

## § 5.31

status of requests, and assisting to resolve any FOIA disputes. Some FOIA Requester Service Centers allow you to check the status of your request online. You can find a list of our FOIA Requester Service Centers and Public Liaisons at <http://www.hhs.gov/foia/contacts/index.html>.

(b) The Office of Government Information Services (OGIS), which is part of the National Archives and Records Administration, serves as the Federal FOIA ombudsman and assists requesters and agencies to prevent and resolve FOIA disputes through mediation. Mediation is a voluntary process. If we participate in the dispute resolution services provided by OGIS, we will actively engage as a partner to the process in an attempt to resolve the dispute and will follow the principles of confidentiality in accordance with the Administrative Dispute Resolution Act, 5 U.S.C. 571–8. You may contact OGIS at the following address: National Archives and Records Administration, Office of Government Information Services, 8601 Adelphi Road—OGIS, College Park, MD 20740–6001, or by email at [ogis@nara.gov](mailto:ogis@nara.gov), or by telephone at 202–741–5770 or 1–877–684–6448 (toll free).

### Subpart C—Exemptions to Disclosure

#### § 5.31 What are the reasons records may be withheld?

While we are committed to providing public access to as many of our records as possible, there are instances in which information falls within one or more of the FOIA's nine exemptions and disclosure would either foreseeably harm an interest protected by a FOIA exemption or disclosure is prohibited by law. We review all records and weigh and assess all legal and policy requirements prior to making a final disclosure determination. A description of the nine FOIA exemptions is provided in paragraphs (a) through (i) of this section.

(a) *Exemption 1.* Exemption 1 protects from disclosure information 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

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properly classified pursuant to such Executive order.

(b) *Exemption 2.* Exemption 2 authorizes our agency to withhold records that are related solely to the internal personnel rules and practices of an agency.

(c) *Exemption 3.* Exemption 3 authorizes our agency to withhold records which are specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) 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; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, October 28, 2009, specifically cites to 5 U.S.C. 552(b)(3).

(d) *Exemption 4.* Exemption 4 authorizes our agency to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(e) *Exemption 5.* Exemption 5 authorizes our agency to withhold inter-agency or intra agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

(f) *Exemption 6.* Exemption 6 authorizes our agency to protect information in personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.

(g) *Exemption 7.* Exemption 7 authorizes our agency to withhold records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would cause the following harm(s):

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

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

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source;

(5) 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; or

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

(h) *Exemption 8.* Exemption 8 authorizes our agency to withhold records that are 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.

(i) *Exemption 9.* Exemption 9 authorizes our agency to withhold geological and geophysical information and data, including maps, concerning wells.

#### **§ 5.32 Records not subject to the requirements of the FOIA—law enforcement exclusions.**

Under the FOIA, there is special protection for narrow categories of law enforcement and national security records. The provisions protecting those records are known as “exclusions” and are described in 5 U.S.C. 552(c). These exclusions expressly authorize Federal law enforcement agencies, under these exceptional circumstances, to treat the records as not subject to the requirements of the FOIA.

(a) Should an HHS OpDiv or StaffDiv maintain records which are subject to a FOIA exclusion, and consider employing an exclusion or have a question as

to the implementation of an exclusion, the OpDiv or StaffDiv will consult with the Office of Information Policy, U.S. Department of Justice.

(b) Because records falling within an exclusion are not subject to the requirements of the FOIA, should any HHS OpDiv or StaffDiv maintain such excluded records, the OpDiv or StaffDiv will limit its response to those records that are subject to the FOIA.

### **Subpart D—Confidential Commercial Information**

#### **§ 5.41 How does a submitter identify records containing confidential commercial information?**

A person who submits records to the government may designate part or all of the information in such records that they may consider to be exempt from disclosure under Exemption 4 of the FOIA. The person may make this designation either at the time the records are submitted to the government or within a reasonable time thereafter. The designation must be in writing. Any such designation will expire 10 years after the records were submitted to the government.

#### **§ 5.42 How does HHS process FOIA requests for confidential commercial information?**

(a) *Predisclosure notification.* The procedures in this section apply to records on which the submitter has designated information as provided in § 5.41. They also apply to records that were submitted to the government where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption 4. Certain exceptions to these procedures are stated in paragraph (b) of this section.

(1) When we receive a request for such records, and we determine that we may be required to disclose them, we will make reasonable efforts to notify the submitter about these facts. The notice will include a copy of the request, and it will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If we must notify a large number of submitters, we may do this by posting or publishing a