
Chapter 3. PROCEDURES FOR NON-DISCLOSURE

3-1 Denial Procedures

- a. The FOIA Liaison will make the initial denial determinations on all access requests. This determination is subject to the concurrence of the General Counsel, or Counsel in the region or field offices, as appropriate. The head of each organizational unit or his designee is the denying and/or signature official on the release of any records pertaining to programs or activities over which he has primary responsibility. Such denial must be in writing; must contain a statement of the reason(s) for the denial, citing applicable exemption(s) or other authorizing statute; must contain the name and title of the denying official; must state that a review by the General Counsel of the denial may be requested; must state the procedures for requesting such review; and must advise that request for such review must be made within thirty (30) federal working days from the date of the denial to the date a review request is filed.
- b. Denials involving twenty (20) documents or less must list each document being withheld under the applicable FOIA exemption. Denials of more than twenty (20) documents, must contain a clear explanation and description of the records being withheld.
- c. The General Counsel has twenty (20) federal working days after receipt to respond to a request for review of an initial denial (24 CFR 15.42). If upon review, the General Counsel determines that the information should be made available, such information will be promptly made available to the requestor. A copy of all appeal determinations made by the General Counsel shall be forwarded to the initial responding office (FOIA Liaison).
- d. Copies of all denials and accompanying requests, must be sent to the Assistant General Counsel for Personnel and Ethics Law, or to Counsel in the region or field offices, as appropriate, with the exception of denials for records maintained by the Office of Inspector General. Copies of the records denied will be kept by the office making the denial.

e. All FOIA Liaisons will be required to provide statistical data to the Executive Secretariat in preparation of the Annual Report to Congress. This data will consist of:

- o number of requests denied
- o exemptions cited
- o fees assessed
- o denial official
- o extensions taken on initial requests
- o the same data listed above for appeals

Guidance on format and reporting requirements will be provided by Headquarter's General Counsel and Executive Secretariat.

f. (Reserved)

3-2 Review of Denial of Requests for Records

The Department's regulations implementing the Freedom of Information Act provide for administrative review by the General Counsel of a denial request for a record, provided the request for review is received within thirty days from the date of the denial to the date the review request is filed. Should a requestor desire such a review, the request for review should be mailed to the appropriate Counsel in the region or field office, and reviewed by Headquarters, Assistant General Counsel for Personnel and Ethics Law, ROOM 10248, Department of Housing and Urban Development, 451 7th Street, SW, Washington, DC 20410. The appeal should be accompanied by a copy of the original request and the response. The envelope should be plainly marked to indicate that it contains a Freedom of information Act request for review. The decision after review will be made within 20 federal working days from the date of receipt of the request for review, and will constitute final action by the Department on a request. The request will contain notification of the right of judicial review if denial is upheld (24 CFR 15.61). A copy of each appeal determination shall be forwarded to the initial responding office (FOIA Liaison).

3-3 Exemptions from Disclosure

a. The head of an organizational unit or designee cannot deny disclosure of a record unless (1) the record comes within one or more of the following exemptions and

there is need in the public interest to withhold the record (24 CFR 15.21). Records authorized to be exempted are those concerning matters that are:

(b)1 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;

(b)2 Related solely to the internal personnel and practices of the Department;

(b)3 Specifically exempted from disclosure by statute;

(b)4 Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Under Exemption 4 Federal agencies have a responsibility to protect sensitive business information from disclosure. Under Executive Order 12,600, 3 CFR 235 (1988), agencies must notify business submitters that their information has been requested under the FOIA and afford them an opportunity to object to disclosure of the requested information. To assure that information is not disclosed in violation of Exemption 4, and the Trade Secrets Act, employees shall follow these notification procedures:

a. Notification Procedures

1. On receiving a request for commercial or financial information that the liaison is unsure should be withheld under Exemption 4, you must inform the submitter to inform HUD within ten federal working days whether it objects to releasing the information on grounds that release will cause it substantial competitive harm.
2. If the submitter has no objection, the information may be released. Obtain the submitter's concurrence in writing.

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3. If the submitter objects, you must still form

your own conclusion, giving such weight as you deem appropriate to the submitter's views; would the release cause the submitter substantial competitive harm?

4. If you decide to withhold the information, you must obtain the concurrence of the Office of the Assistant General Counsel for Personnel and Ethics Law, if the request is in Headquarters, or the appropriate Counsel in the region or field office, if the request was directed to a field office.
 5. If you decide to release the information over the submitter's objection, you must inform the submitter in writing of your decision and give the submitter ten federal working days, before you release the information, to take judicial action to restrain the release.
- b. Disclosure of Profit and Loss Statements under 24 CFR 15.21(c)

Under certain defined conditions, profit and loss statements may be disclosed to potential eligible purchasers of HUD-held multifamily mortgages. See regulations for conditions of disclosure and continued maintenance of confidentiality by potential eligible purchasers.

(b)5 1) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Department.

There are certain privileges invoked within Exemption 5.

- a. deliberative process privilege - protects government agencies' decision making process;
- b. attorney work product privilege - protects government documents prepared by an attorney in contemplation of litigation;

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- c. attorney-client privilege - protects confidential communications between an attorney and his client relating to a

legal matter for which the client has sought professional advice; and

d. documents immune to civil discovery are protected from mandatory disclosure.

(b)6 Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)7 Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would (a) reasonably be expected to interfere with enforcement proceedings, (b) deprive a person of the right to a fair trial or an impartial adjudication, (c) constitute an unwarranted invasion of personal privacy, (d) 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 a lawful national security intelligence investigation, information furnished by a confidential source, (e) 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 (f) would reasonably be expected to endanger the life or physical safety of any individual.

(b)8 Contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency in

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connection with its responsibility for the regulation or supervision of financial institutions;

(b)9 Geological and geophysical information and

data, including maps, concerning wells.

3-4 Segregability /2

The Freedom of Information Act requires that reasonably segregable portions of a record be made available after deletion of portions exempt under one or more of the nine exemptions. Where nonexempt material is so inextricably intertwined that disclosure of it would leave only essentially meaningless words and phrases, the entire record can be withheld.

3-5 Guidance in Deciding to Disclose or Not Disclose

- a. The intent of Congress is that disclosure be the general rule, not the exception. Departmental records are accessible to the public, and full and prompt disclosure of identifiable records is a responsibility of every person having jurisdiction over such records. Records are not to be withheld simply because they fall within one or more of the exempt categories. Exemptions are discretionary and even records in exempt categories should be disclosed unless there is a need in the public interest to withhold.
- b. What is the public interest? 1) Subject matter of the requested records must specifically concern identifiable operations or activities of the government, 2) In order for the disclosure to be likely to contribute to an understanding of specific government operations or activities, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request, 3) The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons.

/2 5 U.S.C. 552(b)

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3-6 Judicial Demands for Disclosure

Any demand of a court or other authority or any request to an employee of the Department to produce any material contained in the files of the Department, or to disclose any information relating to material contained in files

of the Department... shall state with particularity the material sought to be obtained or the information sought to be disclosed. No employee shall comply with any such demand or request without the prior approval of the Secretary, and either the General Counsel or the appropriate Counsel in the region or field office, and shall proceed only with the advice provided thereafter. (The Secretary has delegated to the General Counsel the authority to approve the production or disclosure of HUD materials or information by HUD employees or former employees in response to subpoenas or demands of courts or other authorities.) 35 F.R. 13756.

3-7 Arbitrary and Capricious Withholding

If a court orders disclosure of records under the Freedom of Information Act, that have been improperly withheld and the court additionally issues a written finding that circumstances surrounding withholding of records has raised questions whether Departmental personnel acted "arbitrarily or capriciously" with respect to such withholding, the Office of Personnel Management may initiate a proceeding to determine whether disciplinary action is warranted against the employee primarily responsible for the withholding, and may make recommendations for corrective action (5 U.S.C. 552(a)(4)(F)). Any employee has the right of appeal from any adverse finding by the Office of Personnel Management. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed. Office of Personnel Management (OPM) shall initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The administrative authority of the agency shall take the corrective action that OPM recommends. In the event of noncompliance, the district court may punish for contempt the responsible employee.

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3-8 The Privacy Act

There is a potential for conflict between the Freedom of Information and Privacy Acts. However, the Privacy Act (5 U.S.C. 552(a), P.L. 93-579.) is invoked only when a request is made for records by an individual's name or other personal identifier within a Privacy Act system of records. In cases where a request is made for records by

an individual's name or other personal identifier, the provisions of the Privacy Act must be considered. Guidelines for handling Freedom of Information Act requests where Privacy Act provisions may apply may be found in 24 CFR, Part 16. (HUD Handbook 1325.1, Privacy Act).