

UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON D.C. 20240

April 16, 1997

In Reply Refer To:  
1278 (520), 1760 (630),  
1611 (250)P

EMS TRANSMISSION 4/21/97  
Instruction Memorandum No. 97-109  
Expires: 9/30/98

To: AD's and AFOs  
Attention: Planning Coordinators, Records Administrators, and  
Freedom of Information Act Coordinators

From: Director

Subject: New Procedures for Evaluating Comment Letters Submitted on Proposed Agency Initiatives and  
Respondents Personal Privacy Interests

This Instruction Memorandum (IM) provides new procedures (Attachment 1), for evaluating whether Exemption 6 of the Freedom of Information Act (FOIA) applies, when requesting written comments from the public for proposed agency initiatives. It also includes procedures for addressing the personal privacy information of individuals contained in those comment letters. For this IM, "proposed agency initiatives" include the following:

Rulemaking; environment analysis documents such as Environmental Statement (EIS) and Environmental Assessment (ES); Resources Management Plan, and any other land use plan amendments.

The Division of General Law within the Solicitor's Office, has issued the attached guidance to ensure consistency in applying Exemption 6 (Attachment 2). This guidance will apply to all new requests for comments for proposed Bureau initiatives. Under FOIA's Exemption 6, names and addresses of individuals listed as representatives or officials of organization and business entities are not protected. Therefore, this guidance will not apply to comments received from organization or business entities.

If you have questions concerning this memorandum contact: Marilyn Legnini on FOIA and Privacy Act matters at (202) 452-5013, Ted Hudson on regulatory matters at (202) 452-5042, and Mary Linda Ponticelli on environmental analysis matters at (202) 452-0364.

Signed by:  
Gayle Gordon  
Assistant Director  
Information Resources Management

Authenticated by:  
Robert M. Williams  
Directives and Records  
Group,WO540

2 Attachments:

- 1 - Procedures to Protect personal information in comment letters submitted on proposed agency initiatives (3 pp)
- 2 - Memorandum from the Associate Solicitor, Division of General Law dated October 24, 1996 (5 pp)

## I. Federal Register Notice:

Include the boilerplate language provided below in the public notice. This procedure now indicates to those who will comment, more specifically, what information will be made public. It also provides the opportunity for the respondent to identify any concerns about release of his/her name, and addresses.

"Comments, including names and street addresses of respondents, will be available for public review at the above address during regular business hours (7:45 a.m. to 4:15 p.m. \* ), Monday through Friday, except holidays, [and may be published as part of (the EA, the EIS, or other related documents \*\*)]. Individual respondents may request confidentiality. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety."

\* The BLM office soliciting public comments is to note appropriate business hours.

\*\* Add in notice of availability for EA, proposed EIS, or other related documents.

Since many respondents to Bureau actions do not typically see the notice in the Federal Register, it is recommended that for environmental analysis documents, the above wording be included in the document for which the Bureau is seeking comment (for example, in the "Dear Reader" letter of the document, or on the inside cover).

## II. Information Available to the Public:

a) When the commenter requests confidentiality in the comment letter, only a copy of the letter with the appropriate deletions will be made available to the public. The office soliciting public comments will maintain the original. When a request for confidentiality is made, take steps to ensure that the envelope is not placed in the public room when the return address is visible, and that signatures on the letter are deleted.

In cases where the Bureau accepts comments via the Internet, this guidance will also apply. In such cases, protect the confidentiality of the website address as well.

The BLM Ridgecrest, California, Resource Area Office Internet posting of comment letters for the Soledad Mountain Project is an excellent example for considering privacy interests while making comments available to the public. Addresses and signatures are deleted while the text of the comment letter is available to view. See their Internet posting at "<http://www.ca.blm.gov/GoldenQueen/pub-pc.htm>".

### Attachment 1-1

b) The Bureau office soliciting comments should also consider whether the release of the town or city information in which the respondent resides might jeopardize the confidentiality that he or she requests. Apply good judgment and consideration of the Solicitor's attached guidance.

c) It should be noted that requests for the information identified as confidential by the respondent may be subject to FOIA requests, and, therefore, further FOIA review. Please coordinate such requests with your office's FOIA Coordinator and the regional FOIA attorney.

## III. Previous Collections of Comments:

For information already collected as a result of previous Bureau requests for comments and made available to the public, the Division of General Law has agreed that no special processing is required (i.e. previous commenters will not be contacted to determine if they would like confidentiality). However, in cases where requests for such comment letters come in under FOIA, the Bureau must consider on a case-by-case basis whether FOIA applies to the personal information in these comment letters. Coordinate such requests with your office's FOIA Coordinator and assigned FOIA attorney from the Washington or Regional Solicitor's Office.

#### IV. Privacy Act Considerations:

Any group of records for which information is filed by the name of the individual or by some identifying number, symbol, or other personal identifier assigned to the individual is considered a Privacy Act System of Records, and is subject to the requirements under the Privacy Act. A Privacy Act System Notice must be prepared for the Federal Register to notify the public of record systems which contain information about themselves.

The Bureau and Department currently have no specific Privacy Act System Notice for comments received in response to the above listed actions. The reason for this may be that when comment letters are filed, they are not filed by the name or personal identifier of the individual commenting. However, if comment letter information is placed into databases and the system is programmed to retrieve the information by a name or personal identifier, this system becomes subject to Privacy Act requirements. In this case, a Privacy Act System Notice must be published in the Federal Register to notify the public of the new system of records. Also apply procedures provided in Manual Section 1278.7: External Access to BLM Information/Privacy Act. Please contact your Office's Privacy Act Coordinator if you have questions concerning the application of the Privacy Act to a database, or paper file containing information on those writing comment letters.

#### V. Records Management Procedures:

The National Archives and Records Administration (NARA) employees are not completely familiar with the information sensitivity of records sent to its facilities. Government agencies must notify NARA of any restrictions on releasing copies of information when the information is transferred to the Federal Records Center.

Copies of redacted comment letters should be filed as a set and located with the record copy when sent to the Federal Records Center. Also include instructions for handling comment letters with the shipment and with the SF-115. As a reminder, Privacy Act or other access restrictions should always be noted on the SF-258 when transferring custody of the records to the NARA.

#### VI. Bureau Contacts:

If you have questions concerning these instructions contact: Marilyn Legnini on FOIA and Privacy Act matters at (202) 452-5013; Ted Hudson on regulatory matters at (202) 452-5042, and Mary Linda Ponticelli on environmental analysis matters at (202) 452-0364.

October 24, 1996

Memorandum

To: Associate Solicitors  
Regional Solicitors  
Field Solicitors  
Designated FOIA Attorneys

From: Glynn D. Key  
Associate Solicitor  
Division of General Law

Subject: FOIA Requests for Commenter Names and Home Addresses

The world of FOIA has become increasingly more active and subject to heightened public scrutiny. One of the more active FOIA areas is the application of exemption (6), which permits the Department to withhold information about individuals where the disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).<sup>1/</sup> As you know, when bureaus and offices evaluate FOIA requests under exemption (6), they must balance the privacy interest against the public interest in disclosure of the information. This office regularly receives inquiries about the exemption (6) balancing test as it applies to the names and home addresses of private individuals who submit comments on proposed agency initiatives, such as: notices of proposed rulemaking; environmental impact statements; environmental assessments; general management plans; etc. Further, the Department consistently receives a fair number of FOIA appeals contesting the withholding of the names and addresses of commenters.

We are also aware that in at least one instance, two offices within the same bureau came to different conclusions when they balanced the privacy interest against the public interest in disclosure of the names and home addresses of individuals who commented on the same proposed bureau initiative. In that case, one office withheld the names and home addresses of the commenters, while the other office made a determination to release the names of the same commenters, but withhold the commenters' home addresses. As you know, over the past few years the issue of inconsistent treatment of FOIA requests for names and home addresses has made our defense of FOIA lawsuits more difficult.

Because the Office of the Solicitor has concerns about this Department's inconsistent treatment of FOIA requests for names and addresses of individuals who submit comments on proposed agency initiatives, we are issuing the following guidance.<sup>1/</sup>

Private/Public Interest Balance Test

It is well established that determining whether information is protected from release by exemption (6) requires a process in which the privacy interest at stake is balanced against the public interest, if any, in release of the requested information. Department of the Air Force v. Rose, 425 U.S. 352 (1976); United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). The courts have long recognized that a person

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<sup>1/</sup>An article in the May 4, 1995 Albuquerque Journal discussed the Forest Service's inconsistent treatment of requests for names and home addresses of individuals with whom it does business, such as ranchers with grazing permits and those who file comments on pending policy decisions. The article advised that the Forest Service, prompted by an Albuquerque Journal inquiry into the varying policies in the Forest Service's different regions, will standardize its policy on the release of such information.

<sup>2/</sup>This memorandum supplements the Department FOIA Officer's June 17, 1994, memorandum concerning the processing of FOIA requests for names and home addresses.

has a privacy interest in his or her home address. DOD v. FLRA, 114 S.Ct. 1006 (1994); National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989). This Office has consistently taken the position, with Department of Justice support, that there often is a privacy interest in an individual's name, as well as his or her home address. On the public interest prong of the balancing process, the Supreme Court has determined that in order for any public interest in release to be considered, the information sought to be disclosed must shed light on the agency's performance of its statutory mission. United States Department of Justice v. Reporters Committee for Freedom of the Press, *supra*.

Thus, generally speaking, the individual's name and/or home address may be protected pursuant to exemption (6) if (1) there is no qualifying public interest in the information because release of the name and/or home address itself does not shed light on the agency's performance of its statutory duties; or (2) there is a qualifying public interest in the name and/or home address but the public interest does not outweigh the privacy interest in disclosure of the information. Our appeal opinions, after applying the balancing test, frequently have concluded that both names and home addresses are protected from release by exemption (6). However, this general rule changes when the names and home addresses at issue involve individuals who have willingly introduced themselves into a public arena like commenting on proposed agency initiatives or making a FOIA request.

## Privacy Interest of Commenters

Consistent with Department of Justice guidance, this Office is of the view that when a bureau or office solicits comments from the public on a proposed agency initiative, such as in connection with a rulemaking; an environmental impact statement; environmental assessment; general management plan; etc., the private individuals who submit comments on the initiative do not ordinarily expect that their names will be kept private. See FOIA Update, Winter 1985, at 6. Although we are not aware of a court holding directly on point, the courts have held generally that when individuals participate in other public governmental processes, these individuals do not have a privacy interest in the fact of their participation. See Holland v. CIA, No. 91-1233, slip op. at 30-32 (D.D.C. Aug. 31, 1992) (researcher who requested assistance of presidential advisor in obtaining CIA files he had requested held comparable to FOIA requester whose identity is not protected by exemption (6)); Martinez v. FBI, No. 82-1547, slip op. at 7 (D.D.C. Dec. 19, 1985) (identities of news reporters seeking information concerning criminal investigation not protected) (Exemption (7)(C)). Accordingly, a privacy interest does not ordinarily attach to the names of commenters. Therefore, generally speaking, release of commenters' names would not cause the invasion of privacy necessary to trigger exemption (6)'s balancing test.<sup>1/</sup>

We believe that in special circumstances, there may exist a privacy interest in a commenter's name. A special circumstance would be where the comments pertain to sensitive and/or controversial matters, and releasing the individual's name could cause a clearly unwarranted invasion of personal privacy, or where release of the name alone could reveal the person's home address.<sup>1/</sup> There does not exist any case law on this issue but the Department of Justice has indicated to us that they support this position. If a determination is made that a privacy interest does exist in these special circumstances, then this interest must be balanced against the public interest, if any, in disclosure of the information.

Concerning home addresses, it is our opinion that private individuals who submit comments on proposed agency initiatives have a privacy interest in this information. This position is consistent with the case law recognizing the general privacy interest in home addresses. See DOD v. FLRA, 114 S.Ct. 1006 (1994). This general rule remains intact even in the context of a public governmental process like commenting on a proposed agency initiative. An individual's participation in the public process does not dilute his or her privacy interest in his or her home address. This privacy interest must be balanced against any qualifying public interest in disclosure.

## Public Interest

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<sup>3/</sup>Organization or business entities and individuals listed only in their capacity as representatives or officials of organizations or businesses have no protectible privacy interest. Therefore, the names and addresses of such entities are not protected under exemption (6), and must be released. See, e.g., Sims v. CIA, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560, 1567 (D.D.C. 1985); Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

<sup>4/</sup>A determination to withhold the names of commenters because of these special circumstances should be made only after consultation with the Office of the Solicitor. Further, the bureau or office may not use some arbitrary figure in determining what information to release and what information to withhold (e.g., withhold the names of individuals who reside within 50 miles of a sensitive area, and release the names of individuals who reside beyond 50 miles of the area.) Bureaus and offices should always exercise reason and honest judgment in making these determinations. If a bureau or office determines to withhold the names of individuals, it should have substantial cause for doing so. Lastly, the bureau or office should document the existence of the special circumstances in its files, articulating exactly how disclosure would adversely affect the individuals. This documentation should be made available to the Division of General Law if an administrative appeal is taken from the denial of information.

In its Reporters Committee decision, the Supreme Court limited the concept of public interest under the FOIA to the "core purpose" for which Congress enacted it: To "shed light on an agency's performance of its statutory duties." Information that does not directly reveal the operations or activities of the federal government, the Supreme Court has stressed, "falls outside the ambit of the public interest that the FOIA was enacted to serve." If an asserted public interest is found to qualify under this narrowed standard, it then must be accorded some measure of value so that it can be weighed against the threat to privacy.

Generally speaking, the release of the home addresses will not shed light on bureau or office statutory duties because the home addresses themselves will divulge nothing about the bureau or office. Therefore, it is our opinion that in most cases the privacy interest will outweigh the public interest (there generally being none) in disclosure of the home addresses. When a bureau or office determines to make such comments part of its public or administrative record on a proposed initiative, possibly for viewing in a public reading room, before doing so it should ensure that the private individual home addresses are redacted.

There may be cases where a bureau or office, during its rulemaking or other public process, will advise potential commenters that all comments received, including names and home addresses, will be made available to the public in its administrative record and/or pursuant to a FOIA request. This advice may also mention that commenters may indicate that they do not want their names and/or addresses made available to the public. If a commenter objects to disclosure of his or her home address, the bureau or office, generally speaking, and for the reasons discussed above, should not disclose the home address. Again, the determination to release or withhold the home address should be made on a case-by-case basis. If a commenter also objects to disclosure of his or her name, the bureau or office should evaluate release of the name pursuant to the guidance in this memorandum. To avoid implying that requests from commenters will guarantee that their home addresses and/or names will be withheld, the bureau or office should indicate in its notice that commenters' requests to have their home addresses and/or names withheld from public release will be honored to the extent permissible by law.

### Conclusion

While you should be guided by the information in this memorandum, you are reminded that FOIA requests for names and home addresses should be evaluated on a case-by-case basis, balancing the privacy interest against the public interest, if any, in disclosure. Because of the importance of this issue, bureaus and offices should coordinate their responses to FOIA requests for names and home addresses with their designated FOIA attorneys. By copy of this memorandum, we are requesting that the Departmental FOIA Officer forward this guidance to the bureau and office FOIA coordinators.

Any questions concerning this memorandum may be addressed to Robert H. Moll, Assistant Solicitor, Branch of General Legal Services, or Barbara Abate, Paralegal, at (202) 208-5216.

cc: GLS Attorneys  
Department FOIA Officer  
Department FOIA Appeals Officer