its deliberative nature.

(I) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process.

(ii) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the "discovery process" in the course of litigation with DNA, i.e., the process by which litigants obtain information from each other that is relevant to the issues in trial or hearing, then it should not be withheld from the general public even though "discovery" has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant, balanced against the interests of the agency in maintaining its confidentiality, then the record or document need not be made available under this part. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the "discovery process".

(iii) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through "discovery," and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(iv) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or ad-

vice that would compromise the decision-making process.

(v) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(6) *Number 6.* Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of Records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

(i) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(A) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(B) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(ii) Home addresses are normally not releasable without the consent of the individuals concerned. In addition, lists of DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(A) Privacy interest. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended

funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(B) Published telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(iii) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

(iv) Individuals' personnel, medical, or similar file may be withheld from them or their designated legal representative only to the extent consistent with DoD Directive 5400.11.

(v) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record. When withholding personal information from the subject of the record, legal counsel should first be consulted.

(7) *Number 7.* Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes.

(i) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(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.

(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.

(1) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DNA shall neither confirm nor deny the existence or nonexistence of the record being requested.

(2) A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

(3) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or the person whose personal privacy is in jeopardy is deceased, and DNA is aware of that fact.

(D) Could reasonably be expected to disclose the identity of a confidential source including a source within DNA, a state, local or foreign agency or authority, or any private institution which furnishes the information on a confidential basis.

(E) Could disclose confidential 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.

(F) 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.

(G) Could reasonably be expected to endanger the life, or the physical safety of any individual.

(ii) Examples include:

(A) Statements of witnesses and other material developed during the

course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

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

(C) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within DNA, or a lawful national security intelligence investigation conducted by an authorized agency or office within DNA. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

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

(iv) When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by DoD Directive 5400.11.

(v) *Exclusions.* Excluded from the previous exemptions are the following two situations applicable to the Department of Defense.

(A) Whenever a request is made which involves access to records or information compiled for law enforcement purposes and the investigation or proceedings involves a possible violation or criminal law where there is reason to believe that the subject of the investigation or proceedings is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings. Components may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(B) Whenever informant records maintained by a criminal law enforcement organization within a DoD component under the informant's name or personal identifier are requested by a third party using the informant's name

or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to exemption 7, the response to the requester will state that no records were found.

(8) *Number 8.* Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(9) *Number 9.* Those containing geological and geophysical information and data (including maps) concerning wells.

§ 291.9 For official use only (FOUO).

Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of the reasons cited in FOIA exemptions 2 through 9 shall be considered as being for official use only. No other material shall be considered or marked "For Official Use Only" (FOUO) and FOUO is not authorized as an anemic form of classification to protect national security interests. See DNA Instruction 5230.2A⁵ for additional information regarding FOUO policy.

(a) *Prior FOUO application.* The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release.

(b) *Historical papers.* Records, such as notes, working papers, and drafts retained as historical evidence of DNA actions enjoy no special status apart from the exemptions under the FOIA.

(c) *Time to mark records.* The marking of records at the time of their creation provides notice of FOUO content and

⁵ See footnote 2, to § 291.6(a)