UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 105
Date Signed: August 15, 1996

MEMORANDUM

SUBJECT: Public Release of EPA Enforcement Information

FROM: Steven A. Herman
Assistant Administrator

TO: All Agency Employees

I. Purpose

This memorandum establishes Agency-wide Guidelines to ensure consistency in the release or withholding of documents related to EPA enforcement matters, and supersedes the September 16, 1985 document entitled "United States Environmental Protection Agency Enforcement Document Release Guidelines".

All EPA personnel who participate in and support enforcement actions should exercise extreme caution in their handling of enforcement-related documents, seek guidance concerning both written and oral requests for such documents, and ensure that no documents are released that are prohibited from disclosure or could harm any enforcement proceedings.

The Agency gathers and controls a vast amount of sensitive information. This information is obtained in various ways. It may be submitted voluntarily by the entity to which it pertains; it might be submitted as a requirement under an EPA statute or regulatory scheme; it may be obtained through information requests sent by the Agency; or it may be seized by judicial process of subpoena or warrant.

Regardless of the manner by which information comes into the possession of EPA, the agency has numerous responsibilities that attend to the custody and control of sensitive, enforcement-related information. These responsibilities include an obligation on the Agency and its employees to balance many competing interests that influence the decision whether or not to release to the public enforcement-related documents.

II. Goal

The goal of this policy is to conform with the "presumption of disclosure", which is the foundation of the Freedom of Information Act (FOIA) and is reiterated by Attorney General Janet Reno in her October 4, 1993) Memorandum for Heads of Departments and Agencies.

The presumption of disclosure does not extend, however, to certain categories of information such as Confidential Business Information, personal privacy information or information prohibited from disclosure by statutes (such as the Grand Jury secrecy rule [1]), nor does it routinely extend to documents whose release would interfere with enforcement proceedings.

This policy is intended to encourage the greatest possible disclosure, but without compromising enforcement matters or violating legal prohibitions against disclosure. The purpose underlying this policy is to further EPA's mission by enhancing the Agency's ability, to conduct its business without undue interference and to protect the rights of persons affected by Agency investigative or enforcement activity; it is not intended to hide information from the public, nor to curb Agency employees' freedom to have contact with the public. These purposes are accomplished by balancing the legal protections available to the Agency with the interests of the public to full access of information. In addition, the policy ensures that the constitutional protections afforded to criminal targets or defendants are safeguarded.

## III. Scope

This policy applies to any document which has been placed into an enforcement file, or is otherwise being used, for an enforcement purpose. Documents which were not originally filed or used for an enforcement purpose but are now so used or filed are covered by this policy.

This policy applies not only to those employees assigned to the Office of Enforcement and Compliance Assurance, but to all Agency personnel who participate in enforcement actions, including program, regulatory, technical, legal and support personnel.

## IV. General Principles

The Freedom of Information Act was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed.

The FOIA also provides a mechanism, in its exemption provisions, to balance several unique interests that conflict with its underlying principle of disclosure. The Act's exemptions were designed to guard against specific harms to both governmental and private interests. The mandatory exemptions dictated that certain information could not be disclosed. The discretionary exemptions required the agencies to balance competing interests in determining whether or not to withhold or release certain information.

---

[1] See Federal Rules of Criminal Procedure, Rule 6(e). See discussion addressing why Rule 6(e) is considered a statute for the purposes of Exemption 3, below.

In the past, the Department of Justice endorsed the withholding of information if federal agencies had a "substantial legal basis" for doing so. On October 4, 1993, the Attorney General issued a policy announcing that the Department of Justice would no longer defend an agency's withholding of information merely because there is a "substantial legal basis". Rather, the policy declared a "presumption of disclosure", and directed that discretionary exemptions be applied only after careful consideration of the reasonable expected consequences of disclosure in each particular case.

The distinction between mandatory and discretionary exemptions is critical. EPA personnel must understand that release of prohibited information may subject the agency to lawsuits, and individuals to disciplinary action, or civil or criminal liability. On the other hand, the agency is vulnerable to challenge if information is withheld improperly.

## V. Withholding Documents

### A. Prohibitions Against Disclosure

Statutes such as the Privacy Act and the Trade Secrets Act prohibit disclosure of types of information within their purview. Moreover, EPA regulations establish that as a matter of policy, certain information, even if not covered by such statutes, may not be released unless ordered to do so by a Federal court or in exceptional circumstances[2]. Releases under "exceptional circumstances" are determined on a case-by-case basis, and must be approved by the Office of General Counsel or Regional Counsel.

#### 1. Personal Privacy Information (FOIA Exemption 6)

Exemption 6 of the FOIA exempts from disclosure information relating to an individual, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Any enforcement-related information related to an individual (whether in one's personal or entrepreneurial capacity) must always be carefully scrutinized for Exemption 6 applicability. Information which qualifies for Exemption 6 protection may not be released except by order of a court of competent jurisdiction, or under "exceptional circumstances".

Exemption 6 permits the withholding of all information about individuals in "personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Personal information, which includes any information about a particular individual which is identifiable to that individual, may be disclosed only if there is no expectation of privacy in the

---

[2] See 40 CFR §2.119(b).

information, or if the privacy interest is outweighed by the public interest in disclosure of the information. Several examples follow in order to illustrate EPA's practice in implementing Exemption 6:

> Example 1 EPA has relied on Exemption 6 in declining to provide the identities of individual residents whose drinking water wells or lawn soils have been sampled by the Superfund program and tested for contamination. In these cases, the Agency has determined that the privacy interest in not being harassed by PRPs is not outweighed by the public interest in disclosure of this information.

> Example 2 The Agency routinely relies on Exemption 6 to withhold EPA employees' social security numbers that appear on CERCLA timesheets.

Case law has resulted in clarification of several phrases that are often critical for interpreting Exemption 6. Below is a summary of how the courts have interpreted these phrases in construing Exemption 6.

Privacy interest: Encompasses the individual's reasonable expectation of privacy and control over the dissemination of personal information about himself. Individuals have an expectation of privacy with respect to information which, by its nature, is personal, embarrassing or otherwise injurious to the individual. Privacy interests also include the right to be free from secondary effects of disclosure, such as harassment or unwanted intrusions, even if the information itself is not inherently harmful.

Public interest: There is a public interest in a particular Agency record if disclosure of that record sheds light on the operations or activities of the government.

Glomar: Occasionally a FOIA request is worded in such a way that it would not be possible to deny the record under Exemption 6 without revealing the very information which is protected under the Exemption. For example, a request seeking the information contained in a criminal investigation file targeting a named individual would normally be withholdable under Exemption 6 (and Exemption 7(C)). However, if the Agency denied the FOIA request for such records in reliance on Exemption 6, the Agency would be revealing the existence of such records, the very information which is protected. To guard against such inadvertent disclosures, the Agency may provide a "Glomar" response; that is, neither confirming nor denying the existence of records in response to all requests for criminal files pertaining to individuals. Before a "Glomar" response is issued, however, the Office of General Counsel, Finance and Operations Division, must be consulted.

> Example 1 A recent FOIA request from a newspaper sought "copies of any correspondence since January 1, 1990, between [EPA] and [a United States Senator], his office, his staff, or any of his political organizations" including campaign organizations which were listed by name in the request. In the response supplying this information to the newspaper, which included constituent requests forwarded by the Senator's office, the names of individual constituents, as

well as other personal information such as home addresses and telephone numbers, were redacted.

Example 2 EPA specifically developed a policy regarding FOIA responses to the public for a multi-county site contaminated with lead-mining wastes, affecting many residential properties. The Agency decided that prior to issuing the Agency's response action decision documents, the Agency would release the lead level information only to the property owners, to the exclusion of all others.

Example 3 Personal information in enforcement files concerning EPA employees, e.g., employees' social security numbers on time sheets, are withheld from FOIA requestors under Exemption 6.

Example 4 EPA routinely seeks and obtains financial information, including copies of stare and federal tax returns, from potentially responsible parties (PRPs) in accordance with Section 104(e)(2)(C) of CERCLA in order to assess the ability of PRPs to fund or otherwise finance a response action. Individual income tax returns, in contrast to business tax returns, may not be "business information" within the meaning of 40 C-F.R. 2.20 1 (C) and thus may not be elicible for confidential treatment under Exemption 4. Nonetheless, there is a privacy interest in such tax returns which is unlikely to be counterbalanced by any public interest in their disclosure. This information is of the type contemplated for protection under Exemptions 6 and 7(C).[3]

2. The Privacy Act

The Privacy Act protects information contained within a Privacy Act system of "records; i.e., information about or pertaining to an individual which is maintained or retrieved by the individual's name or other personal identifier (e. a., Social Security Number). A collection of information which is not identifiable to an individual is not a record for Privacy Act purposes; nor is information which contains an individual's name, but is not about or does not pertain to him.

Although EPA is required to publish a notice of the existence and character of a Privacy Act system of records in the *Federal Register*, information contained within a Privacy Act system of records is subject to the restrictions of the Privacy Act regardless of whether the Agency has complied with the requirement of publishing a *Federal Register* notice.

The Privacy Act prohibits disclosure of records covered by the Act (subject to civil and criminal penalties) unless the records fall within one or more of twelve exceptions set forth in the

[3] See, however, discussion of withholdability of CERCLA §104 information, below.

Act. One exception permits disclosure if the records are required to be released under FOIA. Thus, if a Privacy Act record is required to be disclosed under FOIA (i.e., is not exempt under FOIA), the Privacy Act will not preclude disclosure. However, if such a record is exempt under the FOIA, the Privacy Act will prohibit the Agency from releasing the record in its discretion. Accordingly, personal information in law enforcement records which is exempt under FOIA exemptions 6 and 7(C) may not be disclosed in the Agency's discretion.

The Agency is currently considering whether any civil enforcement records are of Privacy Act systems of records. If in doubt concerning the Privacy Act status of a record, contact the Office of General Counsel.

3. Confidential Business Information (Exemption 4)

FOIA Exemption 4 protects trade secrets and commercial or financial information that is privileged or confidential. Generally, if information relates to a business or trade, it should be examined to determine whether the information is confidential or whether the business asserts a claim of confidentiality. By regulation, business information may not be disclosed unless the Agency has ascertained that there is no claim of confidentiality applicable to the information, or a final determination of nonconfidenitiality has already been made and the appropriate period allowed for comment by the business has ended.

- If a FOIA request includes business information within its scope, the office responding to the request must first ascertain whether a confidentiality claim has been asserted for the information.

- If no confidentiality claim has been made but the information is of a type where the submitter might be expected to object to its release, EPA must still contact the business to ascertain whether the business wishes to assert a claim for the information, unless when the information was requested EPA gave notice that the information was subject to release if no confidentiality claim was asserted.

- If the information is claimed as confidential, the EPA office should follow the procedures outlined in Chapter 8 of the FOIA manual.

Following is a list of types of information frequently <u>claimed</u> as confidential by the submitting company. This list is not exhaustive, however, and the Agency must treat the claimed information as confidential until a final confidentiality determination is made.

**S** Trade secret formulas, devices and identities of chemicals

**S** identities of pesticide inerts

- **S** The fact that a company is manufacturing, importing, processing, etc. a particular chemical

- **S** Production volumes of chemicals, or amount stored at a company facility

- **S** Industrial process information

- **S** Any financial data regarding a company (e.g.,. assets, profits, taxes), obtained from any source

- **S** Contractor cost-structure and other contractor-supplied financial information such as direct labor rates, indirect rates, proposals, fees

- If no confidentiality claim is asserted for a record, the Agency may not use Exemption 4 as grounds for withholding.

With some exceptions, the Agency deems commercial or financial information to be entitled to Exemption 4 protection if 1) its disclosure is likely to cause substantial harm to the competitive position of the submitter, 2) the information was voluntarily submitted to the Agency and is of a type that the submitter would not customarily disclose to the public, or 3) information is privileged.

Example of Settlement Documents In the course of settling claims, the Agency frequently sends correspondence to, and receives correspondence from, private entities against whom claims have been asserted. The private entity may claim its correspondence as confidential. If so, the correspondence is likely to be eligible for confidential treatment under the settlement privilege.[4] Correspondence from the Agency to the private entity is not eligible for protection under Exemption 4 (except insofar as the correspondence restates the private entity's communications with EPA), but potentially is subject to Exemption 5 protection (see below). Note that the Trade Secrets Act and some environmental statutes impose criminal liability for unauthorized disclosure of confidential business information.

4. Statutory (Exemption 3)

Exemption of FOIA covers information specifically exempted from disclosure by another Federal statute. The statute in question must leave no discretion as to the requirement that information be withheld, or it must establish particular criteria for withholding or refer to particular types of information to be withheld.

---

[4] The Agency must first establish that the party has claimed the information as confidential and follow the other appropriate procedures in 40 CFR part 2, subpart B.

The most common Exemption 3 statute applicable to enforcement documents is Federal Rules of Criminal Procedure, Rule 6(e) which prohibits disclosure of matters occurring before a grand jury. Although Rule 6(e) is not technically a statute, it has been held to satisfy the "statute" requirement of Exemption 3 because it was specially amended by Congress in 1977.

B. Discretionary Withholding

1. Presumption of Disclosure

Throughout the following summary of the discretionary exemptions most common to enforcement documents - Exemptions 5 and 7 - the presumption of disclosure allows withholding of documents only if, after careful consideration of the reasonably expected consequences of disclosure in each particular case, the Agency foresees that disclosure would be harmful to an interest protected by that exemption.

2. Articuable Harm

In order to withhold enforcement-related documents not otherwise prohibited from disclosure, the Agency must be able to identify and define the harm that could reasonably be expected to result if requested information were released to the public.

3. FOIA Exemptions 5 and 7

**Exemption 5 - Privileged Inter-Agency or Intra-Agency Memoranda**. This exemption allows the Agency to withhold from disclosure interagency or intra-agency memoranda or other written communications which fall under one or more of several privileges, including:

- the deliberative process privilege;
- the attorney work-product privilege;
- the attorney-client privilege;
- the expert witness report privilege;
- the government commercial information privilege;
- the investigative report privilege; and
- the confidential informant privilege (see also Exemption (b)(7)(D)).

- <u>Predecisional, Deliberative Documents</u>. Only pre-decisional, deliberative documents may be withheld. Predecisional, deliberative documents written prior to the agency's final decision and usually contain recommendations or express opinions on that decision. These documents typically discuss the pros and cons of the Agency's adoption of one viewpoint or another. In determining whether a document is predecisional, consider the document's language and its place in the Agency's chain of decision making. Documents written by a subordinate and

transmitted to a superior are more likely to be predecisional than those written by a person, with final decision making authority. Factual information contained within a deliberative document must normally be released.
The deliberative process privilege is intended to encourage frank and open discussion within the government, to protect against premature disclosure of policies before they are adopted, and to protect against public confusion should recommended actions be different upon formal adoption by the government. Internal Agency comments on proposed courses of action, pros and cons of various options, and similar discourse may be withheld from from release under Exemption 5.

> Example 1 The Agency has withheld from requestors copies of Requests for Concurrence on Settlement, relying on the Deliberative Process Privilege.
>
> Example 2 The Agency has withheld from requestors copies of comments on draft or pre-decisional regulatory proposals, Agency enforcement initiatives, or enforcement policy matters.

- Settlement Documents Some courts have held that documents transmitted between the government and third parties during settlement negotiations are not inter- or intra-agency documents, but have indicated much sympathy for withholding such documents from public disclosure for policy reasons. The Department of Justice has indicated that settlement documents be withheld by agencies at the administrative level, particularly where strong policy interests militating against disclosure are present. (See Exemption 4, above, for settlement documents received from private entities.)

- The Attorney Work-Produce Privilege This privilege allows the withholding of documents prepared by, or at the direction of, an attorney in anticipation of possible litigation (which can include administrative proceedings). Litigation need not have commenced but it must be reasonably contemplated. This means that a specific claim must exist that is likely to lead to litigation. The privilege is still applicable after a legal case has ended or even if it was never begun, as long as the documents were prepared in reasonable contemplation of litigation.

> Example The Agency generally withholds litigation referrals and other memos or notes prepared by the case attorney which discuss evidence against defendants in enforcement actions and any weaknesses in the evidence. or possible defenses. Exemption 7(A) may also apply to these documents.

- The Attorney-Client Privilege. This privilege applies to confidential communications between attorney and client. An attorney-client relationship is necessary to invoke this privilege. Such a relationship exists for communications between an Agency attorney and an Agency employee, The application of this privilege requires that the communications between the parties be of a

confidential nature. Unlike the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. The privilege still applies when this information is disseminated within the Agency to persons involved with the matter in question. However, unrestricted distribution within the Agency would preclude the Agency from claiming the privilege. Communications between the Department of Justice attorneys and EPA counsel or EPA program or technical staff are also covered by this privilege protection.

- The Government Commercial Information Privilege. A privilege is available to the government for information it generates in the process leading up to the award of a contract. An example of this type of information would be cost estimates prepared by the government and used to evaluate the construction proposals of private contractors.

- The Expert Witness Report Privilege. Another privilege that is commonly invoked allows the withholding of records generated by an expert witness.

- The Investigative Report Privilege. This privilege has been applied to protect witness statements in Criminal Investigation Division and Inspector General investigations.

- The Confidential Statement Privilege. Statements obtained from confidential informants such as statements given to the Inspector General by witnesses who have been granted confidentiality, may be withheld.

**Exemption 7 - Records or Information Compiled For Law Enforcement Purposes**. Exemption 7 applies to all records or information compiled for law enforcement purposes whose release could reasonably be expected to cause the specified harm each sub-section is intended to prevent. Exemption 7 provides that records or information compiled for law enforcement purposes need not be disclosed under the following six instances.

1) Exemption 7(A): Interference with Enforcement Proceedings. Records or information compiled for law enforcement purposes may be withheld where disclosure "could reasonably be expected to interfere with enforcement proceedings"

   Harm to the government's case in court by premature release of evidence or information, or damage to the Agency's ability to conduct an investigation, constitutes interference under this exemption. Damage to a related or similar enforcement proceeding also constitutes interference. Exemption 7(A) can be invoked only as long as the enforcement proceeding is in progress, pending or anticipated.

   The Agency must be able to specifically articulate the kind of harm that would affect its case. Some types of harm that fall under this exemption include premature disclosure of the

government's evidence and strategy or the focus of its investigation, and the possibility that potential witnesses and sources of information would be inhibited.

Example 1 EPA typically uses contractor support at early stages of a site investigation to determine the "potentially responsible parties" ("PRPs") that might be liable for fire cleanup of the site, or, in the alternative for the reimbursement of EPA's costs, if EPA funds the cleanup. The contractor prepares for EPA a "PRP Report" summarizing the results of its investigation. The Agency often withholds this report under Exemption 7(A). Similarly, CERCLA enforcement staff may compile and maintain information linking various entities to sites being addressed through emergency response or remedial actions. The Agency often withholds this information during the pendency of a CERCLA § 104(e) request to a PRP in order to prevent PRPs from using this information to tailor their responses to the agency according to their estimation of the strength of the enforcement case.[5] As this example illustrates, Exemption 7(A) is extremely time-sensitive: information which must be protected at one state of an investigation may have few consequences at a later stage.

Example 2 The Agency may withhold the transcript of a deposition taken of and informant pursuant to a CERCLA administrative subpoena. Exemptions 7(A) and 7(C) may be applicable, as well as 7(D) (where the informant asks to keep his identity confidential). If the depositions are part of a confidential investigation, and the Agency is still trying to build it's case against some PRPs, the Agency may want to preclude the PRPs from having access to the informants and being able to intimidate them into changing their testimony.[6]

Example 3 The Agency withheld an internal memorandum on enforcement strategy for the Tulalip Landfill site. Disclosure of the document would reveal sensitive information about the Agency's approach to the site, which could interfere with subsequent enforcement actions or with access agreements to the Superfund site.

2) Exemption 7(B): Deprive a Person of the Right to a Fair Trial. Records or information compiled for law enforcement purposes may also be withheld if their disclosure "would deprive a person of the right to a fair trial or an impartial adjudication." This exemption applies mostly in criminal trials of individuals.

---

[5] See, however, discussion of withholdability of CERCLA §104 information, below.

[6] See, however, discussion of withholdability of CERCLA §104 information, below.

3) Exemption 7(C): Unwarranted Invasion of Personal Privacy. Records or information compiled for law enforcement purposes may be withheld if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The public interests in the disclosure of a document must be balanced against the invasion of privacy that would result from disclosure.

Courts have recognized the danger of damage to an individual's reputation simply because or her name is mentioned in a record compiled for law enforcement purposes even though he or she is not charged. Such information should be released only where exceptional interests weigh in favor of disclosure.

Exemption 7(C) is also used to protect the identities of Criminal Investigation Division special agents and other law enforcement officials who are personally involved in compiling records or information for law enforcement purposes, and to withhold the names of informers who may not technically qualify as confidential sources under Exemption 7(D).

Because the test for withholding personal information under Exemption 7(C) is less stringent than that under Exemption 6, both exemptions should ordinarily be refined to protect personal privacy in the law enforcement context.

4) Exemption 7(D): Disclose Identity of Confidential Source. The first prong of Exemption 7(D) applies to civil law enforcement investigations and permits records and information compiled for law enforcement purposes to be withheld if disclosure "would reveal the identity of the source." The second prong of Exemption 7(D) applies to criminal law enforcement matter and allows the withholding not only of the identity of the confidential source, but also any information provided by the source. This allows withholding of information provided by a source even if the information was obtainable by other means.

> Example The Agency withholds the identity of persons interviewed during an investigation to find potentially responsible parties at a Superfund site, because the source may request anonymity, or may be subject to potential retaliation by employers.[7]

5) Exemption 7(E): Reveal Techniques, Procedures or Guidelines. This exemption permits the withholding of records or information compiled for law enforcement purposes that "would disclose techniques and procedures for law enforcement investigations or prosecution, or would disclose guidelines for law enforcement investigation or prosecution if such disclosure could reasonably expected to risk circumvention of law." Generally, the technique or procedure

[7] See, however, discussion of withholding of CERCLA §104 information, below.

should not be known to the public. Those portions of an internal agency enforcement manual or guidelines that would enable the circumvention of the law should be withheld.

> Example 1 The Agency received a FOIA request for all Agency information relating to criteria used for selecting facilities for multimedia inspection. Among the grounds available for withholding subject documents is Exemption (7E).
> Example 2 The Agency withholds lists of target facilities for PCB compliance inspections and lists of inspection categories showing the percentage distribution of target number for each category.

6) Exemption 7(F): Endanger Life or Safety of Any Individual Under this exemption, any records or information compiled for law enforcement purposes may be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual".

C. Special Considerations in Criminal Enforcement Cases

The prosecution of criminal cases is governed by a strict set of rules, set forth in the Federal Rules of Criminal Procedure. The scope of these rules extends beyond court procedures. The conduct of those involved in a criminal matter is strictly governed from the very outset of a criminal investigation. These rules are designed to protect the guaranteed constitutional rights of a criminal defendant. As a result, virtually every aspect of a criminal case - from initiation to closure - will be subject to challenge by the defense.

Therefore, in order to successfully investigate and prosecute environmental crimes, the Agency must be able to control and monitor the conduct of its employees to protect against later challenges by the defense that may compromise or even destroy a criminal case. Also, innocent persons, cleared during investigation, may be harmed by premature statements by Agency employees.

In a criminal case, the government has the burden to prove the crime(s) beyond a reasonable doubt. This is the highest, most stringent burden of proof in the American legal system.

In order to develop that proof in an environmental criminal case, the Agency routinely relies on the assistance and expertise of many of its employees. Thus, Agency employees will have access to information that is not otherwise available to the public. In a criminal case, because of the government's heavy burden of proof, the confidentiality of such privileged information must be carefully guarded.

In addition, the Criminal Investigation Division special agents rely on an element of secrecy in conducting their investigations. Criminal cases are often supported by information provided by - employees of, and documents maintained by, a targeted company. If the fact of a criminal investigation is prematurely disclosed, the criminal target will have the opportunity to tamper with potential witnesses,

destroy incriminating documents or otherwise conceal the evidence of a crime, and may endanger potential witnesses.

With these special considerations applicable to criminal cases in mind, Congress carved out an exclusion to the FOIA, which allows the Agency to treat records as not subject to the FOIA requirements under the following, limited circumstances:

1) If the investigation or enforcement actions involve a possible violation of criminal law; and

2) if there is reason to believe that the subject of the investigation is unaware of its pendency; and

3) if the mere disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

In situations where it would appear to be appropriate to rely on this exclusion provision, Agency employees must consult with the Office of the General Counsel, Information Law attorneys, Finance and Operations Division, prior to responding to the request.

It is also important to distinguish between the exclusion described here, and the situation in which the Agency refuses to confirm or deny the existence of records responsive to a FOIA request (see **Exemption 6 - "Glomar"**, above).

D. Disclosure of Data Collected Pursuant to CERCLA § 104, and CAA §114

CERCLA § 104(e)(7)(A) and the CAA provides that "Information obtained ... under this section ... shall be available to the public" unless it is CBI. A May 7, 1992 opinion issued by the Office of General Counsel stated that the language in §104(e)(7)(A) precluded the assertion of FOIA exemptions (other than Exemption 4) for information collected pursuant to §104(e). Upon the reconsideration of the issue, in consultation with the Department of Justice, OGC withdrew the 1992 opinion via a memorandum issued on September 11, 1995, pending development of further guidance. Additionally, Superfund legislation being considered by Congress containing language which would expressly preserve FOIA privileges for information collected pursuant to §104.

Similarly, CAA §114(c) provides that "any ... information obtained under [§114(a)] shall be made available to the public upon a showing to the Administrator ... that... information ... if made public, would divulge methods or processes entitled to protection as trade secrets." OECA's practice regarding this section has been to allow the withholding of information from the public upon a showing that the information is CBI. However, OECA's practice also to permit the assertion of other FOIA exemptions for information collected pursuant to §114.

E. Consultation and Approval Procedures

While the authority to issue an initial determination releasing information has been delegated to the Division Director level in OECA and the Regions[8] the OECA or regional attorney assigned to the case must be consulted prior to the release of documents in response to a request for records pertaining to any ongoing enforcement matter. In cases that have been referred to the Department of Justice (DOJ), the DOJ attorney and/or the Assistant United States Attorney (AUSA) assigned to the case should also be consulted.

The authority to withhold requested enforcement records lies with the Assistant Administrator and his Office Directors. Each region has its own delegation of authority which should be adhered to. The FOIA attorney in the Offices of Regional Counsel should concur on all denials.

F. Resources

Additional information about the FOIA exemptions and their application to enforcement related documents is found at 40 CFR Part 2 and the Agency's Freedom of Information Act Manual (#1550, 992 Edition).

An exhaustive study of the FOIA and Privacy Act, and related case law, is contained in the two-volume publication entitled the Freedom of Information Act Guide and Privacy Act Overview, and the Freedom of Information Case List, issued by the Department of Justice, Office of Information and Privacy, and available through the U.S. Government Printing Office.

Questions concerning the releasability of information may be directed to the Office of General Counsel, Finance and Operations Division, at (202) 260-5460.

---

[8] Regions may have differing delegations of authority which should be confirmed by those handling the FOIA request.