

## FREEDOM OF INFORMATION ACT

### Release of Environmental Documents to the Public and Non-governmental Entities

You asked whether records related to installation environmental issues and programs would be releasable to members of the public, commercial entities, not-for-profit organizations, and the media if requested under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. While many responsive records will be releasable under the FOIA, some redactions may be required or appropriate under one or more FOIA exemptions.

Under the FOIA, requested records must be released unless the Agency can withhold the information under one of nine FOIA exemptions or an exception to the FOIA. *See* 5 U.S.C. § 552(b); DoD 5400.7-R\_AFMAN 33-302, *Freedom of Information Act Program*. The FOIA exemptions most likely to apply to determinations about releasing installation environmental records are Exemptions 3, 5, and 6.

FOIA Exemption 3, 5 U.S.C. § 552(b)(3), permits or requires the withholding of records that are exempt from release under another federal statute. Some environmental statutes contain provisions that exempt information from release under FOIA. For example, the Safe Drinking Water Act exempts vulnerability assessments from release. 42 U.S.C. § 300i-2(a)(3). In addition, 10 U.S.C. § 455 contains a provision exempting certain maps, charts, and geodetic data. Furthermore, 10 U.S.C. § 130e authorizes the withholding of DoD critical infrastructure security information from release under FOIA when preventing disclosure of the information outweighs the public interest consideration in having the information released.<sup>1</sup>

Exemption 5, 5 U.S.C. § 552(b)(5), allows an agency to withhold documents - and portions of documents - that are normally privileged in the civil discovery context. Withholding information under this principle is most often done when the information falls within the pre-decisional, deliberative process privilege. To qualify under the pre-decisional deliberative process privilege, a record must be an inter or intra-agency document that is both deliberative in nature and “pre-decisional.” Generally, this privilege does not extend to factual portions of the document. However, factual portions still fall under Exemption 5 if either: 1) the author selected specific facts out of a larger group of facts in a deliberative manner, such as preparing a summary of a lengthy interview; or 2) where the factual information is so inextricably connected to the deliberative material that revealing the factual information is equivalent to revealing the agency’s deliberations. Inspector notes, preliminary findings, recommendations, and draft reports associated with internal Air Force environmental inspections, audits, and assessments are pre-

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<sup>1</sup> DoD "critical infrastructure security information" involves sensitive but unclassified information that, if disclosed, would reveal infrastructure vulnerabilities that, if exploited, would likely lead to significant disruption, destruction, or damage of or to DoD operations, property, or facilities. *See* 10 U.S.C. § 130e(c). The statute indicates information about the securing and safeguarding of explosives, hazardous chemicals, and pipelines are examples of the type of information that may be exempted from release under Exemption 3. *Id.* Procedurally, the DoD Director of Administration and Management (DoD DA&M) determines when to grant a disclosure exemption under 10 U.S.C. § 130e. *See* Deputy Secretary of Defense Memo, *Delegation of Authority to Exempt Information Under the Freedom of Information Act (FOIA)*, 2 May 12; OSD/DA&M Memo, *Processing of Freedom of Information Act (FOIA) Exemption Determinations Pursuant to 10 U.S.C. § 130e and 10 U.S.C. § 2254a*, 3 Aug 12; DoDD 5400.7, *DoD Freedom of Information Act (FOIA) Program*, para 4.1, 2 Jan 08 (certified current through 2 Jan 15).

decisional, deliberative process information that may be exempt from release under FOIA Exemption 5. Enforcement vulnerability ratings (assessments of potential risk of enforcement action by a regulatory authority), ratings of program areas (e.g., "healthy," "needs improvement"), and root cause analyses that appear in final reports could also be withheld from release under Exemption 5. These types of information usually fall within the scope of the pre-decisional deliberative process privilege since they consist of opinions or recommendations provided to Air Force leaders (senior leadership at wing and MAJCOM level) to help them decide the cause and importance and/or severity of environmental issues, as well as how to correct or respond to those issues.

The attorney-client privilege and attorney work product doctrine provide two additional bases for withholding information under FOIA Exemption 5. To qualify for withholding or redacting under the attorney-client privilege, information must concern a confidential communication between an attorney and client relating to a legal matter for which the client sought professional advice. See *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). The attorney work-product doctrine applies to documents that were prepared by an attorney in anticipation of civil, administrative, or criminal proceedings. See *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978). All facts – not just opinions and recommendations – can be withheld from attorney-client privileged and attorney work-product doctrine documents.

FOIA Exemption 6, 5 U.S.C. § 552(b)(6), protects from release those portions of environmental documents that contain information that "would constitute a clearly unwarranted invasion of personal privacy." In determining whether a release meets this test, a balancing test is applied, weighing the privacy interest of affected individuals against the public interest in the requested information. The public's interest concerns its right to know how the Air Force is carrying out its statutory and regulatory duties. See *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), where the Supreme Court limited the concept of "public interest" under the FOIA to the "core purpose" for which Congress enacted the law – to shed light on an agency's performance of its statutory duties. See also *Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1051 (D.C. Cir. 2009), where the Circuit Court of Appeals for the District of Columbia Circuit said, "The requested information must 'shed[ ] light on an agency's performance of its statutory duties.'" (quoting *Reporters Committee*, 489 U.S. at 773). This exemption would most likely arise in the environmental context in tort claims and environmental litigation (e.g., tort actions, challenges to environmental effects analysis performed under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h). Unless the following information belongs to the requester, it should always be redacted: home telephone numbers and personal e-mail addresses.

## CONCLUSION

Installation environmental programs generate numerous reports, correspondence, and internal memos. Many of these documents are releasable to requesters under the FOIA, but some redactions are required or appropriate pursuant to one or more FOIA exemptions (e.g., Exemptions 3, 5, and 6).