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DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

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Subject:

1278 – External Access to BLM Information (Public)

1. Explanation of Material Transmitted: This release transmits the revised 1278 Manual External Access to BLM Information. This revision provides guidance on the Electronic Freedom of Information Act (EFOIA) of 1996, the Executive Order 13392, Open Government Act of 2007, the Open Government Directive (December 2009), and Current statutes requiring release of government records.
2. Reports Required: None.
3. Material Superseded: This release supersedes the BLM 1278 Manual released in November of 1993.
4. Filing Instructions: File as directed below.

REMOVE:

All of 1278 (Rel. 1-1627)
(Total: 55 Sheets)

INSERT:

All of the Revised 1278
(Total: 30 Sheets)

/s/ Lisa Jollay
Acting, Assistant Director
Information Resources Management

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Chapter 1 Overview

1.1 Purpose

This manual section (MS) provides Bureau of Land Management employees with the policy and procedures for processing Freedom of Information Act (FOIA) requests. It also provides guidance for answering requests made to the State Information Access Centers (IACs).

1.2 Objectives

This MS provides policies and guidelines to:

1. Define bureau-wide activities and programs responsible for effective management of access to BLM records.
2. Ensure that all BLM records are identified in Records Access Categories.
3. Identify standards which may be used to protect sensitive information found within BLM records.
4. Facilitate information sharing amongst the BLM, other Federal agencies, and the public.

1.3 Authority

1. The Freedom of Information Act of 1966 (5 U.S.C. 552).
2. The Privacy Act (PA) (5 U.S.C. 552a).
3. The Copyright Act of 1976 (17 U.S.C. 101 et seq).
4. Federal Records Act of 1950 (44 U.S.C. Chapters 21, 29, and 31).
5. Copies of Records, Documents (43 U.S.C. 1460).
6. Department of the Interior (DOI) Regulations on the Privacy Act (43 CFR 2).
7. Federal Claims Collection Standards (31 CFR 9).
8. National Archives and Records Administration (NARA) (36 CFR 1220).
9. Federal Information Resources Management Regulation (43 CFR 201).
10. Implementing Disposition (36 CFR 1226).
11. Personnel Records (5 CFR 293.311).
12. OMB Circular A-130, Transmittal Memorandum #4, Management of Federal Information Resources (11/28/2000).

1.4 Responsibility

A. *The BLM Director and Deputy Director* are jointly responsible for ensuring that policy and guidance are established for managing access to all BLM records. These responsibilities include:

1. Implementing the overall direction of the BLM information access program under the FOIA to protect proprietary/confidential or otherwise protected information and to ensure the release of non-exempt records.
2. Making final decisions regarding disclosure of BLM records.
3. Resolving conflicts that cannot be solved at the Assistant Director (AD) level.
4. Determining solutions to disagreements affecting disclosure.

B. *The Assistant Director, Information Resources Management (AD, IRM)* is responsible for the following:

1. Ensuring BLM records that contain proprietary/confidential or otherwise protected information are preserved and protected from unauthorized disclosure.
2. Making decisions regarding disclosure of BLM records.
3. Carrying out the other responsibilities as included under the Assistant Directors paragraph in section C. below.

C. *Assistant Directors* are responsible for:

1. Making final decisions regarding the content of records and directives that involve policy and procedures pertaining to their programs.
2. Ensuring that records under their control are segregated and protected in accordance with laws and regulations.
3. Overseeing that Program Managers under their jurisdiction issue records and case file guidelines.
4. Designating System Managers to determine what records in the BLM Privacy Act (PA) systems may be appropriate for release or restriction under the FOIA.

D. *The Division Chief of IRM Governance* is responsible for:

1. Establishing an effective and efficient information access program that is consistent with Open Government and the FOIA information laws.
2. Implementing BLM FOIA policy in accordance with the Department of the Interior (DOI) Departmental Manual, FOIA Handbook (383 DM 15).
3. Appointing the FOIA Public Liaison.
4. Providing direction to the BLM FOIA Program Manager.

E. *The BLM FOIA Program Manager* is responsible for:

1. Developing FOIA policies in accordance with the DOI DM FOIA Handbook.
2. Providing guidance to implement information access policies and procedures on a bureau-wide basis.

F. *State Directors/Center Directors and Associate State Directors* are responsible for:

1. Complying with the statutory timeframe associated with replying to FOIA requests.
2. Following records' access rules of BLM records guidelines as defined by the Department of the Interior (DOI) Departmental Manual, FOIA Handbook (383 DM 15).
3. Approving discretionary disclosures for the release of information.
4. Surnaming all denial letters in accordance with the BLM MS 1203, Delegation of Authority.

G. *Deputy State Directors, District Managers, and Field Managers* are responsible for:

1. Ensuring that BLM policies for managing access to BLM records are followed in accordance with the Bureau's FOIA policies.
2. Applying fees to requests and collecting cost recovery.
3. Safeguarding all records in their custody, including records containing proprietary/confidential or otherwise protected information.
4. Assuring that the procedures established for proprietary/confidential or other protected information are strictly adhered to at all times.
5. Ensuring that training is provided to include guidance and instruction on the policies and procedures for the identification, use, and safeguarding of sensitive information.

H. *State FOIA Specialists* are responsible for:

1. Developing policies and procedures concerning access to BLM information in accordance with the policies in the DOI DM FOIA Handbook and providing this information to field offices.
2. Assisting with the development of Records Access Categories (RACs).
3. Establishing procedures or cooperating in establishing procedures for access to records including Information Access Center (IAC) procedures.
4. Collecting data and calculating cost recovery rates related to fees charged with FOIA requests.
5. Overseeing the processing of FOIA requests to ensure compliance with DOI requirements.
6. Providing procedural guidance and training to Field FOIA Coordinators and program employees.
7. Providing statistics necessary for completing the Annual FOIA Report to the BLM FOIA Program Manager.

I. *Field FOIA Coordinators* are responsible for working with subject matter experts, managers, and the State FOIA Specialists to process FOIA requests in compliance with this MS.

J. *System Managers* are responsible for:

1. Implementing the policies and practices governing a system of records.
2. Coordinating issues and requests for access to system records with FOIA and Privacy Specialists.

K. *All employees* are responsible for following BLM policy and guidance contained in this MS. This includes:

1. Appropriately safeguarding all records in their custody to prevent unauthorized disclosure.
2. Awareness of protected or proprietary/confidential information.
3. General knowledge of the FOIA.
4. Knowledge of which records are protected by specific statutes.
5. Knowledge of access categories for the records within their respective program area.
6. Responding to FOIA requests in a timely manner.

1.5 References

- A. DOI Department Manual, FOIA Handbook (383 DM 15).
- B. BLM MS 1271, Information Access Center.
- C. BLM MS 1203, Delegation of Authority.
- D. Office of the Chief Information Office (OCIO) Directive, OPEN Government Act Provisions, 2009-003.
- E. OCIO Directive, Implementing Administrative Guidelines of the Freedom of Information Act, 2010-011.
- F. Executive Order 13392, Improving Agency Disclosure of Information (December 14, 2005).
- G. Department of Justice (DOJ), Guide to the Freedom of Information Act, 2009.
- H. Presidential Memorandum on Transparency and Open Government, 2009.
- I. BLM Instruction Memorandum 2007-06, "Multi-track Processing of Freedom of Information Act Requests."
- J. Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information."

1.6 Policy

The BLM's FOIA policy is based upon the transparency initiative as outlined in the 2007 Open Government Act. Furthermore, the BLM's FOIA policy is committed to the release of records with a "presumption of openness," as established by the President's Memorandum on Transparency and Open Government 2009. The 2009 Open Government Act ensures accountability and transparency by: (1) Adopting a presumption in favor of disclosure of records, (2) Increasing proactive disclosures over the internet; and (3) Requiring all employees to work collaboratively with FOIA Specialists to process requests within statutory timeframes.

All employees must also follow procedures and policies found in the DOI Department Manual FOIA Handbook (383 DM 15) to supplement existing BLM guidelines.

Chapter 2 Records Access Categories (RAC) and FOIA Requests

This chapter provides general guidance on the maintenance and protection of BLM records and information. All BLM information is maintained and segregated into RACs. The BLM makes some of its information available in public reading rooms and on the web. This information does not require a written FOIA request. Information that does not require a FOIA request includes information the BLM has voluntarily made available to the public because of public interest. It also includes those documents which Federal Agencies are required to make available to the public either because of the FOIA, Administrative Procedures Act, or other public land statutes and regulations.

These RACs are reviewed and updated periodically. A specific breakdown of the records in the RACs is available at http://www.blm.gov/wo/st/en/res/FOIA/records_access.html.

2.1 External Requesters and Information Access Center Policies

The BLM has several Information Access Centers (IACs) located in several State Offices, where members of the public may walk in and request access to copies of records under FOIA. If the requester seeks access to records which are public, a copy of the record may be released without a written FOIA request. However, a written FOIA request must be submitted for internal records that contain sensitive/proprietary information.

Chapter 3 Requirements of FOIA Requests

In accordance with 43 CFR 2.10(b), all FOIA requests must be in writing. Members of the public should take care to send requests to the office where the records are located or to the State/Center with jurisdiction over that office. If the records are located at more than one installation or if the specific location of the records is not known to the requester, the requester may direct a request to the FOIA Program Analyst Office (WO) BLM. In accordance with DOI policy a letter does not have to cite the words “Freedom of Information Act” for the FOIA to be treated as a FOIA request. However, the request must ask for records. There is no requirement under FOIA to answer questions or conduct research. If a request concerns internal records which fall into a records access category that contains sensitive/proprietary information, it must be handled as a FOIA request and the requester must be advised. Proprietary and sensitive records must be reviewed prior to release in order to restrict protected information.

3.1 Scope of FOIA Requests

Unless a request specifies otherwise, requests to BLM field offices may be presumed to seek only records at that office and requests to the BLM Director may be presumed to seek only records of the BLM headquarters office (43 CFR 2.10 (b) (1)(4)). Requesters may seek access to BLM records maintained by contractors working for the Bureau by contacting the BLM FOIA Specialist or by contacting the appropriate BLM State Office where the contractor is located. The BLM will not begin processing FOIA requests until any issues regarding the fees, scope, or nature of the request are resolved.

3.2 Procedural Requirements of FOIA Requests

A. Any individual may file a FOIA request seeking access to BLM records. Under the FOIA, 5 U.S. C. 552, the definition of “any individual” includes corporations, non-U.S. citizens, public interest groups, members of the media, State, local or foreign government representatives, or members of Indian tribes. This definition includes BLM employees, however all employees must use their own personal address when filing a FOIA request. The use of government equipment is considered an unethical practice.

All BLM FOIA Specialists must work with requesters to ensure that their letters are as specific as possible when describing the desired records sought through their FOIA requests. For example, whenever possible, the request should identify the date, title or name, author, recipient, and the subject of the record; the office that created it, the present custodian of the record, the geographical location (e.g., headquarters or a regional/field office) and the timeframe for which records are sought.

B. Requesters should indicate that they are willing to pay fees unless they are seeking a fee waiver. The BLM uses the following fee categories to determine cost recovery as provided by DOI guidelines: (1) commercial use, (2) educational institution or noncommercial scientific institution that operates programs of scholarly/scientific research, or a representative of the news media; and (3) all others. The fee category decision is based on the proposed use of the records as provided by the requester's statement in their letter. Requesters may state how much they are willing to pay for processing and provide information as to their purpose for seeking the records. If the fee category is not determined in the initial processing of the FOIA request, the request is not perfected and therefore the FOIA Specialist must communicate with the requester to determine fee status and understanding of the fees. The following chart provides more information:

Category	Search fees	Review fees	Duplication fees
Commercial Use	Yes	Yes	Yes
Educational Institution	No	No	Yes (100 pages free)
Non-Commercial Scientific Institution	No	No	Yes (100 pages free)
News Media	No	No	Yes (100 pages free)
All Others	Yes (2 hours free)	No	Yes (100 pages free)

This MS provides more detailed information on fees and fee waivers in Chapter 4.

C. In accordance with (43 CFR 2.7(d) (1)) a requester may seek only records that are in existence at the time the BLM conducts the search for responsive records. A requester may not seek records that come into existence after the date the search was conducted and may not require that new records be created in response to the request. The BLM is not required to combine or compile selected items, respond to a questionnaire, prepare a new computer program, or calculate proportions, percentages, frequency distributions, trends, or comparisons, to fill a request.

D. All BLM FOIA Specialists must acknowledge receipt of FOIA requests by sending an acknowledgement letter with a FOIA request tracking number to the requester within 5 days from the date of receipt. This acknowledgement letter must advise the requester of the FOIA tracking number and estimated fees in accordance with DOI policy. The BLM FOIA Specialists may also send follow-up letters to correspond with the requester if there is an increase in the estimated fees or if there are follow-up questions on described records. They must also advise the requester of an approximate final date of response via a letter.

The time limit for acting on a normal request is 20 working days (43 CFR 2.12(a)) after the appropriate FOIA Specialist receives the request and it is perfected. In accordance with the 2008 Open Government guidelines, FOIA Specialists may only seek clarification on the description of the desired BLM records one time, and then the request is perfected upon receipt of the reply from the requester. The BLM must make a determination granting or denying the FOIA request, within the statutory time limit. If a request is unclear as to the desired records or does not indicate a willingness to pay fees, then the BLM FOIA Specialists must communicate with the requester to clarify these issues.

3.3 Multi-track Processing

Under specific circumstances, the BLM will process requests using multi-track processing. The paragraphs below provide a description of the Multi-track processing. All requests are processed on a “first in, first out” basis within the tracks below.

A. Simple: 1-5 workdays.

B. Normal: 1-20 workdays. For “Normal” track requests, a 10-day extension may be taken for specific circumstances. See Section 3.8 for further information.

C. Complex: Less than 20 workdays. For “Complex” track requests, the BLM may provide the requester with the opportunity to limit the scope of the request to result in faster processing within the “Complex” track; or, for even faster processing move the request into the “Normal” track. In the event that the BLM determines that a single consolidated response to a request seeking documents from multiple bureaus/offices is appropriate, the request will be considered “Complex.” Similarly, if the BLM determines that a single consolidated response to a request seeking documents from multiple BLM offices is appropriate, the request will be considered “Complex.” For “Complex” track requests, a 10-day extension may be taken for specific circumstances. More details are provided on these circumstances in the DOI FOIA Handbook (DM 383, Chapter 3, 3.3A-C).

3.4 Expedited Processing

When requested, the BLM will provide expedited processing, if the requester demonstrates a “compelling need.” A compelling need is described as: (1) where failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (2) an urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information. In most situations, a person primarily engaged in disseminating information will be a representative of the news media. The requested information must have particular value that will be lost if not disseminated quickly, and ordinarily refers to a breaking news story of general public interest. Therefore, information of historical interest only, or information sought for litigation or

commercial activities, would not qualify, nor would a news media deadline unrelated to breaking news.

3.5 Action on Initial Requests

Requests to field offices will be processed by the designated FOIA Specialist. All BLM FOIA Specialists must: (1) consult with BLM program staff for recommendations on release of internal records; (2) make recommendations to withhold the requested record based on the nine FOIA exemptions; (3) coordinate exemptions and withholdings of information with DOI Solicitors; and (4) release any information that is not exempt from disclosure.

All FOIA Specialists must consult with the appropriate DOI Associate, Regional, or Field solicitor in order to properly coordinate a decision to withhold a requested record, release a record that is exempt from disclosure, or deny a fee waiver. The State/Center Directors or the designated denying official must sign all denials. Designated signing authorities are contained in the BLM Manual Section 1203, "Delegation of Authority."

3.6 Granting Release of Information Under FOIA

When a requested record or part of a record has been determined to be available for release, the BLM FOIA Specialist processing the request must notify the requester in a response letter as to when and where the record is available for inspection or, when and how copies will be provided. If fees are due, the response letter must state the amount of fees due and the procedures for payment.

3.7 Denials of Records' Release Under FOIA

In accordance with 43 CFR 2.21(d), a decision to withhold a requested record (or portion of a record) must be in writing and must include: (1) a reference to the specific exemption or exemptions authorizing the withholding; (2) an explanation of the reason(s) for the denial; (3) an estimate of the volume of information being withheld; (4) the name(s) and title(s) of the person(s) responsible for the denial; (5) the name and title of the Office of the Solicitor attorney consulted; and (6) a statement that the denial may be appealed to the FOIA Appeals Officer in accordance with the requirements in §2.29.

3.8 Extensions of Time

The time limit for determining whether to grant or deny an initial request may be extended as reasonably necessary for the proper processing of the request, but in no case may the time limit be extended more than an additional 10 working days. The FOIA provides for extensions of the

time limit in the following specific situations: (1) the need to search for and collect the requested records from multiple offices; (2) the need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request; or, (3) the need to consult with another agency or one or more bureaus within the Department that may have a substantial interest in the determination of the requested subject matter.

3.9 Withholding Review and Discretionary Release

Decisions to withhold or deny information or to make a discretionary release require consultation with designated DOI FOIA solicitors. If a BLM FOIA Specialist believes that records are exempt from release and intends to withhold them, they must consult with the designated FOIA solicitor to ensure that the withholding has a sound legal basis. The FOIA case file must contain the justification for denying release and the solicitor approval and/or comments. The response to the requester must describe the records withheld and provide an explanation of the reason(s) for the withholding along with a reference to the specific exemption authorizing the denial. Discretionary releases are possible if the program office decides to waive the use of the exemption and determines that release of the information will not harm the agency, violate a statute, or harm an interest protected by a FOIA exemption.

3.10 Proactive Releases

The BLM State Offices may make proactive releases of Bureau records without a FOIA request if no information within those records is prohibited from release by Statute or Executive Order. The action of making a proactive release is required under subsection (a) (2) of the FOIA. The 2009 Open Government Act has placed greater emphasis on making proactive disclosures, in particular on the Web.

Chapter 4 Fees

In accordance with the DOI Fee schedules outlined in 43 CFR Part 2, Appendix C, all BLM FOIA requesters will pay fees when requesting records through FOIA requests. However, there are two criteria in which fees may be waived. These criteria are as follows: (1) requesters are not charged if the total amount of fees accumulated for search, review, and duplication of records fall below the Departmental threshold; (2) Fees are waived, if requesters qualify for fee waivers as outlined in the criteria listed in 43 CFR 2.19(a) – (b). For more information on the criteria in which requesters qualify for these fee waivers, refer to paragraph 4.4 below in this MS.

If FOIA requesters do not qualify for fee waivers under the two criteria as outlined above, then they are charged according to one of three categories as outlined in the chart in Chapter 2.4B of this MS.

All fees must be discussed in a letter to the requester. The response letter to the requester should contain an explanation of how applicable fees were calculated, and that a bill will follow (or is included with the response). A Bill for Collection must be generated in the current billing system, and the bill will include a statement that interest and other administrative charges and costs will be charged in accordance with the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982, if the fees are not paid within 30 calendar days.

4.1 Advance Payments

A. The BLM may only require advance payments when the estimated fees are over \$250 and when: (1) the requester has never made a previous FOIA request to the BLM; or; (2) the requester did not pay fees related to a previous FOIA request promptly.

B. If the requester has previously failed to pay fees within 30 calendar days of the date of billing, the BLM will require the requester to: (1) pay the full amount owed plus any applicable interest penalties, and to make an advance payment of the full amount of the estimated fee of the new request; or (2) demonstrate that the prior fee has been paid.

4.2 Form of Payment

Payment of fees should be made by check or money order payable to: “Department of the Interior - BLM.” Credit cards are also accepted where the capability exists.

4.3 Unresolved Fee Issues

The BLM will not start processing a request until all fee issues are resolved. If the BLM seeks clarification from the requester about a fee issue and does not hear from the requester within 20 workdays, the request will be closed. The responsible official should advise the requester in writing that the request is closed since a response has not been received.

4.4 Fee Waivers

All BLM FOIA Specialists will consider requests for Fee Waivers under two criteria as listed below:

A. Public Interests Fee Waiver Approval. If the requester has asked for a fee waiver, the BLM must make a determination on the request within 20 workdays based on the information within the letter (see 43 CFR 2.19(a)). Approvals of fee waivers for public interest requests are determined on a case-by-case analysis. The BLM will waive fees (in whole or part) if disclosure of all or part of the information is in the public interest because its release: (1) is likely to contribute significantly to public understanding of the operations or activities of the Government; and, (2) is not primarily in the commercial interest of the requester.

B. Commercial factors. Commercial factors considered are as follows: (1) the requester has a commercial interest that would be furthered by the requested disclosure; and, (2) if so, would disclosure be primarily in that interest. Often the requester may need to be consulted to gain more information to make this determination.

4.5 Limitation on Assessing Search and Duplication Fees

The BLM may no longer assess search fees or duplication fees for requesters in the following categories: "educational institution," "non-commercial scientific institution," or "representative of the news media," if the agency fails to comply with the 20-day time limit for responding to initial requests or appeals unless "unusual circumstances" or "exceptional circumstances" apply to the requests.

A. "Unusual Circumstances" generally apply whenever there is a need: (1) to search for and collect records from offices or establishments outside of the office processing the request; (2) to search for, collect, and examine a voluminous amount of records; or (3) to consult with another agency or more than two Departmental components. In this case, a statutory time extension must be taken (see Chapter 3.3 of the DOI FOIA Handbook).

B. "Exceptional circumstances" generally apply when the FOIA office processing the request has a backlog of pending requests and that office is making reasonable progress in reducing its backlog.

4.6 Litigation Fees

The Open Government Act expands the circumstances in which a plaintiff may be awarded attorney fees to include when the plaintiff obtained relief in the litigation due to a voluntary or unilateral change in the agency's position. Furthermore, the Act provides that attorney fees and costs from FOIA litigation may no longer be paid from the Judgment Fund in the Treasury, but rather is paid from annual appropriations of the agency.

Chapter 5 Appeals

This chapter provides guidance on when FOIA requesters may appeal decisions made by the BLM during FOIA processing. All appeal requests must be filed with the DOI Appeals Office.

5.1 Appropriate Situations to File Appeals.

Requesters may file appeals in the following situations:

- A. Records, or portions of records, have been withheld.
- B. The BLM informs the requester that they have not adequately described the records sought, or that the BLM does not have any responsive records.
- C. The requester questions the adequacy of the search.
- D. A fee waiver has been denied.
- E. A request has not been decided within the time limits required. (43 CFR 2.28 (a)).
- F. The BLM did not address all aspects of the request for records.
- G. A request for expedited processing has been denied or not responded to on time.
- H. The requester believes there is a procedural deficiency (e.g., fees are improperly calculated).
- I. If no determination has been reached at the end of the 20 working day period for deciding an initial request, or after a 10-day extension, the requester may deem the request denied and may exercise a right of administrative appeal or immediately bring a case in Federal Court. See 43 CFR 2.28 (a) (3). The action of not answering a request within the 20 working day period can be construed as a “constructive denial.” Under the 2007 Open Government Act, requesters may be awarded attorney fees, payable from agency funds, if they prevail in court if the BLM does not answer requests within the statutory time limit. For more detailed information on the term “constructive denial” refer to the glossary within this MS.

5.2 Time Limits on Appeals

All appeals must be received in the office of the Departmental FOIA Appeals Officer no later than 30 working days after the date of a total denial, or 30 working days after records have been made available in the case of a partial denial (43 CFR 2.29 (a)). For more information on time limits applying to appeals as illustrated in instances 4.1A through H above, see 43 CFR 2.29(a) through 2.29(e). If the BLM does not respond within the statutory timeframe of 20 working days, a requester may file an appeal any time after that time limit has expired.

Chapter 6 Description of FOIA Exemptions

6.1 Presumption of Disclosure

The BLM will apply a presumption of disclosure in responding to requests for records under the FOIA. Accordingly, the BLM will disclose requested information unless its release is prohibited by Statute or an Executive Order. Furthermore, if full disclosure of information within records is not possible, the BLM must consider making a partial disclosure. Discretionary disclosures are strongly encouraged whenever possible. It should be noted that the BLM may withhold information if the release of the information will foreseeably cause harm to an interest protected by a FOIA exemption.

6.2 Descriptions of FOIA Exemptions and BLM's Use of the Exemptions

The following paragraphs are provided as general descriptions of the nine FOIA exemptions under (5 U.S.C. 552(b)), where records may be withheld from public release. If the reader requires more information on the nine exemptions as outlined below they should refer to the DOI FOIA Handbook, Chapter 5 "FOIA Exemptions" (383 DM 15). Records (or portions of records) that meet any of the following nine exemption criteria may be withheld from public disclosure. The use of the exemptions below are discretionary not mandatory in nature and the appropriate officials within the BLM may waive the right to use any of the nine exemptions after consultation with the appropriate DOI solicitor. Generally, FOIA exemptions (1) and (8) are not normally applicable to BLM records, and as such are listed below without any explanation.

- A. Exemption 1 - Classified National Security Information Concerning National Defense or Foreign Policy.
- B. Exemption 2 - Internal Personnel Rules and Practices of an Agency. This exemption encompasses rules that apply to the rules and practices of personnel management, such as the hiring and firing rules which agencies may use in employee hiring procedures. The exemption may be used to restrict information such as scoring and selection plans used in positions, job suspension procedures, performance selection criteria, etc.
- C. Exemption 3 - Matters Specifically Exempted From Disclosure by Statute. This exemption is used in conjunction with specific statutes which require or authorize the withholding of confidential information to remain unaffected by the disclosure mandate of the FOIA.
- D. Exemption 4 - Trade Secrets and Confidential Business Information. Exemption 4 protects trade secrets, and commercial or financial information obtained from a person that is considered privileged or confidential. This exemption is intended to protect both the interests of the commercial entities that submit proprietary information to the government, and the interests of the government in receiving continued access to such data. It should be noted that under Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information" the BLM is required to notify

submitters when their data is requested under the FOIA prior to making a decision on allowing access to the records. The notice must give the submitter a reasonable amount of time to comment on the proposed release of the records.

- E. Exemption 5 - Internal Memoranda Privileges. Exemption 5 protects inter or intra-agency memoranda and letters that would not routinely be available by law to a party in litigation with the BLM. Any information withheld under this exemption must meet the threshold requirements. This exemption also protects information that falls within the Attorney-Work Product Privilege or the Attorney-Client Privilege.
- F. Exemption 6 - Personal Privacy. Exemption 6 protects personnel, medical, and similar files (of individuals), disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This exemption does not apply to corporate records or to information concerning individuals in their professional capacity. As a threshold requirement, information protected under Exemption 6 must relate to an individual and be contained in a personnel, medical, or similar file. Once this threshold requirement has been satisfied, Exemption 6 requires a balancing of interests between an individual's right to privacy and the public's right to Government information. Because balance is required, any invasion of privacy claims can prevail, if the public interest is distinctly weaker. Moreover, it should be remembered that the "public interest" must actually be in the interest of the overall public and the information must directly reveal the operations or activities of the Federal Government.
- G. Exemption 7 - Investigatory Files. Exemption 7 permits an agency to withhold investigatory records compiled for law enforcement or administrative purposes to the extent that release of such information: (a) could reasonably be expected to interfere with enforcement proceedings; (b) would deprive a person of the right to a fair trial or an impartial adjudication; (c) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (d) could reasonably be expected to disclose the identity of a confidential source; (e) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations; or, (f) would reasonably be expected to endanger the life or physical safety of any individual.
- H. Exemption 8 - Records of Financial Institutions.
- I. Exemption 9 - Geological and Geophysical Information. Exemption 9 protects geological and geophysical information and data, including maps concerning wells. This information may also be protected by Exemption 4 if the competitive harm standard is met. Exemption 9 has been invoked to withhold well logs and maps, seismic reports, and other exploratory findings of oil companies. The exemption applies to oil wells, natural gas wells, and water wells.

6.3 Waiver of Exemptions

Depending upon the circumstances of the release, the BLM may lose the right to invoke an exemption even when it is otherwise warranted, if the information has been disclosed previously, i.e., shared with parties outside the Federal Government. The paragraphs below provide an explanation of how discretion disclosures may be waived and a definition of proactive releases.

Discretionary Disclosure/Release versus Proactive Disclosure/Release

A discretionary disclosure occurs when a bureau/office decides, on a discretionary basis, to release information that is protected by a FOIA exemption in response to a FOIA request. In accordance with DOJ guidance, discretionary releases “are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” When conducting its review of a document, the agency must first verify that any information being considered for withholding under an exemption meets all of the requirements of that exemption. If the exemption applies, the agency should then determine whether to make a discretionary release of the document or portion thereof. The age of the document and the sensitivity of its content are universal factors that need to be evaluated when deciding whether or not to make a discretionary release. Per DOJ, “[f]or records covered by certain other exemptions ... discretionary disclosures are not possible because the information is required to be withheld by some other legal authority. Specifically, records protected by the exemptions covering national security, commercial and financial information, personal privacy, and information protected by statute, are generally not subject to discretionary releases.”

A proactive disclosure is when a bureau/office decides to make its records or information publicly available outside the context of a FOIA request. Agencies are required to affirmatively disclose information under subsection (a) (2) of the FOIA. Proactive disclosures can be made at any time by any office. Typically, such records are not posted in a FOIA electronic reading room. Instead, they are posted on a program office's website where the public is most likely to look for them.

All BLM offices should be aware that discretionary disclosures are made on a case-by-case basis. Agencies can waive the use of the exemptions cited above, as they are not mandatory, unless backed by statute or by Executive Order. FOIA Specialists should also be aware that the use of Exemption 5 may be inadvertently waived by disclosure or release of the protected communication. This inadvertent disclosure could occur through the following ways: (1) discovery in litigation; (2) in response to requests from congressional committees and individual members of Congress; (3) through responses to informal requests from the press and the public (including oral conversations); and (4) through dissemination of a document within an agency beyond those people who need to know its contents. All discretionary disclosures must be coordinated with the designated DOI solicitor.

Chapter 7 Special Requests for BLM Information

7.1 Congressional FOIA Requests

The following paragraphs describe how the BLM must process requests for records from members of Congress. The BLM must consult with the Office of Congressional and Legislative Affairs (OCL) to ensure proper coordination.

- A. Requests from Individual Members of Congress. Requests for access to non-public records from individual members of Congress are processed under FOIA in the same manner as requests from the general public. Upon receipt, these requests must be forwarded to a BLM FOIA Specialist.
- B. Requests from Congressional Committees or Subcommittees. Requests for access to non-public records from congressional committees or subcommittees are not processed under the FOIA. Upon receipt, these requests must be sent to a public affairs or an external affairs specialist.

Chapter 8 Requests Handled Under the FOIA and the Privacy Act

8.1 Personally Identifiable Information

Requests for records containing Personally Identifiable Information (PII) are processed under both the FOIA and the Privacy Act (PA). These records are protected by a PA Systems of Records Notice (SORN) and therefore require special handling procedures. All BLM FOIA Specialists must follow the general procedures outlined below when processing requests for records containing PII.

Prior to processing a request for records covered by a SORN (i.e. records retrieved by a personal identifier or by name) all BLM FOIA Specialists will ensure that the requester has provided a legible signature or photo ID. Requests for personnel information must be received in writing. Requests processed under the PA are most often received from first or third party requesters. For definitions of first and third party requests see the glossary.

8.2 Criminal Penalties

Any employee who knowingly and willfully discloses information protected by the PA may be subject to criminal penalties.

8.3 Application of Privacy Act

Unlike the FOIA, which applies to “any individual” the PA only applies to U.S. citizens or lawfully admitted aliens.

8.4 Fees Provisions for Combined FOIA/Privacy Act Requests

When processing requests for records protected by the PA, all BLM FOIA Specialists will apply the FOIA fee provisions and time limits as outlined in Chapters 2 and 4 of this MS. However, in regards to those records that are subject to the PA, the BLM cannot charge the person who is the subject of the records for search or review time. The only charge applicable for these requests is for duplication of the records. All fees are waived if the processing of the request is below the departmental threshold.

8.5 Accounting of Disclosures of Records Subject to the Privacy Act

All BLM FOIA Specialists must maintain an accounting of all disclosures, including public requests, in compliance with BLM records schedules. The system of accounting for disclosures must include a listing of all disclosures made of any individual record within the system of records, including the date, nature, and purpose of each disclosure and the name and address of

the person or agency to whom the disclosure was made. It is not necessary to include disclosures made to BLM employees to facilitate the performance of their duties. The system of accounting, must be retained or maintained for five years or the life of the record, whichever is longer.

8.6 Additional Guidance Regarding the Handling of Privacy Act Requests

Guidance regarding the handling of PA requests can be found by referring to the appropriate SORN.

8.7 Release of Grade and Salary Information of Federal Employees

The PA does not prohibit the disclosure of information that the FOIA requires to be released. Therefore all BLM FOIA Specialists should release records containing the grade level and salary of a Federal employee when this information is found in records reviewed under both the FOIA and the PA.

Glossary of Terms

-A-

Access: the ability to view, inspect, copy, or have copied BLM records.

Agency Records: The Supreme Court has articulated a two-part test for determining what constitutes “agency records” under the 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.” DOJ Guide to FOIA, pg. 34, citing DOJ v. Tax Analysts, 492 U.S. 136, 144-45 (1989).

Agency records in the custody of contractors: “Agency records” subject to disclosure under FOIA are documents under the control of an agency. To determine whether a record in the custody of a contractor is under the control of an agency (an agency record subject to FOIA), consider: “(1) the intent of the document’s creator to retain or relinquish control over the record, (2) the ability of the agency to use and dispose of the record as it sees fit, (3) the extent to which agency personnel have read or relied upon the document, and the degree to which the disclosure was integrated into the agency’s record systems or files.” *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1988).

-B-

BLM Records Not Requiring a FOIA Request are defined as follows: (1) records access category designated by BLM determining that the public has the right to view/inspect without charge and/or (2) records open to the public for inspection by law. Cost recovery fees apply for research and reproduction of these records.

BLM Records Requiring a FOIA Request are defined as follows: A limited-access record category which includes all records not designated in publicly available records categories, or those records that must be reviewed prior to release because: (1) a FOIA exemption may apply to all or portions of the record, or (2) the PA or other statute is applicable which may restrict access.

-C-

Commercial Information: Records are commercial so long as the submitter has a "commercial interest" in them. Commercial information consists of "intrinsically valuable" materials pertaining or relating to commerce or profit. Examples of commercial information are as follows: sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition.

Constructive Denial: This is a term used by the DOJ to signify that an agency has not responded to a FOIA request within the statutory timeframe as required by law. When requesters have not heard from the agency within the appropriate timeframe of 20 working days as to a decision upon their request, they can file an appeal or some other type of legal action.

Custody: Guardianship or control of records including either (or both) physical possession (physical custody) and legal responsibility (legal custody) as specified.

-D-

Denial: A letter informing a FOIA requester that either part or all of the records requested have been withheld because specified FOIA exemptions apply or a fee waiver has not been approved.

Discretionary Release: The FOIA provides exemptions from the general Government policy of making information publicly available. An agency has, at its discretion, the authority to make an administrative decision to release information that could be withheld under certain FOIA exemptions when not otherwise prohibited from doing so. When discretion is exercised, it should only be done under full and deliberate consideration of all interests involved. The BLM policy in making a discretionary release decisions is to review the facts and information in the documents to consider carefully the institutional (government), commercial (business entities), and personal privacy (individuals) interests that might be impacted by disclosure and to carefully consider the values and interest underlying the applicable exemption(s).

Duplication: Refers to the process of making copies of documents in response to a request. Such copies can take the form of paper, microform, audiovisual materials, or machine-readable information.

-E-

Educational Institution: A preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, which operates a program or programs of scholarly research.

External Access: Access to BLM recorded information by other Government (Federal, State, local or foreign) agencies or organizations; private sector organizations or members/persons representing private industry, news media, special interest groups, private educational institutions, scientific non-commercial, and general commercial entities; and individual members of the public.

Exempt: For the purposes of the FOIA, a record is exempt from release when one or more of the nine FOIA exemptions prohibit its disclosure to the public. Certain FOIA exemptions allow for a "discretionary release" of otherwise exempt information. (See also, "discretionary release.")

-F-

Financial Information: Records that concern a submitter's revenues or financial resources such as sales statistics; profit and loss data; overhead and operating costs; and information on financial condition.

First-Party Requester: A person seeking access to records about themselves; where records are contained in a system of records and the requester is the subject of the record sought.

FOIA request: A written request for records made by a third-party requester that either seeks copies of Record Access Category 2 records (and certain Category 1 records) or specifically invokes the FOIA, reasonably describes the records sought, and either requests a fee waiver or states a willingness to pay processing fees. The BLM must treat a request for records that does not specifically invoke the Act as a FOIA request when the information requested may require a FOIA review before release.

-G-

Granting a Request: A determination to release information sought through either a FOIA or request.

-I-

Individual: (1) for purposes of the PA, this refers to a citizen of the United States or an alien lawfully admitted for permanent residence. (2) For purposes of the FOIA “individual” means any individual person (including a non-U.S. citizen), corporation, association, public interest group, or the media; a State, local, or foreign government; or an Indian tribe can make a request under the FOIA. The only exception is a fugitive from justice.

Information: Knowledge or data, which can be communicated or received by any means concerning a particular fact or circumstance. For purposes of this manual “information” and “records” are synonymous. See also “Bureau records.”

Information Access Center (IAC): In the context of this Manual Section, this term is used to describe the BLM's primary contact point for providing external access to BLM records. The term also describes centralized physical locations within BLM State, District or Field/Resource Area offices that are designated as areas where the private sector or other external entities may obtain access to the BLM's records releasable without a FOIA request.

Inspection: The opportunity to view records and to use records to conduct research. These records may not be altered, removed, or destroyed.

-N-

News Media Requesters. Are any individuals actively engaged in gathering news for an entity whose primary function is to publish or broadcast news to the public. Under the Open Government act, this category was broadened to include “news-media entities such as “television or radio stations broadcasting to the public at large.” It also includes free-lance journalist, however the journalist may be asked to prove that they regularly disseminate news for the public.

Noncommercial Scientific Institution Requesters: Requesters in this category include non-commercial scientific institutions operated to conduct a program of scholarly research not intended to promote any particular product or industry.

-O-

Other Requesters. Other requesters include all requesters not covered by the other three categories. Public interest (non-profits) and environmental organizations will generally be in this category.

-P-

Person: For the purposes of the FOIA, this includes individuals (including non-American citizens), partnerships, corporations, associations and foreign, State, or local Governments. It does not include Federal agencies or offices. For the purpose of the PA a person is an individual, meaning a citizen of the United States or an alien admitted for permit citizenship.

Privacy Act (PA): A law (5 U.S.C. 552a) regulating the Federal Government's collection, maintenance, use, and dissemination of personal information about American citizens or aliens lawfully admitted for permanent residence. The Act provides that no agency will disclose any record that is contained in a “PA system of records” by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.

PA Notice: Usually refers to the “ System Notice” required to be published in the Federal Register; can also refer to the notice or “privacy statement” required to be included on a form or other collection instrument for gathering information subject to the PA or for inclusion in a PA system of records.

Proprietary/Confidential Information: is information submitted (either voluntarily or as a requirement) to the Government with an expectation of confidentiality, the release of which would result in substantial competitive or financial harm to the submitter.

Protected Information: Is broadly defined. The status “protected” is not primarily an access control designation but an indication of the need for the protection of the information’s integrity from corruption, misuse, or loss. Some protected information may be freely available to the public while other protected information must be tightly controlled. Protected Information

includes but is not limited to “For Official Use Only” information, financial information, Indian fiduciary trust data, and personally identifiable information (PII). PII includes but is not limited to Social Security number, date-of-birth, passport number, driver’s license number, personal address, personal telephone number, credit card information, savings/checking account numbers or balances, Selective Service registration number, sex, height, weight, and any medical, personnel or payroll information.

-R-

Record: See “Bureau record.”

Records Access Categories: The division and designation of BLM records into distinct categories that establish specific access rights and procedures.

Redact: The action of marking out or restricting information that is determined appropriate for protection by one or more of the nine FOIA exemptions

Requester: Is an individual who has asked to see or receive a copy of an agency record.

Review: Refers to the process of examining documents located that are responsive to a request to determine whether any portion is permitted to be withheld, and the subsequent processing of documents for disclosure by redacting exempt material or otherwise preparing them for release. Review does not include time spent in resolving general legal or policy issues regarding the application of FOIA exemptions.

-S-

Search: Refers to the time spent looking for material that is responsive to a request, including line-by-line or page-by-page search to determine whether a record is responsive, even if the search fails to locate records or the records located are determined to be exempt from disclosure.

Sensitive Information: See “protected information.”

Submitter: Any person or entity who provides proprietary/confidential or otherwise protected information to the Government. The term "submitter" includes, but is not limited to, individuals, corporations, and State, local or foreign Governments.

Substantial Competitive Harm: Harm that may occur when commercial or financial information concerning a company or person is made available to a competitor. Information that could cause competitive harm is information that could be used by a competitor to their advantage causing financial and economic loss that would harm the competitive position of the person the information concerns.

System Manager: A system manager is an official who has been designated in a system notice as having administrative responsibility for a system of records.

System of Records: See “PA system of records.”

-T-

Trade Secret: A secret, commercially valuable plan, formula, process or device that is issued for the making, preparing, compounding or processing of trade commodities that can be said to be the end product of either innovation or substantial effort.

