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U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
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May 24, 2022

RE: 22-00091-FOIA

This is in response to your request dated May 22, 2022 under the Freedom of Information Act seeking access to: [A copy of each (internal) FOIA Standard Operating Procedure (SOP) at the CFTC FOIA Office. Please apply the foreseeable harm test, and discretionary release of what might otherwise be considered records exempt under b(5), and the presumption of openness.]. In accordance with the FOIA and agency policy, we have searched our records, as of May 22, 2022, the date we received your request in our FOIA office.

We have located 17 pages of responsive records.¹ You are granted full access to the responsive records, which are enclosed.

If you have any questions about the way we handled your request, or about our FOIA regulations or procedures, please contact Bridget McFarland at 202-418-5319 or Jonathan Van Doren, our FOIA Public Liaison, at 202-418-5505.

Sincerely,

Rosemary B. Killoy
Assistant General Counsel

¹ Please be aware that the FOIA Office is currently in the process of updating the SOPs, as the current version is outdated.

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Introduction to FOIA

What is the FOIA?

The Freedom of Information Act provides that any person has a right of access to federal records, and this right is enforceable by the courts if an agency fails to comply and administrative appeals have been exhausted. Access is limited, in whole or in part, if records are protected from disclosure by one of nine exemptions (see [FOIA Exemptions](#)).

What is the purpose of FOIA?

The purpose of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed" (see [NLRB v. Robbins Tire & Rubber Co.](#), 437 U.S. 214, 242 (1978)). In effect, the public has the right to obtain "official" information that sheds light on an agency's performance of its statutory duties. There is a strong presumption in favor of releasing requested documents.

Who can make a FOIA request?

A FOIA request can be made by "any person," a broad term that encompasses individuals (including

foreign citizens), partnerships, corporations, associations, and foreign or domestic governments; requests may also be made through an attorney or other representative on behalf of any person. The only apparent exception to the broad "any person" standard is for those who flout the law, such as fugitives from justice, who may be denied judicial relief by the courts if the requested records relate to the requester's fugitive status.

NOTE: A FOIA request can be made for any reason because the purpose for which records are sought has no bearing upon the merits of the request. Additionally, FOIA requesters do not have to explain or justify their requests. As a result, FOIA requesters may invoke FOIA as a supplement/substitute for document discovery in both civil and criminal litigation.

What is a "record"?

A record is any document, writing, photograph, sound or magnetic recording, videotape, microfiche, drawing, or computer-stored information or output in the possession of the Commission. The term record does not include personal convenience materials over which the Commission has no control, such as appointment calendars and handwritten notes that may be retained or destroyed at an employee's discretion.

What is an "agency record"?

The Supreme Court articulated a two-part test for determining what constitutes an agency record under FOIA. Agency records are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request. The Court defined "control" to mean that the materials came into the agency's possession in the legitimate conduct of its official duties. Additionally, there is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

Administrative Process

How do I complete the FOIA Search Form?

Once you have completed your search for the requested material, please fill out the three-page FOIA Search Form and return it along with the releasable material to the FOIA specialist indicated at the top of page one.

On the first page of the Search Form, indicate whether responsive documents have been located, and whether the material will be released in full, in part, or withheld in total. Also, indicate the number of pages that are being granted and/or denied. On the second page, indicate the exemptions that apply to the material being withheld. On the third page, indicate the number of pages that are being denied under each category along with the exemption invoked and make an estimate of your office's search and review times.

NOTE: The Search Form must be completed for all requests, including searches that do not locate any responsive documents.

What is "search" time?

Search time refers to the process of looking for responsive records, either manually or by computer, including page-by-page or line-by-line identification of material within documents.

What is "review" time?

Review time refers to the process of examining a responsive record to determine whether information needs to be redacted, withheld in total, and otherwise prepared for its release.

NOTE: Photocopying is NOT included in the search and review time.

How do I calculate the office's search/review time?

The time spent processing search and review time is calculated on a quarter-hour basis for FOIA billing purposes. Use your best judgment and round to the nearest quarter-hour, if necessary. The FOIA Office will calculate the total search and review charges and state them in its response to the requester.

How can I determine whether the FOIA search conducted by our office is legally adequate?

The adequacy of an agency's search under the FOIA is determined by a test of reasonableness. As a general rule, the agency is required to undertake a search that is reasonably calculated to uncover all relevant documents. Additionally, the response must include all records that persons familiar with the subject matter of the request can be expected to locate in a reasonable amount of time. The agency's inability to locate every single record does not undermine an otherwise reasonable search.

How do I determine if I should redact material that is exempt from disclosure or simply withhold the entire document?

The FOIA requires that any "reasonably segregable" portion of a record must be released after appropriate application of the Act's nine [exemptions](#) listed below. However, if the agency determines that the non-exempt information is "so inextricably intertwined" that disclosure of it would leave only essentially meaningless words and phrases on the document, then the entire record may be withheld.

If more than one exemption applies to a particular record, should I indicate that on the Search Form?

Yes, you should cite all applicable exemptions on the Search Form. If the requester decides to appeal the Commission's determination of withholding certain material based on certain exemption(s), recent FOIA case law suggests that an agency is deemed to have waived potentially applicable exemption(s), if they are not cited during the initial response to the request.

What if our office department is unable to complete the search by the deadline indicated on the Search Form?

The deadline on the Search Form typically allows for the divisions to respond to the FOIA office within ten business days. However, under the FOIA regulations, we are not required to respond to the requester until 20 business days have elapsed from receipt of the request. This ten-day cushion provides our office sufficient opportunity to review the request before a final determination letter is sent to the requester. If your office feels that that you need additional time in processing the request, please notify the FOIA office as soon as possible.

How do I determine whether my office can seek an extension beyond the 20-day statutory deadline?

In unusual circumstances, the agency may extend the 20-day time limit by ten days for processing a FOIA request if the agency informs the requester in writing and explains why an extension is needed and when it will make a determination on the request. The FOIA defines unusual circumstances as (1) the need to search for and collect records from separate offices (e.g., DC office request to search regional office); (2) the need to examine a voluminous amount of records required by the request (e.g., Division of Enforcement investigation consisting of 50 boxes); and (3) the need to consult with another agency or agency component (e.g., SEC). If your office needs additional time to process its request, please notify the FOIA Office as soon as possible.

FOIA Exemptions

How do I determine whether a particular record is releasable?

There are nine exemptions under which the agency may withhold requested information. Exemptions (b)(1), (b)(3), (b)(6), and (b)(7)(C) are mandatory and require the agency to withhold information that falls under these categories. However, the remainder of the exemptions permits discretionary disclosure. The

agency is free to make discretionary disclosure of exempt information as a matter of sound policy. Therefore, even if the information can be withheld under a FOIA exemption, some records should be released unless a foreseeable harm to an interest protected by an exemption can be identified.

What are the exemptions under FOIA?

The nine exemptions are listed below (5 U.S.C. 552).

Some do not generally apply to Commission records, but those that do are highlighted and appear in green.

- Exemption (b)(1) National defense or foreign policy matters required by Executive Order to be secret.
- Exemption (b)(2) Records related solely to the internal personnel rules and practice of an agency. This exemption encompasses two distinct categories of information ("Low 2" and "High 2").

Exemption "Low 2"

- Permits the withholding of information that is predominantly internal, of a trivial nature, and of no significant public interest.
- Exemption is based upon the rationale that the task of processing and releasing some requested records would place an administrative burden on the agency that is not justified by any genuine public benefit.
- Examples covered under the exemption include performance standards and leave practices for agency personnel as well as file numbers, mail routing stamps, data processing notations, and other administrative data.
- Although an agency personnel list satisfies the "related to internal agency rules and practices," courts have ruled in favor of releasing this information (see also [Exemption \(b\)\(6\)](#)).
- "Low 2" is subject to discretionary disclosure because there is rarely an identifiable foreseeable harm.

Exemption "High 2"

- This portion of the exemption requires the information to be predominantly "internal" and disclosure of this information must pose a significant risk to "circumvention" of agency regulations or statutes.
- Examples of internal activities include general guidelines for conducting enforcement investigations, guidelines for conducting post-investigation litigation, and guidelines for identifying law violators.
- Examples of information that could lead to circumvention include information that would reveal agency audit guidelines, sensitive administrative notations in law enforcement files, agency testing materials (e.g., test given to an applicant for employment at the agency), and agency credit card numbers.

Exemption (b)(3) Records specifically exempted from disclosure by statute.

- Incorporates the disclosure prohibitions that are contained in certain federal statutes.
- Allows the withholding of information prohibited from disclosure by statute if the statute establishes particular criteria for withholding or refers to particular types of matters to be withheld.
- This prong of the exemption is satisfied by the language of Section 8(a) of the Commodity Exchange Act (CEA), which specifies certain documents that are exempt from disclosure.
- Pursuant to Section 8(a), the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.
- Commission may withhold material concerning or obtained in connection with any pending investigation of any person (see also [Exemption \(b\)\(7\)\(A\)](#)).
- Commission may not disclose any information or data obtained from a foreign futures authority when certain conditions are met (see Section 8(a) of the CEA for further details).

NOTE: The discretionary disclosure policy does not apply to Exemption 3 because the agency is constrained by Section 8(a) from making disclosure of this information. HOWEVER, in contrast to a FOIA request, if the agency receives a subpoena request for information that would separately disclose the market positions, business transactions, trade secrets, or names of customers, then the agency may release this information pursuant to 8(b) of the Act.

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

This exemption is intended to protect the interests of both the government and submitters of information. Its existence encourages submitters to voluntarily furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable. This exemption also affords protection to those submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure.

Trade Secrets

- A trade secret is defined as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and is the end product of either innovation or substantial effort.
- There must be a direct relationship between the trade secret and the productive process.
- Trade secret protection has been recognized for product manufacturing and design information, but has been denied for general information concerning a product's physical or performance characteristics or a product formula when release would not reveal the actual formula itself.

NOTE: This portion of Exemption 4 is rarely cited.

Commercial or Financial Information

- Commercial or financial information is broadly interpreted and can meet the threshold as long as the submitter of information has a commercial interest in the record.
- Commercial information includes anything relating to or dealing with commerce. Examples include customer and supply lists, customer statements, trading records, bank records, sales statistics, research data, profit and loss data, overhead and operating costs, and information on financial condition.
- Financial information consists of economic data generated by corporations or other business entities as well as personal financial information.

Obtained from a Person

- This prong of Exemption 4 is met in most circumstances. The term "person" refers to a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations.
- However, the courts have held that information generated by the federal government is NOT obtained from a person and is therefore excluded from Exemption 4's coverage.

NOTE: Although information generated by the federal government is not covered by Exemption 4, it may be protected from disclosure under [Exemption 5](#), which incorporates a qualified privilege for commercial or financial information generated by the government.

Privileged or Confidential Information

- Confidential information is used to protect both governmental and private interests.
- A two-part test is used to determine whether commercial or financial information is confidential for purposes of the exemption:
 - **Impairment prong:** The test is whether the disclosure of the information is likely to impair the Government's ability to obtain necessary information in the future.
 - **Competitive harm prong:** The test is whether disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained.
- When the submission of information is compelled by the government, the interest protected by nondisclosure is to ensure the continued "reliability" of the information.
- When the information is submitted on a voluntary basis, the governmental interest protected by nondisclosure is the continued full "availability" of the information.

Exemption (b)(5) Interagency 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.

In general, this exemption protects predecisional expressions of opinion or the deliberative portion of the decision making process. Factual information, on the other hand, is exempt from disclosure ONLY if it is

"inextricably intertwined" with exempt deliberative material so that it cannot be released without divulging opinions. In addition, Exemption 5 incorporates all privileges available to the government including the deliberative process, attorney **work-product**, and **attorney-client privileges**.

Deliberative Process Privilege

- Purpose of the privilege is to prevent injury to the quality of agency decisions.
- Rationale of the privilege:
 - To encourage open, frank discussions on matters of policy between subordinates and superiors.
 - To protect against premature disclosure of proposed policies before they are finally adopted.
 - To protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.
- A two-part test **MUST** be satisfied in order to assert this privilege.
 - The communication must be predecisional (i.e., antecedent to the adoption of an agency policy) **AND** the communication must be deliberative (i.e., a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters).
 - The burden is upon the agency to show that the information in question satisfies both requirements. In determining whether a document is predecisional, the agency does not necessarily have to point specifically to an agency final decision, but merely establish what deliberative process is involved, and the role played by the document in the course of that process.
- A document from a subordinate to a supervisor is more likely to be predecisional.
- Predecisional documents lose their status if a final decisionmaker chooses to expressly adopt or incorporate the particular document by reference.
- Factual portions of predecisional documents are generally not protected since they are available in civil discovery and its disclosure is not considered a threat to the agency's consultative process.
- Drafts, or other documents that provide analysis, evaluations, or recommendations are generally predecisional and may be protected.

Attorney Work-Product Privilege

Protects documents and other memoranda prepared by an attorney in contemplation of litigation.

- Privilege does not attach until at least some articulable claim, likely to lead to litigation has arisen.
- The termination of litigation does not abolish the protection for material otherwise properly categorized as attorney work-product.

- Courts look at the plain meaning of the privilege and have extended protection to material prepared by non-attorneys who act as the agent of the attorney (e.g., DMO Economist preparing documents for DOE Attorney).
- Factual materials are covered under the privilege unlike the deliberative process privilege.
- Privilege extends to civil, criminal, and administrative litigation, as well as amicus briefs.
- Privilege may also be asserted for law enforcement investigations when the investigation is based upon a specific wrongdoing and represents an attempt to garner evidence and build a case against the suspected wrongdoer (i.e., Division of Enforcement).

Attorney-Client Privilege

- Protects communications between a client and an attorney relating to a legal matter for which the client has sought legal advice.
- Exemption also protects opinions given by an attorney to the client based on facts divulged by the client as well as communication between attorneys that reflects client-supported information.
- The privilege extends to confidential communications made to an attorney by decision-making personnel and by lower-echelon employees. This broad interpretation acknowledges that lower-echelon employees often possess information relevant to an attorney's advice rendering function.
- Unlike the attorney work-product privilege, the attorney-client privilege is not limited to the context of litigation.

NOTE: All 3 privileges within Exemption 5 are subject to discretionary disclosure.

Exemption (b)(6) Personnel, medical, or similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

- Balancing test with the public's interest in disclosure against the individual's right to privacy.
- First, it must be determined whether a privacy interest exists. If no privacy interest is found, then further analysis is unnecessary and the information must be disclosed.
- If a privacy interest is found to exist, then the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure. If no public interest exists, then the information should be protected.
- If a privacy interest exists and it outweighs the public interest, then the information should be withheld; if the opposite is the case, then the information should be released.
- Certain information including age, marital status, medical conditions, information about unsuccessful job applicants, performance appraisals, salary of non-federal employees, criminal convictions, and information that, although once public, has become "practically obscure" is generally not releasable and should be withheld or redacted, if possible, in accordance with the "**reasonably segregable**" standard.

➤ Information including the names, present and past position titles, grades, salaries, and duty stations of agency employees is generally releasable as federal employees do not have an expectation of privacy under FOIA for this information.

➤ In general, no privacy interest exists for corporations, deceased individuals, public records, and the identities of FOIA requesters (unless first-party Privacy Act requesters).

NOTE: Exemptions (b)(6) and (b)(7)(C) have slightly different language, but a similar analysis is used. Exemption (b)(6) pertains to personnel, medical, and similar files pursuant to a "clearly unwarranted invasion of privacy" standard while (b)(7)(C) is limited to information compiled for law enforcement purposes that "could reasonably be expected to cause unwarranted invasion of privacy."

Exemption (b)(7) Records or other information compiled for law enforcement purposes, but only to the extent that production of such records or information: (A) could reasonably be expected to interfere with enforcement proceedings; or (B) would deprive a person of a right to a fair trial or an impartial adjudication; or (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; or (D) could reasonably be expected to disclose the identity of a confidential source, and in the case of a records compiled by a criminal law enforcement investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source (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; or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Exemption (b)(7)(A)

➤ Protects information concerning pending or prospective law enforcement proceedings, the disclosure of which "could reasonably be expected" to interfere with that proceeding.

➤ "Proceeding" includes law enforcement investigations, prosecutions, administrative and regulatory proceedings, and applies to federal, state, and foreign law enforcement proceedings.

➤ This exemption is temporal. It may be invoked only as long as the proceeding is pending. Once concluded, the specific harm (interference) can no longer occur.

HOWEVER, the exemption may still be applicable if: (1) the case is dormant, but the possibility of future proceedings exists; or (2) the case is closed, but disclosure would affect another related pending proceeding; or (3) the case is terminated, but the agency retains some oversight responsibilities which may result in re-opening the investigation.

The temporal nature of the exemption does NOT mean that when the justification for the exemption is no longer applicable that all the information must be disclosed; OTHER exemptions may still apply.

➤ The agency may invoke this exemption when release of information could hinder an agency's ability to control or shape investigations; would enable targets of investigations to avoid detection or fabricate evidence; or would prematurely reveal evidence or strategy in the Commission's case.

NOTE: Interference with enforcement proceedings does not have to be shown on a document-by-document basis. Generic categories of records can be used in withholding law enforcement records as long as you can explain how the release of each category could interfere with enforcement proceedings. But, each document must be reviewed to determine to which category, if any, it belongs.

Exemption (b)(7)(B)

➤ This exemption protects information that would deprive an individual of the right to a fair trial or impartial adjudication (e.g., prejudicial pre-trial publicity that could impair a court proceeding). It is RARELY used as the use of exemption (b)(7)(A) already protects the interests of the defendant(s) and the prosecution.

Exemption (b)(7)(C)

➤ Provides protection for personal information in law enforcement records and as mentioned above the analysis is similar to exemption (b)(6). However, there is a lower burden of proof required to justify withholding material under (b)(7)(C) as the test hinges on whether the release of material "could reasonably be expected to constitute an unwarranted invasion of privacy."

➤ The balancing test of privacy interest vs. public interest is applied and considerably more weight is given to the privacy interest in law enforcement records since the mere mention of a person in an investigation carries a negative connotation.

➤ The identities of law enforcement personnel are generally withheld under (b)(7)(C), since identification of such personnel could subject them to harassment and annoyance in carrying out their duties.

➤ The names of witnesses, their home and business addresses, and telephone numbers can be protected under this exemption.

NOTE: If the agency receives a FOIA request asking for access to non-public law enforcement records about other individuals, the Commission routinely responds to these requests by issuing a Glomar response (neither confirm nor deny the existence of such records). If such records do exist, Commission release of such records to the requester "could cause an unwarranted invasion of the personal privacy" of either the subject of the investigation or a third-party in violation of [Privacy Act](#) protections.

Exemption (b)(7)(D)

➤ Provides protection for information compiled for law enforcement purposes which "could reasonably be expected to disclose the identity of the confidential source." A confidential source can be a state, local, or foreign authority or any private institution which furnished information on a confidential basis.

➤ "Sources" include a wide variety of individuals and institutions, such as crime victims, citizens providing unsolicited allegations of misconduct, citizens responding to inquiries from law enforcement agencies, employees providing information about their employers, commercial or financial institutions, and local, state, and foreign law enforcement agencies.

➤ Not all information received from "sources" in the course of criminal investigations is automatically entitled to confidentiality. Source confidentiality must be determined on a case-by-case basis. Confidentiality means that the information was provided in confidence or in trust, with the assurance that it would not be disclosed to others.

➤ Informants' identities are protected whenever they have been provided information under either an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred.

NOTE: Protection for sources and the information provided is not extinguished when the case is closed. Unlike (b)(7)(C), the safeguards for (b)(7)(D) remain unaffected by the death of the source.

Exemption (b)(7)(E)

➤ Protects law enforcement information that discloses techniques and procedures for law enforcement investigations or prosecutions that are generally unknown to the public, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure "could reasonably be expected to risk circumvention of the law."

NOTE: "Could reasonably be expected to . . ." standard is broader than "would reasonably be expected to . . ." standard in applying this exemption.

➤ Law enforcement manuals meet the requirements for withholding under this exemption to the extent that they consist of or reflect law enforcement techniques and procedures that are confidential.

NOTE: Since exemption (b)(7)(E) only protects a governmental interest, it is well suited for discretionary disclosure when disclosure can be made without foreseeable harm.

Exemption (b)(7)(F)

➤ Permits the withholding of law enforcement information that, if disclosed, could reasonably be expected to endanger the life or physical safety of any individual.

➤ Protects names and identifying information of agency employees and third persons that may be unknown to the requester in connection with particular law enforcement matters.

➤ Exemption is broader than (b)(7)(C) because no balancing test for withholding is required. The applicable standard is whether there is "any reasonable likelihood that disclosure could cause any physical harm to anyone."

Exemption (b)(8) Records related to reports prepared for or by an agency responsible for regulating financial institutions.

➤ The purpose of this exemption is to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability and to promote cooperation and communication between employees and examiners.

➤ Although this exemption is rarely cited by the agency, recent case law suggests that the term "financial institutions" should be interpreted broadly and include brokers and dealers of securities and commodities as well as self-regulatory organizations (e.g., New York Mercantile Exchange (NYMEX)).

Exemption (b)(9) Records related to geological and geophysical information and data concerning wells (including maps).

Division of Market Oversight

What exemptions may apply to records maintained by the DMO?

Document	Exemption(s)
Large Trader Position Reports	(b)(3) & (b)(4)
Large Trader Identification Reports	(b)(3) & (b)(4)
Cash Position Reports	(b)(3) & (b)(4)

Division of Enforcement

What exemptions may apply to records maintained by the DOE?

Document	Exemption(s)
Internal Memoranda	(b)(5)
Attorney Notes	(b)(5)
Other documents	(b)(7)

Division of Clearing and Intermediary Oversight

What exemptions may apply to records maintained by the DCIO?

Document	Exemption(s)
CFTC Workpapers containing customer account daily or month-end statements (showing FCM & customer names and market positions)	(b)(3)
CFTC Workpapers having FSIS (Financial Surveillance Information System) large trader data (showing FCM and customer names and market positions)	(b)(3)
Trading Records (includes redaction of name of trader, firm, and/or account number either by detailed or summary market, volume, and position information) General trading or price quote data	(b)(3) & (b)(4) Public Release
Financial Reports from FCMs (non-public portions)	(b)(4) & (b)(8)
CFTC Workpapers containing copies of FCM financial report (non-Public portions)	(b)(4) & (b)(8)
CFTC Rule Enforcement Review Reports Background documents including confidential trade data or confidential exchange internal investigative reports	Public Release (b)(3) & (b)(4)
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DSRO Internal Documents, Audit Schedules, Audit Reports, Firm Responses, Audit Management Points	(b)(4)
DSRO Committee Minutes & Disciplinary Actions & DSRO Audit Workpapers	(b)(4)
Disclosure Documents (CPO/CTA)	(b)(4)
DSRO Training Manuals, Audit Techniques & Procedures	(b)(4)
JAC Audit Programs	(b)(4)

CONFIDENTIAL TREATMENT REQUESTS

What is a Confidential Treatment Request (RCT)?

This request is designed to give submitters of information to the Commission a method by which they may seek to protect sensitive commercial information when those records are subject to a FOIA request. Pursuant to Section 145.9(d) of the Commission's Regulations, the submitter may request confidential treatment based on exemptions (b)(3), (b)(4), (b)(6), (b)(7)(B), (b)(7)(C), and (b)(7)(E) of FOIA. However, no determination as to the merits of a confidential treatment request is made unless and until a proper FOIA request is filed with the Commission for documents that are the subject of a RCT.

When my office receives a RCT how should it be processed?

First, you should identify the records that are the subject of the petition. Next, you should review the documents to determine whether the RCT should be granted based on the arguments presented by the submitter and the applicable statutory exemptions under FOIA. If the division decides not to grant confidential treatment, then the submitter is provided the opportunity to file a detailed written justification (DWJ). If the division decides to grant confidential treatment, then the FOIA requester may file an appeal with the Commission's Office of the General Counsel (OGC).

DETAILED WRITTEN JUSTIFICATIONS

What is a Detailed Written Justification (DWJ)?

The DWJ enables the submitter to present the reasons why their request for confidential treatment should be granted. This document is similar to a legal brief and is designed to assist the Commission's lawyers and economists focus on the issues that concern the submitter, and to assist the staff in its efforts to make an informed decision as to the release of these documents.

What if the submitter disagrees with the Commission's determination to deny the request for confidential treatment?

The submitter has the right to appeal any initial staff decision to release information subject to a petition. If the Commission decides that all or part of the information should be released, nothing can be made public without first notifying the submitter of the adverse decision and advising it of its right to file a formal appeal with OGC. If OGC decides that the information is still disclosable following an appeal, then the firm may proceed with an action in federal court to prevent the release of the material.

APPEALS

Can a requester appeal the Commission's determination to withhold material?

Yes, if a FOIA request is denied in full or denied in part, the requester may appeal to OGC. OGC will review the appeal and make a decision either to accept the reasoning of the FOIA office and division officers or reject it and release some or all of the material.

If the requester is not satisfied with OGC's decision, is there anything else the requester can do?

Yes, if the requester's appeal is denied by OGC, then an appeal may be filed in U.S. District Court. However, the requester must have exhausted the administrative remedies prior to initiating court action.

What is a Vaughn Index?

If the requester files an appeal in U.S. District Court, the agency can be required to provide additional details about the documents that are being withheld. The Vaughn Index, which is similar to a privilege log, provides the court with a description of the material being withheld along with the applicable exemption(s).

PRIVACY ACT

What is the Privacy Act?

The Privacy Act of 1974 protects the privacy of individuals and provides them a right of access to material that has been compiled about them by federal agencies. The Act is intended to strike a balance between the government's need to maintain information about individuals while recognizing the need for individuals to be protected against unwarranted invasions of their privacy stemming from federal agencies' collection, maintenance, use, and disclosure of personal information about them.

How does the Privacy Act relate to the FOIA?

Although the two laws were enacted for different purposes, there is some similarity in their provisions. Both the FOIA and the Privacy Act give people the right to request access to records held by agencies of the federal government. The FOIA's access rights are given to "any person," but the Privacy Act's access rights are given only to the individual who is the subject of the records sought (if that individual is a U.S. citizen or a lawfully admitted permanent resident alien). In addition, the FOIA permits any person to seek access to any agency record that is not subject to any of its nine exemptions. By comparison, the Privacy Act only permits access to records that are maintained by the agency within a system of records. Therefore, the primary difference between the FOIA and the access provision of the Privacy Act is in the scope of information requestable under each statute.

What is a "System of Records"?

A system of records is defined as a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number (e.g., social security number), symbol, or other identifying particular assigned to the individual. A system of records exists if: (1) there is an indexing or retrieval capability using identifying particulars that is built into the system; and (2) the agency does, in fact, retrieve records about some individuals by reference to some personal identifier.

NOTE: Some personal information maintained by the agency is not kept in a "system of records" and this information is not subject to the provisions of the Privacy Act. However, this information may still be releasable under FOIA as FOIA does not require the system of records threshold in applying the Act.

What are the underlying policy objectives for the Privacy Act?

- Restrict disclosure of personally identifiable records maintained by the agency.
- Grant individuals increased rights of access to agency records maintained on themselves.
- Allow individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete.
- Establish a code of fair information practices which requires the agency to comply with statutory norms for collection, maintenance, and dissemination of records.

What is the Commission required to do under the Privacy Act?

- To collect, maintain, use, or disseminate records of personal information in a manner that assures that such action is for a necessary and lawful purpose; that the information is current and accurate for its intended use; and that adequate safeguards are provided to prevent misuse of information.

- Permit individuals to determine what records pertaining to them the agency collects, maintain, uses, or disseminates; and
- Allow individuals to prevent information pertaining to them obtained for a particular purpose from being used or made available for another purpose without their consent; and
- Permit individuals to prevent information pertaining to them in federal agency records, to have a copy made of their records, and to correct or amend their records.

What are the exemptions under the Privacy Act? 5 USC 552(a).

There are nine exemptions that may be grounds for withholding records under the Privacy Act.

(j)(1) General exemption for any records maintained by the Central Intelligence Agency

(j)(2) General exemption for any records maintained by a criminal law enforcement agency.

(k)(1) Specific exemption for properly classified records of national defense or foreign policy matters.

(k)(2) Specific exemption for investigatory material compiled for law enforcement purposes, unless the subject is denied a benefit to which he is entitled to under Federal law, in which case only the identity of confidential sources may be withheld.

(k)(3) Specific exemption for records maintained to provide protective services to the President of the United States.

(k)(4) Specific exemption for statistical records required by statute to be kept.

(k)(5) Specific exemption for the identity of confidential sources who have provided information in investigatory material compiled solely to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or to classified information.

(k)(6) Specific exemption for testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service.

(k)(7) Specific exemption for evaluative material in connection with promotion in the armed services of the United States.

What is a first-party request?

This is a person who requests either directly or via an agent access to their own record.

How do you process a first-party request under both FOIA and the Privacy Act? Chart under construction.

First, determine whether a Privacy Act exemption is applicable. If no Privacy Act exemption applies, then the records should be released to the requester. If, on the other hand a Privacy Act exemption is applicable, then access is denied or limited depending upon whether an exemption can be asserted under FOIA. If no FOIA exemption exists, then the material must be released.

NOTE: ALL Privacy Act requests should also be treated as FOIA requests. Therefore, because a first-party request is also a FOIA request, the agency is obligated to search for any records on the individual that are NOT maintained in a Privacy Act system of records.

What if a Privacy Act exemption AND a FOIA exemption apply?

This information should be withheld. When an individual requests access to their own record maintained

in a system of records, the agency must be able to invoke properly BOTH a Privacy Act exemption and a FOIA exemption to withhold that record.

How do you process a third-party request?

The general rule is that there is no disclosure without prior consent of the individual to whom the records pertain. However, there are twelve exceptions where disclosure of information from records pertaining to individuals does not require the prior consent of the individual to whom the records pertain.

(1) To other employees of the Commission, in the performance of their official duties. Officials of any regional, branch, or staff/administrative office may be granted access to information from Commission records without consent of the subjects in connection with the performance of their official duties.

(2) To the public, when disclosure would be required or permitted pursuant to the Freedom of Information Act. Information from a public record, such as an administrative proceeding, may be disclosed to anyone. Information available to the public from personnel records includes the name, past and present position, titles, grades, salaries, duty stations, and position descriptions or work standards of Commission employees (See FOIA Exemption (b)(6)).

(3) To Federal agencies, state and local agencies, and others, for routine uses that have been published in the Federal Register.

(4) To the Bureau of the Census or survey purposes.

(5) To a person or another agency for statistical research or reporting purposes, provided that the individual identifying information is removed.

(6) To the National Archives for preservation of records of historical value.

(7) To other agencies or organizations for law enforcement purposes upon written request from the agency head.

(8) To others under emergency circumstances affecting the health or safety of an individual. The subject of the record must be notified immediately.

(9) To Congress or Congressional committees to the extent that the records concern matters within their official jurisdiction.

(10) To the Comptroller General.

(11) By order of a court of competent jurisdiction.

(12) To consumer reporting agencies in accordance with section 3(d) of the Federal Claims Collection Act of 1986.

Can a requester appeal a Privacy Act determination?

Yes, see [Appeals](#) under the FOIA section.