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the request should be submitted to the Freedom of Information Officer, RSPA Headquarters, and that official will forward the request to the appropriate office. Each request should be accompanied by a signed authorization to conduct the search and agreement to pay any costs incurred. Prepayment may be required before delivery is made. The requester may stipulate a maximum fee which he or she will pay.

5. Reconsideration of Determination not to Disclose Records and to Deny Fee Waivers

Any person who has been notified that a record or part of a record that has been requested will not be disclosed or that a request for a fee waiver or reduction will not be granted, either in whole or in part, may appeal, in writing, to the Research and Special Programs Administrator, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, for a reconsideration of the determination. The decision of the Administrator is administratively final.

PART 8—CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL

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AUTHORITY: E.O. 11652 (37 FR 5209), National Security Council Directive of May 17, 1972 (37 FR 10053), and secs. 3 and 9 of the Department of Transportation Act (49 U.S.C. 1652 and 1657).

SOURCE: 37 FR 28297, Dec. 22, 1972, unless otherwise noted.

§ 8.1 Scope.

This part sets forth procedures affecting the public, for the classification, declassification and availability

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of information, in implementation of Executive Order 11652, "Classification and Declassification of National Security Information and Material."

§ 8.3 Applicability.

The provisions of this part apply to all elements of the Department of Transportation including the National Transportation Safety Board.

§ 8.5 Definitions.

As used in this part:

Classified information means official information which requires protection against unauthorized disclosure in the interest of the national security of the United States and which has been so designated. The specific degree of protection required is designated by the following classification categories:

(a) *Top secret*. That information or material which requires the highest degree of protection and the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security.

(b) *Secret*. That information or material which requires a substantial degree of protection and the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security.

(c) *Confidential*. That national security information or material which requires protection and the unauthorized disclosure of which could reasonably be expected to cause damage to the national security.

Classify means to determine that official information requires, in the interest of national security, a specific degree of protection against unauthorized disclosure, coupled with a designation signifying that such a determination has been made.

Declassify means to determine that information no longer requires protection against unauthorized disclosure in the interest of national security. Material will be re-marked to reflect this determination.

Downgrade means to determine that classified information requires a lesser degree of protection against unauthorized disclosure in the interests of national security than that currently assigned. Material will be re-marked to reflect this determination.

§ 8.7 Spheres of responsibility.

(a) Pursuant to the provisions of section 7(B)(2) of Executive Order 11652, the Assistant Secretary for Administration is hereby designated as the senior staff officer of the Secretary of Transportation with assigned responsibilities to assure effective compliance with and implementation of the order, National Security Council Directives, and this part.

(b) In the discharge of these responsibilities, the Assistant Secretary for Administration shall be assisted by the Director of Investigations and Security who, in addition to other actions directed by this part, shall evaluate the overall application of and adherence to the security policies and requirements prescribed herein and who shall report his findings and recommendations to the Assistant Secretary for Administration, heads of administrations, Chairman, National Transportation Safety Board, and, as appropriate, to the Secretary.

(c) Secretarial Officers, heads of administrations, and the Chairman, National Transportation Safety Board, shall assure the effective administration of the provisions prescribed herein, that adequate personnel and funding are provided for this purpose, and that corrective actions which may be warranted are taken promptly.

§ 8.9 Security Review Committee.

(a) There is hereby established a Department of Transportation Security Review Committee which shall have authority to:

(1) Act on all suggestions and complaints not otherwise resolved with respect to the Department's administration of the Executive Order and implementing directives, including those regarding overclassification, failure to declassify, or delay in declassifying;

(2) Act on appeals of requests for classification reviews, and appeals of requests for records under section 552 of title 5, United States Code, (Freedom of Information Act), when the initial denial is based on continued classification of the record; and

(3) Recommend to the Secretary, when necessary, appropriate administrative action to correct abuse or violation of any provision of the Execu-

tive order and implementing directives.

(b) The Security Review Committee shall be composed of the Assistant Secretary for Administration who shall serve as Chairman, the General Counsel, and the Director of Investigations and Security. When matters affecting a particular administration or the National Transportation Safety Board are at issue, the Associate Administrator for Administration for that administration, the Chief of Staff for the U.S. Coast Guard, or the General Manager for the National Transportation Safety Board, as the case may be, shall participate as an ad hoc member, together with the Chief Counsel for the particular element.

(c) The Chairman shall submit to the Interagency Classification Review Committee quarterly reports of Departmental Committee actions on classification review requests, classification abuses, and unauthorized disclosure of classified information.

§ 8.11 Authority to classify information.

(a) Executive Order 11652 confers upon the Secretary of Transportation the authority to originally classify information as SECRET or CONFIDENTIAL with further authorization to delegate this authority.

(b) The following delegations of authority to originally classify information as "SECRET" or "CONFIDENTIAL", which may not be redelegated, are hereby made:

(1) *Office of the Secretary of Transportation.* The Deputy Secretary; Assistant Secretary for Transportation Policy; Assistant Secretary for Aviation and International Affairs; Assistant Secretary for Administration; Director of Investigations and Security; Director, Transportation Systems Center.

(2) *United States Coast Guard.* The Commandant; Assistant Commandant; Chief of Staff; Chief, Office of Marine Environment and Systems; Chief, Office of Operations; Chief, Intelligence Staff; Commander, Eastern Area; Commander, Western Area; Commanders, Coast Guard Districts; Commander, Coast Guard Activities Europe.

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(3) *Federal Aviation Administration.* The Administrator; Deputy Administrator; Associate Administrator for Administration; Assistant Administrator for International Aviation Affairs; Director of Air Transportation Security; Regional Directors; Director, Aeronautical Center; Director, National Aviation Facilities Experimental Center.

(4) *National Transportation Safety Board.* Chairman of the Board; General Manager.

(c) Although the delegations of authority set out in paragraph (b) of this section are expressed in terms of positions, the authority is personal and is invested only in the individual occupying the position. The authority may not be exercised "by direction of" a designated official. The formal appointment or assignment of an individual to one of the identified positions or a designation in writing to act in the absence of one of these officials, however, conveys the authority to originally classify information as "Secret" or "Confidential."

(d) Previous delegations and redelegations of authority within the Department of Transportation to originally classify information "Top Secret," "Secret," or "Confidential" are hereby rescinded.

[37 FR 28297, Dec. 22, 1972, as amended at 59 FR 10061, 10064, Mar. 3, 1994]

§ 8.13 Authority to downgrade or declassify.

Information originally classified by the Department may be specifically downgraded or declassified by the official authorizing the original classification or by his successor; by a supervisory official of either, or by higher authority; or by the Departmental Security Review Committee.

§ 8.15 Review of exempted and excluded material.

(a) *Background*—(1) *Classified material produced after June 1, 1972.* Executive Order 11652 establishes a General Declassification Schedule under which classified material produced after June 1, 1972, becomes automatically downgraded and declassified at prescribed intervals. Exceptions to the General Declassification Schedule with respect

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to material produced after June 1, 1972, are:

(i) Material which is downgraded or declassified earlier than provided by the Schedule, based upon a predictable event or other development; and

(ii) Material which is exempt from automatic declassification because it may warrant protection for a period exceeding that provided by the Schedule.

Decisions to exempt material from the General Declassification Schedule may be made only by an official authorized to originally classify information as Top Secret, and only if the information falls within one of four categories established by the Executive order. Material which has been exempted from the General Declassification Schedule is subject to a mandatory classification review as specified in paragraph (b) of this section.

(2) *Classified material produced prior to June 1, 1972.* Classified material produced prior to June 1, 1972, and which was marked group 1, group 2, or group 3 in accordance with the provisions of Executive Order 10501, as amended (26 FR 8932, Sept. 22, 1961), or which is not group marked, is excluded from automatic declassification, but is subject to a mandatory classification review as specified in paragraph (b) of this section.

(b) *Requirement for classification review.* Classified material which is exempt from the General Declassification Schedule, and classified material which is excluded from automatic declassification shall be subject to a mandatory classification review for declassification purposes at any time after the expiration of 10 years from the date it was produced, provided that:

(1) A department or agency or a member of the public requests a review;

(2) The request describes the record with sufficient particularity to permit the record to be identified; and

(3) The record can be obtained with only a reasonable amount of effort.

(c) *Remarking.* Material which no longer warrants classification as determined by the review shall be declassified, and so marked. Material which continues to warrant classification

shall be marked to indicate that a review was conducted. Whenever possible, a date for automatic declassification shall be established and the material so marked.

§ 8.17 Procedures for submitting and handling requests for classification reviews.

(a) The Director of Investigations and Security, Office of the Secretary of Transportation, 400 Seventh Street SW, Washington, DC 20590, is hereby designated as the office to whom a member of the public or another department or agency should submit a request for a classification review of classified material produced by or under the primary cognizance of the Department. Elements of the Department which may receive a request directly shall immediately notify the Director.

(b) If the request for classification review involves material produced by or under the cognizance of the U.S. Coast Guard, the Federal Aviation Administration, or the National Transportation Safety Board, the Director shall forward the request to the headquarters security staff of the element concerned for action. If the request involves material produced by other Departmental elements, the Director shall serve as the office acting on the request.

(c) The office acting on the request shall:

(1) Immediately acknowledge receipt of the request and provide a copy of the correspondence to the Director. If a fee for search of records is involved pursuant to part 7, subpart H of the regulations of the Office of the Secretary (part 7, subpart H, of this subtitle), or, in the case of material of the National Transportation Safety Board, pursuant to the regulations of the National Transportation Safety Board (14 CFR part 401, subpart C) [part 401 was redesignated as 49 CFR part 801, at 40 FR 30235, July 17, 1975], the requester shall be so notified;

(2) Conduct a security review which shall include consultation with the office which produced the material and with source authorities when the classification, or exemption of material from automatic declassification, was

based upon determinations by an original classifying authority; and

(3) Assure that the requester is notified of the determination within 30 days or given an explanation as to why further time is necessary, and provide a copy of the notification to the Director of Investigations and Security.

(d) Whenever a request is insufficient in the description of the record sought, the requester shall be asked to limit his request to records that are reasonably obtainable. If, in spite of these steps, the requester does not describe the records with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why the request is denied and of his right to appeal the determination. Denial of a request to review based on the provisions of this paragraph shall be taken only under the most extreme circumstances.

(e) If the determination reached is that continued classification is required, the notification to the requester shall include, whenever possible, a brief statement as to why the requested material cannot be declassified. The notification shall also advise the requester of his right to appeal the determination. A requester who wishes to appeal a classification review decision, or who has not been notified of a decision after 60 days, may submit his appeal to the Chairman, Security Review Committee, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590.

(f) If the determination reached is that continued classification is not required, the information shall be declassified and the material remarked. The office acting on the request shall then refer the request to the office originating the material or higher authority to determine if it is otherwise available for public release under the Freedom of Information Act (5 U.S.C. 552) and part 7 of the regulations of the Office of the Secretary (part 7 of this subtitle, "Public Availability of Information").

(1) If the material is available under the Freedom of Information Act, the requester shall be advised that the material has been declassified and is available. If the request involves the furnishing of copies and a fee is to be

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collected, the requester shall be so advised pursuant to part 7, subpart H of the regulations of the Office of the Secretary (part 7, subpart H, of this subtitle), or in the case of National Transportation Safety Board material, pursuant to the regulations of the National Transportation Safety Board (14 CFR part 401, subpart C) [part 401 was redesignated as 49 CFR part 801, at 40 FR 30235, July 17, 1975].

(2) If the material is not available under the Freedom of Information Act, the requester shall be advised that the material has been declassified but that the record is unavailable pursuant to the Freedom of Information Act, and that the provisions concerning procedures for reconsidering decisions not to disclose records, contained in subpart G of part 7 of the regulations of the Office of the Secretary (part 7, subpart G, of this subtitle), or in the case of National Transportation Safety Board material, in 14 CFR part 401, subpart E [part 401 was redesignated as 49 CFR part 801, at 40 FR 30235, July 17, 1975], apply.

(g) Upon receipt of an appeal from a classification review determination based upon continued classification, the Departmental Security Review Committee shall immediately acknowledge receipt and act on the matter within 30 days. With respect to information originally classified by or under the primary cognizance of the Department, the Committee, acting for the Secretary, has authority to overrule previous determinations in whole or in part when, in its judgment, continued protection in the interest of national security is no longer required. When the classification of the material produced in the Department is based upon a classification determination made by another department or agency, the Security Review Committee shall immediately consult with its counterpart committee for that department.

(1) If it is determined that the material produced in the Department requires continued classification, the requester will be so notified and advised of his right to appeal the decision to the Interagency Classification Review Committee.

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(2) If it is determined that the material no longer requires classification, it shall be declassified and remarked. The committee shall refer the request to the general counsel, or to the head of the operating administration concerned, or to the Chairman, National Transportation Safety Board, as the case may be, to determine if the material is otherwise available for public release under the Freedom of Information Act (5 U.S.C. 552) and the relevant regulations, and the provisions set forth in paragraphs (f)(1) and (2) of this section shall be followed. A copy of the response to the requester shall be provided to the committee.

(h) Requests for a classification review of material more than 30 years old shall be referred directly to the Archivist of the United States and the requester shall be notified of the referral. In this event, the provisions of § 8.19 apply.

§ 8.19 Declassification of classified material after 30 years.

(a) Classified material produced in the Department after June 1, 1972, which remains in a protected status, will become automatically declassified at the end of 30 full calendar years after the date of its original classification. If it appears, however, that continued protection is essential to the national security or that disclosure would place a person in immediate jeopardy, the matter shall be referred to the Secretary, through the Director of Investigations and Security. A determination that continued classification is warranted may be made only by the Secretary.

(b) Classified material produced before June 1, 1972, and which is more than 30 years old will be reviewed systematically for declassification by the Archivist of the United States by the end of the 30th full calendar year following the year in which it was originated. In his review, the Archivist will separate and keep protected only such material produced by the Department as is specifically identified by the Secretary as requiring protection. The Director of Investigations and Security is designated as the liaison officer for the Department with the Archivist for this

purpose. Each administration shall advise the Director of Investigations and Security of classified material under its cognizance which is or becomes 30 years old. This notification shall also include recommendations for protection of the material considered to warrant continued classification in order that a determination by the Secretary may be obtained.

§ 8.21 Burden of proof.

For the purpose of determinations to be made under §§ 8.13, 8.15, and 8.17, the burden of proof is on the originating element to show that continued classification is warranted.

§ 8.23 Classified material transferred to the Department of Transportation.

(a) Classified material officially transferred to the Department pursuant to statute or Executive order in conjunction with a transfer of function, and not merely for storage purposes, shall be considered to have been originated by the Department for the purpose of downgrading and declassification.

(b) Classified material in the custody of the Department originated by a department or agency which has ceased to exist and whose functions and records were not officially transferred to another department shall be downgraded and declassified by the Department in accordance with the provisions of this part. If it appears that another department or agency may have an interest in the subject matter of the material from a classification standpoint, that department shall be advised of the nature of the material and the intention to downgrade or declassify. The notified department shall be allowed 30 days in which to express an objection, if it so desires, before action is taken. A difference of opinion which cannot be resolved shall be referred to the Departmental Security Review Committee which will consult with its counterpart committee for the respective department.

§ 8.25 Public availability of declassified information.

(a) It is a fundamental policy of the Department to make information

available to the public to the maximum extent permitted by law. Information which is declassified for any reason loses its status as material protected in the interest of national security. Accordingly, declassified information shall be handled in every respect on the same basis as all other unclassified information. Declassified information is subject to the Departmental public information policies and procedures, with particular reference to regulations of the Office of the Secretary on public availability of information (part 7 of this subtitle) and the Freedom of Information Act (5 U.S.C. 552).

(b) In furtherance of this policy, all classified material produced after June 1, 1972, which is of sufficient historical or other value to warrant preservation as permanent records in accordance with appropriate records administrative standards, and which becomes declassified, shall be systematically reviewed prior to the end of each calendar year for the purpose of making the material publicly available. To the maximum extent possible without destroying the integrity of the Department's files, all such material shall be segregated or set aside for public release upon request.

§ 8.27 Access to historical researchers, former Presidential appointees and contractors.

(a) *Historical researchers.* (1) Persons outside the executive branch who are engaged in historical research projects may have access to classified information provided that:

(i) Access to the information will be clearly consistent with the interests of national security; and

(ii) The person to be granted access is trustworthy.

(2) The provisions of this paragraph apply only to persons who are conducting historical research as private individuals or under private sponsorship and do not apply to research conducted under Government contract or sponsorship. The provisions are applicable only to situations where the classified information concerned, or any part of it, was originated by the Department or Department contractors, or where the information, if originated elsewhere, is in the sole custody of the Department.

If any person requests access to material originated in another agency or to information under the exclusive jurisdiction of the National Archives and Records Service, General Services Administration, he will be referred to the other agency or to the National Archives and Records Service.

(3) When a request for access to classified information for historical research is received, it will be referred to the appropriate local security office. The security office shall obtain from the applicant completed Standard Form 86 in triplicate, investigation data for sensitive position, and Standard Form 87, fingerprint chart; a statement in detail to justify access, including identification of the kind of information desired and the organization or organizations, if any, sponsoring the research; and a written statement (signed, dated, and witnessed) with respect to the following:

(i) That he will abide by regulations issued by the Department:

(a) To safeguard classified information; and

(b) To protect information which has been determined to be proprietary or privileged and is therefore not eligible for public dissemination.

(ii) That he understands that any classified information which he receives affects the security of the United States.

(iii) That he acknowledges an obligation to safeguard classified information or privileged information of which he gains possession or knowledge as a result of his access to files of the Department.

(iv) That he agrees not to reveal to any person or agency any classified information or privileged information obtained as a result of his access except as specifically authorized in writing by the Department and further agrees that he shall not use the information for purposes other than those set forth in his application.

(v) That he agrees to authorize a review of his notes and manuscript for the sole purpose of determining that no classified information or material is contained therein.

(vi) That he understands that failure to abide by conditions of this statement will constitute sufficient cause

for canceling his access to classified information and for denying him any future access, and may subject him to criminal provisions of Federal law as referred to in this statement.

(vii) That he is aware and fully understands that the provisions of title 18, United States Code, Crimes and Criminal Procedures, and of the Internal Security Act of 1950, as amended, title 50, United States Code, prescribe, under certain circumstances, criminal penalties for the unauthorized disclosure of information respecting the national security and for loss, destruction, or compromise of such information.

(viii) That this statement is made to the U.S. Government to enable it to exercise its responsibilities for the protection of information affecting the national security. That he understands that any material false statement which he makes knowingly and willfully will subject him to the penalties of title 18, United States Code, section 1001.

(4) The security office shall process the forms in the same manner as specified for a preappointment national agency check for a critical-sensitive position. Upon receipt of the completed national agency check, the security office, if warranted, may determine that access by the applicant to the information will be clearly consistent with the interests of national security and the person to be granted access is trustworthy. If deemed necessary, before making its determination, the office may conduct or request further investigation. Before access is denied in any case, the matter will be referred through channels to the Director of Investigations and Security for review and submission to the Secretary for final denial.

(5) If access to Top Secret, intelligence, or communications security information is involved a full field investigation is required. However, this investigation shall not be requested until the matter has been referred through channels to the Director of Investigations and Security for determination as to adequacy of the justification and the consent of other agencies as required.

(6) When it is indicated that an applicant's research may extend to material originating in the records of another agency, approval must be obtained from the other agency prior to the grant of access.

(7) Approvals for access shall be valid for the duration of the current research project but no longer than 2 years from the date of issuance, unless renewed. If a subsequent request for similar access is made by the individual within 1 year from the date of completion of the current project, access may again be granted without obtaining a new National Agency Check. If more than 1 year has elapsed, a new National Agency Check must be obtained. The local security office shall promptly advise its security staff, headquarters, of all approvals of access granted under these provisions.

(8) An applicant may be given access only to that classified information which is directly pertinent to his approved project. He may review files or records containing classified information only in offices under the control of the Department. Procedures must be established to identify classified material to which he is given access. He must be briefed on local procedures established to prevent unauthorized access to the classified material while in his custody, for the return of the material for secure storage at the end of the daily working period, and for the control of his notes until they have been reviewed. In addition to the security review of the applicant's manuscript, the manuscript must be reviewed by appropriate offices to assure that it is technically accurate insofar as material obtained from the Department is concerned and is consistent with the Department's public release policies.

(b) *Former Presidential appointees.* Persons who previously occupied policy-making positions to which they were appointed by the President may be granted access to classified information or material which they originated, reviewed, signed, or received, while in public office, provided that:

(1) It is determined that such access is clearly consistent with the interests of national security; and

(2) The person agrees to safeguard the information, to authorize a review

of his notes to assure that classified information is not contained therein, and that the classified information will not be further disseminated or published.

(c) *Contractors.* Classified information may be disclosed to DOT contractors, subcontractors, bidders, and grantees, and to contractors of other Government agencies, provided access to the information is necessary to the performance of the contract and required security clearances have been issued.

§ 8.29 Industrial security.

(a) *Background.* Executive Order 10865, as amended, Safeguarding Classified Information Within Industry (25 FR 1583, February 24, 1960) states,

The Secretary of State, the Secretary of Defense, the Secretary of Transportation, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect:

(1) Releases of classified information to or within U.S. industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies; and

(2) Other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

Executive Order 10865 also prescribes criteria for the issuance of security clearances to industry personnel and requirements for the adjudication of controverted cases.

(b) *Implementing regulations.* Under an agreement between the Department of Defense and the Department of Transportation, regulations prescribed by the Secretary of Defense to fulfill the provisions of Executive Order 10865, as amended, have been extended to protect releases of classified information for which the Secretary of Transportation is responsible. Specifically, these regulations are:

(1) DOD 5220.22-R, Industrial Security Regulation;

(2) DOD 5220.22-M, Industrial Security Manual for Safeguarding Classified

Information, together with supplements; and

(3) DOD 5220.6, Industrial Personnel Security Clearance Program.

These regulations are effective within the Department, which functions as a User Agency as prescribed in the regulations. Appropriate security staffs, project personnel, and contracting officers assure that actions required by the regulations are taken.

(c) *Liaison and coordination with Department of Defense.* The Director of Investigations and Security shall maintain liaison and coordination with the Department of Defense on behalf of the Department on overall industrial security matters. The Director shall develop such material as may be necessary to permit the Secretary to reach those determinations specifically reserved to him by Executive Order 10865, as amended, and the agreement between the Department of Defense and the Department of Transportation.

PART 9—TESTIMONY OF EMPLOYEES OF THE DEPARTMENT AND PRODUCTION OF RECORDS IN LEGAL PROCEEDINGS

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- 9.17 Legal proceedings between private litigants: Procedures for taking testimony.
- 9.19 Acceptance of service on behalf of Secretary.

AUTHORITY: 5 U.S.C. 301; 45 U.S.C. 41–42; 49 U.S.C. 322; 49 U.S.C. 504(f); 23 U.S.C. 409.

SOURCE: 58 FR 6724, Feb. 2, 1993, unless otherwise noted.

§9.1 Purpose.

(a) This part sets forth procedures governing the testimony of an em-

ployee in legal proceedings in which the United States is a party. It also sets forth procedures to be followed when an employee is issued a subpoena, order or other demand (collectively referred to in this part as a “demand”) by a court or other competent authority, or is requested by a private litigant, to provide testimony or produce records concerning information acquired in the course of performing official duties or because of the employee’s official status. It also prescribes the policies and procedures of the Department with respect to the acceptance of service of legal process and pleadings in legal proceedings involving the Department.

(b) The purposes of this part are to:

- (1) Conserve the time of employees for conducting official business;
- (2) Minimize the possibility of involving the Department in controversial issues not related to its mission;
- (3) Maintain the impartiality of the Department among private litigants;
- (4) Avoid spending the time and money of the United States for private purposes; and
- (5) To protect confidential, sensitive information and the deliberative processes of the Department.

(c) Agency counsel, in his or her discretion, may permit an exception from any requirement in this part. The exception may be granted only when the deviation will not interfere with matters of operational or military necessity, and when agency counsel determines that:

- (1) It is necessary to prevent a miscarriage of justice;
- (2) The Department has an interest in the decision that may be rendered in the legal proceeding; or
- (3) The exception is in the best interest of the Department or the United States.

For Office of Inspector General employees and documents, the Inspector General, in conjunction with the General Counsel of the Department, may permit an exception from any requirement of this part if the Inspector General determines, based on the Inspector General Act of 1978, as amended, that application of the requirement would be inappropriate.