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(4) Excluded from exemption 7 are two situations applicable to DoD. (Activities considering invoking an exclusion based on the following scenarios should first consult through legal counsel, to the DoJ, Office of Information and Privacy (DoJ OIP).

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Activities may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such a situation, the response to the requester will state that no records were found.

(ii) Whenever informant records maintained by a criminal law enforcement organization within an Army Activity or a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Activity may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the requester will state that no records were found.

(h) *Number 8 (5 U.S.C. 552 (b)(8))*. Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) *Number 9 (5 U.S.C. 552 (b)(9))*. Those containing geological and geophysical information and data (including maps) concerning wells.

### Subpart D—For Official Use Only

#### § 518.14 General.

Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public

because disclosure would cause harm to an interest protected by one or more FOIA exemptions 2 through 9 (see Subpart C of this part) shall be considered as being for official use only (FOUO). No other material shall be considered FOUO and FOUO is not authorized as an additional form of classification to protect national security interests. Additional information on FOUO and other controlled, unclassified information may be found in DoD 5200.1-R, "Information Security Program" or by contacting the DA FOIA/PA Office.

### Subpart E—Release and Processing Procedures

#### § 518.15 General provisions.

(a) Since the policy of the DoD is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for an Army record made under the provisions of 5 U.S.C. 552 (a)(3) of the FOIA may be denied only when:

(1) The record is subject to one or more of the exemptions of the FOIA;

(2) The record has not been described well enough to enable the Army Activity to locate it with a reasonable amount of effort by an employee familiar with the files; or

(3) The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the Army Activity concerned. When personally identifiable information in a record is requested by the subject of the record or his attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a PA system of records, to include the subject's attorney.

(4) Release of information under the FOIA can have an adverse impact on OPSEC. The Army implementing directive for OPSEC is AR 530-1. It requires that OPSEC points of contact be named for all HQDA staff agencies and for all commands down to battalion level. The FOIA official for the staff

agency or command will use DA Form 4948-R to announce the OPSEC/FOIA advisor for the command. Persons named as OPSEC points of contact will be OPSEC/FOIA advisors. Command OPSEC/FOIA advisors should implement the policies and procedures in AR 530-1, consistent with this part and with the following considerations:

(i) Documents or parts of documents properly classified in the interest of national security must be protected. Classified documents may be released in response to a FOIA request only under AR 380-5, Chapter III. AR 380-5 provides that if parts of a document are not classified and can be segregated with reasonable ease, they may be released, but parts requiring continued protection must be clearly identified.

(ii) The release of unclassified documents could violate national security. When this appears possible, OPSEC/FOIA advisors should request a classification evaluation of the document by its proponent under AR 380-5, paragraphs 2-204, 2-600, 2-800, and 2-801. In such cases, other FOIA exemptions may also apply.

(iii) A combination of unclassified documents, or parts of them, could combine to supply information that might violate national security if released. When this appears possible, OPSEC/FOIA advisors should consider classifying the combined information per AR 380-5, paragraph 2-211.

(iv) A document or information may not be properly or currently classified when a FOIA request for it is received. In this case, the request may not be denied on the grounds that the document or information is classified except in accordance with Executive Order 12958 as amended, section 1.6(d), and AR 380-5, paragraph 2-204, and with approval of the Army OGC.

(5) OPSEC/FOIA advisors will; advise persons processing FOIA requests on related OPSEC requirements; help custodians of requested documents prepare requests for classification evaluations; and help custodians of requested documents identify the parts of documents that must remain classified under this section and AR 380-5.

(6) OPSEC/FOIA advisors do not, by their actions, relieve FOIA personnel and custodians processing FOIA re-

quests of their responsibility to protect classified or exempted information.

(b) The provisions of the FOIA are reserved for persons with private interests as opposed to U.S. Federal Agencies seeking official information. Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, Army Activities shall still process the request. Army Activities should encourage requesters to send requests by mail, facsimile, or by electronic means. Disclosure of records to individuals under the FOIA is considered public release of information, except as provided in this paragraph. DA officials will release the following records, upon request, to the persons specified below, even though these records are exempt from release to the general public. The statutory 20 working day limit applies.

(1) *Medical records.* Commanders or chiefs of medical treatment facilities will release information:

(i) On the condition of sick or injured patients to the patient's relatives to the extent permitted by law and regulation.

(ii) That a patient's condition has become critical to the nearest known relative or to the person the patient has named to be informed in an emergency.

(iii) That a diagnosis of psychosis has been made to the nearest known relative or to the person named by the patient.

(iv) On births, deaths, and cases of communicable diseases to local officials (if required by local laws).

(v) Copies of records of present or former soldiers, dependents, civilian employees, or patients in DA medical facilities will be released to the patient or to the patient's representative on written request. The attending physician can withhold records if he or she thinks that release may injure the patient's mental or physical health; in that case, copies of records will be released to the patient's next of kin or

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legal representative or to the doctor or dentist chosen by the patient. If the patient is adjudged insane, or dies, the copies will be released, on written request, to the patient's next of kin or legal representative.

(vi) Copies of records may be given to a Federal or State hospital or penal institution if the person concerned is an inmate or patient there.

(vii) Copies of records or information from them may be given to authorized representatives of certain agencies. The National Academy of Sciences, the National Research Council, and other accredited agencies are eligible to receive such information when they are engaged in cooperative studies, with the approval of The Surgeon General of the Army. However, certain information on drug and alcohol use cannot be released. AR 600-85 covers the Army's substance abuse program.

(viii) Copies of pertinent parts of a patient's records can be furnished to the staff judge advocate or legal officer of the command in connection with the Government's collection of a claim. If proper, the legal officer can release this information to the tortfeasor's insurer without the patient's consent.

NOTE: Information released to third parties must be accompanied by a statement of the conditions of release. The statement will specify that the information not be disclosed to other persons except as privileged communication between doctor and patient.

(2) *Military personnel records.* Military personnel records will be released under these conditions:

(i) DA must provide specific information about a person's military service (statement of military service) in response to a request by that person or with that person's written consent to his or her legal representative;

(ii) Papers relating to applications for, designation of beneficiaries under, and allotments to pay premiums for, National Service Life Insurance or Serviceman's Group Life Insurance will be released to the applicant or to the insured. If the insured is adjudged insane (evidence of an insanity judgment must be included) or dies, the records will be released, on request, to designated beneficiaries or to the next of kin;

(iii) Copies of DA documents that record the death of a soldier, a depend-

ent, or a civilian employee will be released, on request, to that person's next of kin, life insurance carrier, and legal representative. A person acting on behalf of someone else concerned with the death (e.g., the executor of a will) may also obtain copies by submitting a written request that includes evidence of his or her representative capacity. That representative may give written consent for release to others; or

(iv) Papers relating to the pay and allowances or allotments of a present or former soldier will be released to the soldier or his or her authorized representative. If the soldier is deceased, these papers will be released to the next of kin or legal representatives.

(3) *Civilian personnel records.* Civilian Personnel Officers (CPO) with custody of papers relating to the pay and allowances or allotments of current or former civilian employees will release them to the employee or his or her authorized representative. If the employee is deceased, these records will be released to the next of kin or legal representative. However, a CPO cannot release statements of witnesses, medical records, or other reports or documents pertaining to compensation for injuries or death of a DA civilian employee.

(4) *Accused persons.* Release of information to the public concerning accused persons before determination of the case. Such release may prejudice the accused's opportunity for a fair and impartial determination of the case. The following procedures apply:

(i) The following information concerning persons accused of an offense may be released by the convening authority to public news agencies or media. The accused's name, grade or rank, unit, regular assigned duties, and other information as allowed by AR 25-71, paragraph 3-3a. The substance or text of the offense of which the person is accused. The identity of the apprehending or investigating agency and the length or scope of the investigation before apprehension. The factual circumstances immediately surrounding the apprehension, including the time and place of apprehension, resistance, or pursuit. The type and place of custody, if any;

(ii) *Information that will not be released.* Before evidence has been presented in open court, subjective observations or any information not incontrovertibly factual will not be released. Background information or information relating to the circumstances of an apprehension may be prejudicial to the best interests of the accused, and will not be released unless it serves a law enforcement function. The following kinds of information will not be released: Observations or comments on an accused's character and demeanor, including those at the time of apprehension and arrest or during pretrial custody. Statements, admissions, confessions, or alibis attributable to an accused, or the fact of refusal or failure of the accused to make a statement. Reference to confidential sources, investigative techniques and procedures, investigator notes, and activity files. This includes reference to fingerprint tests, polygraph examinations, blood tests, firearms identification tests, or similar laboratory tests or examinations. Statements as to the identity, credibility, or testimony of prospective witnesses. Statements concerning evidence or argument in the case, whether or not that evidence or argument may be used at the trial. Any opinion on the accused's guilt. Any opinion on the possibility of a plea of guilty to the offense charged, or of a plea to a lesser offense;

(iii) *Other considerations.* Photographing or televising the accused. DA personnel should not encourage or volunteer assistance to news media in photographing or televising an accused or suspected person being held or transported in military custody. DA representatives should not make photographs of an accused or suspect available unless a law enforcement function is served. Requests from news media to take photographs during courts-martial are governed by AR 360-1;

(iv) *Fugitives from justice.* This section does not restrict the release of information to enlist public aid in apprehending a fugitive from justice; or

(v) *Exceptional cases.* Permission to release information from military personnel records to public news agencies or media may be requested from The

Judge Advocate General (TJAG). Requests for information from military personnel records will be processed according to this part.

(5) *Litigation, tort claims, and contract disputes.* Release of information or records under this section are subject to the time limitations prescribed by the FOIA. The requester must be advised of the reasons for nonrelease or referral.

(i) *Litigation.* Each request for a record related to pending litigation involving the United States will be referred to the staff judge advocate or legal officer of the command. He or she will promptly inform the Litigation Division, U.S. Army Legal Services Agency (USALSA), of the substance of the request and the content of the record requested. (Mailing address: U.S. Army Litigation Center, 901 N. Stuart Street, Arlington, VA 22203-1837. If information is released for use in litigation involving the United States, the Chief, Army Litigation Division (AR 27-40, para 1-4d) must be advised of the release. He or she will note the release in such investigative reports. Information or records normally exempted from release (*i.e.*, personnel and medical records) may be releasable to the judge or court concerned, for use in litigation to which the United States is not a party. Refer such requests to the local staff judge advocate or legal officer, who will coordinate it with the Litigation Center, USALSA.

(ii) *Tort claims.* A claimant or a claimant's attorney may request a record that relates to a pending administrative tort claim filed against the DA. Refer such requests promptly to the claims approving or settlement authority that has monetary jurisdiction over the pending claim. These authorities will follow AR 27-20. The request may concern an incident in which the pending claim is not as large as a potential claim; in such a case, refer the request to the authority that has monetary jurisdiction over the potential claim. A potential claimant or his or her attorney may request information under circumstances clearly indicating that it will be used to file a tort claim, though none has yet been filed. Refer such requests to the staff judge advocate or legal officer of the command.

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That authority, when subordinate, will promptly inform the Chief, U.S. Army Claims Service (USACS), of the substance of the request and the content of the record. (Mailing address: U.S. Army Claims Service, ATTN: JACS-TCC, Fort George G. Meade, MD 20755-5360. IDA officials who receive requests will refer them directly to the Chief, USACS. They will also advise the requesters of the referral and the basis for it. The Chief, USACS, will process requests according to this part and AR 27-20, paragraph 1-10.

(iii) *Contract disputes.* Each request for a record that relates to a potential contract dispute or a dispute that has not reached final decision by the contracting officer will be treated as a request for procurement records and not as litigation. However, the officials will consider the effect of release on the potential dispute. Those officials may consult with the USALSA, Contract Appeals Division. (Mailing address: U.S. Army Legal Services Agency, ATTN: JALS-CA, 901 North Stuart Street, Arlington, VA 22203. If the request is for a record that relates to a pending contract appeal to the Armed Services Board of Contract Appeals, or to a final decision that is still subject to appeal (*i.e.*, 90 days have not lapsed after receipt of the final decision by the contractor) then the request will be: Treated as involving a contract dispute; and referred to the USALSA, Contract Appeals Division.

(6) *Special nuclear material.* Dissemination of unclassified information concerning physical protection of special nuclear material.

(i) Unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment for the physical protection of special nuclear material, is prohibited under 10 U.S.C. 128.

(ii) This prohibition shall be applied by the Deputy Chief of Staff, G-3 as the IDA, to prohibit the dissemination of any such information only if and to the extent that it is determined that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and se-

curity by significantly increasing the likelihood of illegal production of nuclear weapons, theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(iii) In making such a determination, Army personnel may consider what the likelihood of an illegal production, theft, diversion, or sabotage would be if the information proposed to be prohibited from dissemination were at no time available for dissemination.

(iv) Army personnel shall exercise the foregoing authority to prohibit the dissemination of any information described so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security, and upon a determination that the unauthorized dissemination of such information could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of illegal production of nuclear weapons, theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(v) Army employees shall not use this authority to withhold information from the appropriate committees of Congress.

(7) *Names and duty addresses.* Lists of names, including telephone directories, organizational charts, and/or staff directories published by installations or activities, and other personally identifying information will ordinarily be withheld when requested under the FOIA. This does not preclude a discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as general officers, public affairs officers, and other personnel designated as official command spokespersons. The IDA for telephone directories is delegated to the DA, FOIA/PA Office. Public Affairs Offices may, after careful analysis, release information determined to have legitimate news value, such as notices of personnel reassignments to new units or installations within the continental United States, results of selection/promotion boards, school graduations/completions, and

awards and similar personal achievements. They may release the names and duty addresses of key officials, if such release is determined to be in the interests of advancing official community relation's functions.

(c) *Requests from government officials.* Requests from officials of State or local Governments for Army Activity records shall be considered the same as any other requester. Requests from members of Congress not seeking records on behalf of a Congressional Committee, Subcommittee, either House sitting as a whole, or made on behalf of their constituents shall be considered the same as any other requester. Requests from officials of foreign governments shall be considered the same as any other requester; however, Army Intelligence elements are statutorily prohibited from releasing records responsive to requests made by any foreign government or a representative of a foreign government. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(d) *Privileged release outside of the FOIA to U.S. government officials.* Records exempt from release to the public under the FOIA may be disclosed in accordance with Army regulations to agencies of the Federal Government, whether legislative, executive, or administrative, as follows:

(1) In response to a request of a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoDD 5400.4. The Army implementing directive is AR 1-20. Commanders or chiefs will notify the Chief of Legislative Liaison of all releases of information to members of Congress or staffs of congressional committees. Organizations that in the normal course of business are required to provide information to Congress may be excepted. Handle requests by members of Congress (or staffs of congressional committees) for inspection of copies of official records as follows:

(i) National security classified records, follow AR 380-5;

(ii) Civilian personnel records, members of Congressional Committees, Subcommittees, or Joint Committees

may examine official personnel folders to the extent that the subject matter falls within their established jurisdictions, as permitted by 5 CFR 297.401(i);

(iii) *Information related to disciplinary action.* This paragraph refers to records of trial by courts-martial; nonjudicial punishment of military personnel under the Uniform Code of Military Justice, Article 15; nonpunitive measures such as administrative reprimands and admonitions; suspensions of civilian employees; and similar documents. If DA has specific instructions on the request, the following will apply. Subordinate commanders will not release any information without securing the consent of the proper installation commander. The installation commander may release the information unless the request is for a classified or "FOUO" document. In that case the commander will refer the request promptly to the Chief of Legislative Liaison for action, including the recommendations of the transmitting agency and copies of the requested records with the referral.

(iv) *Military personnel records.* Only HQDA can release information from these records. Custodians will refer all requests from Congress directly and promptly to the Chief of Legislative Liaison, HQDA, Washington DC 20310-1600.

(v) *Criminal investigation records.* Only the Commanding General, U.S. Army Criminal Investigation Command (USACIDC), can release any USACIDC-originated criminal investigation file. For further information, see AR 195-2.

(vi) *Other exempt records.* Commanders or chiefs will refer requests for all other categories of exempt information directly to the Chief of Legislative Liaison. They will include a copy of the material requested and, as appropriate, recommendations concerning release or denial.

(vii) *All other records.* The commander or chief with custody of the records will furnish all other information promptly; to other Federal Agencies, both executive and administrative, as determined by the head of an Army Activity or designee; or in response to an order of a Federal court, Army Activities shall release information along with a description of the restrictions on its release to the public;

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(viii) *Disciplinary actions and criminal investigations.* Requests for access to, or information from, the records of disciplinary actions or criminal investigations will be honored if proper credentials are presented. Representatives of the Office of Personnel Management may be given information from personnel files of employees actually employed at organizations or activities. Each such request will be considered on its merits. The information released will be the minimum required in connection with the investigation being conducted.

(ix) *Other types of requests.* All other official requests received by DA elements from agencies of the executive branch (including other military departments) will be honored, if there are no compelling reasons to the contrary. If there are reasons to withhold the records, the requests will be submitted for determination of the propriety of release to the appropriate addresses shown in Appendix B of this part.

(2) Army Activities shall inform officials receiving records under the provisions of this section that those records are exempt from public release under the FOIA. Army Activities also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1-R, and information contained in Privacy Act systems of records is subject to DoD 5400.11-R.

(e) *Consultation with affected DoD component.* (1) When an Army Activity receives a FOIA request for a record in which an affected Army or DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected Army or DoD organization is required. As an example, where an Army Activity receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

(2) The affected Activity shall review the circumstances of the request for host-nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component

regarding release of information. Responding Army Activities shall provide copies of responsive records to the affected DoD Component when requested. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

(3) Nothing in § 518.19 shall impede the processing of the FOIA request initially received by an Army Activity.

### § 518.16 Initial determinations.

(a) *Initial denial authority.* The DA officials are designated as the Army's only IDAs. Only an IDA, his or her delegate, or the Secretary of the Army can deny FOIA requests for DA records. Each IDA will act on direct and referred requests for records within his or her area of functional responsibility. (See the proper AR in the 10 series for full discussions of these areas. Included are records created or kept within the IDA's area of responsibility; records retired by, or referred to, the IDA's headquarters or office; and records of predecessor organizations. If a request involves the areas of more than one IDA, the IDA to whom the request was originally addressed will normally respond to it; however, the affected IDAs may consult on such requests and agree on responsibility for them. IDAs will complete all required coordination at initial denial level. This includes classified records retired to the NARA when a mandatory declassification review is necessary. Requests and/or responsive documents should not be sent to the DA FOIA/PA Office for initial denial authority or to forward to other offices within the DA.

(b) FOIA requesters may ultimately appeal if they are dissatisfied with adverse determinations. It is crucial to forward complete packets to the IDAs. Ensure cover letters list all attachments and describe from where the records were obtained, *i.e.*, a PA system of records (including the applicable systems notice), or other. If a FOIA action is complicated, include a chronology of events to assist the IDA in understanding what happened in the course of processing the FOIA request. If a file does not include documentation described below, include the tab,