

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-3022 (CJN)
)	
U.S. DEPARTMENT OF COMMERCE,)	
)	
Defendant.)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN REPLY TO PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

In this case against defendant United States Department of Commerce (“DOC”), under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, plaintiff seeks summary judgment on two issues. First, plaintiff alleges that an email and attachment were disclosed outside of the agency to a non-government party, and thus cannot be withheld pursuant to the deliberative process privilege of Exemption 5 of the FOIA. Second, plaintiff argues that defendant improperly asserted Exemption 4 to withhold confidential commercial information without any evidence that DOC had provided the submitter any express assurance of confidentiality. Consequently, defendant is entitled to summary judgment as undisputed with respect to the search performed for responsive documents, and DOC’s invocation of FOIA Exemptions 6.

With respect to the document at issue that was withheld under Exemption 5, there was

no disclosure to an unnecessary third party. Even if such a disclosure could be found, it was against DOC policy and unauthorized. Thus, the waiver doctrine does not apply.

Plaintiff's claim under Exemption 4 also fails. Plaintiff can point to no authority that would limit the reach of Exemption 4 to confidential commercial information *only* if the government gave an *express* assurance of confidentiality, which is what plaintiff seems to suggest. As the accompanying Supplemental Lieberman Declaration explains, the information that has been withheld is of a type that the submitter maintains in confidence and expects DOC to maintain in confidence; DOC knew that when it received the information; DOC receipt of the information was for a specific purpose that did not involve the indiscriminate dissemination of the information; and thus the confidential commercial information was submitted under an implied assurance of confidentiality.

For the reasons set forth below, and in defendant's opening memorandum ("Defendant's Mem."), defendant is entitled to summary judgment and plaintiff's cross-motion for summary judgment should be denied.

ARGUMENT

II. Pursuant to Exemption 4, DOC Properly Withheld Confidential Commercial Information

Plaintiff challenges DOC's invocation of Exemption 4 on a limited basis. Plaintiff does not dispute that the information at issue constitutes commercial or financial information obtained from a person, which has been held to include a business. Compare Defendant's Mem. at 4-5 with Plaintiff's Mem. at 8-11. Plaintiff also does not challenge that the information is of a type

that is customarily kept private by the submitter, Circinus. Compare Defendant’s Mem. at 5-6 with Plaintiff’s Mem. at 8-11.

Instead, plaintiff argues that because there is no evidence that DOC provided an assurance of confidentiality to Circinus with respect to the submitted information, this is “fatal” to DOC’s Exemption 4 claim. Plaintiff’s Mem. at 8. Yet plaintiff points to *no* authority to support this claim. See Plaintiff’s Mem. at 8-11.

With respect to whether information under Exemption 4 is “confidential,” the parties agree that the analysis is guided by the Supreme Court’s decision in Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019), but is not resolved by that case. In Food Marketing, the Supreme Court held that information is confidential “whenever it is customarily kept private, or at least closely held, by the person imparting it.” Food Mktg. Inst., 139 S. Ct. at 2363. DOC has demonstrated in the Lieberman Declaration that the information at issue meets this criteria and plaintiff makes no attempt to challenge this. Compare Defendant’s Mem. at 5-6 with Plaintiff’s Mem. at 8-11.

The only issue is whether, in addition to demonstrating that the information at issue was maintained in a confidential manner by Circinus, DOC also was obligated to demonstrate that it had provided Circinus with an assurance of confidentiality when the information was submitted. Plaintiff concedes that the Supreme Court in Food Marketing expressly declined to resolve this question. Plaintiff’s Mem. at 9, *citing* Food Mktg. Inst., 139 S. Ct. at 2363 (no need to resolve this issue because the government promised confidentiality).

Plaintiff argues that Exemption 4 should require a governmental assurance of confidentiality, because the Supreme Court cited two cases from this Circuit that plaintiff claims

establish such a requirement. Plaintiff's Mem. at 9. Plaintiff is wrong; neither case cited by plaintiff discusses such a requirement as being applicable to the Exemption 4 analysis.

In Sterling Drug Inc. v. FTC, 450 F.2d 698, 709 (D.C. Cir. 1971), the government had agreed to treat the submitters' information as confidential, so the Court had no occasion to decide whether that should be a requirement for the application of Exemption 4. Plaintiff does not suggest otherwise. Plaintiff's Mem. at 9-10. In Grumman Aircraft Eng. Corp. v. Renegotiation Bd., 425 F.2d 578, 580 (D.C. Cir. 1970), there was no discussion of whether information the submitter kept as confidential would only be treated as confidential if the government also had provided an assurance of confidentiality, nor does plaintiff suggest otherwise. Plaintiff's Mem. at 10. Thus, neither case relied upon by plaintiff stands for the requirement that plaintiff seeks this Court to engraft upon Exemption 4, as a matter of first impression, when the Supreme Court expressly declined to do so.

Of more persuasive value is the Supreme Court's citation to GSA v. Benson, 415 F.2d 878, (9th Cir. 1989). In Food Marketing the Supreme Court cited GSA as a prior case that was "consistent with" the Supreme Court's understanding of the application of Exemption 4, and the Supreme Court cited from GSA that "Exemption 4 would 'protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express *or implied* promise' of confidentiality." Food Mktg. Inst., 139 S. Ct. at 2363 (*citing GSA*, 415 F.2d at 881) (emphasis added). If the decision in GSA is "consistent with" the Supreme Court's understanding of the term "confidential" as found in Exemption 4, then it should be presumed that were the Supreme Court to resolve the issue of whether a government assurance of confidentiality needs to be made, the Court would conclude that, if there must be

some kind of assurance in order for Exemption 4 to apply, such assurances may be express or implied.

Such a conclusion would be in keeping with the Supreme Court's interpretation of the word "confidential" in the context of FOIA Exemption 7(D), which protects information that "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). Just as with Exemption 4, the word "confidential" is not defined under the FOIA. In U.S. Dept. of Justice v. Landano, 508 U.S. 165 (1993), the Supreme Court held that "[a] statement can be made 'in confidence' even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately." Id. at 173. Thus, the Court concluded that "[a] source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." Id. at 174.

The Supreme Court in Landano declined to find that an assurance of confidentiality could be implied whenever a source communicated with the FBI. Id. at 176. Instead, the Court held that the character of the information, and the context in which it was conveyed, may be relevant to determining whether a source cooperated with the FBI under an implied assurance of confidentiality. Id. at 179. The Court therefore required a particularized approach, in which the government would be obligated to demonstrate the specific circumstances under which an implied promise of confidentiality should be recognized. Id. at 180.

The Supreme Court's analysis in Landano translates comfortably into the Exemption 4 context, and is consistent with the well established rule of statutory construction that "words

repeated in different parts of the same statute generally have the same meaning.” Law v. Siegel, 571 U.S. 415, 422 (2014). Consequently, if a submitter conveys information to the government that the submitter customarily maintains as private or closely held, and the government knows the information is of a type that is ordinarily kept confidential, and the government’s known purpose for obtaining the information is to use it to further the government’s specific, identified interests, and there is no reason for the submitter to believe that the government will disseminate the information “indiscriminately,” then the circumstances give rise to an implied assurance of confidentiality on the government’s part.

In this case the information withheld consists of confidential commercial information Circinus used in its commercial and business activities to provide defense/military contracting and related services on an international basis. Lieberman Declaration, ¶ 19. In particular, the information concerned Circinus’s international business plans and strategy for expanding operations abroad. See Lieberman Decl., ¶ 21. “[P]ublic dissemination of the information withheld would give insight to competitors of Circinus’s pursuit of opportunities with a particular foreign government, its capabilities and the manner in which it markets its capabilities.” Supplemental Lieberman Declaration, attached, ¶ 6.

The accompanying Supplemental Lieberman Declaration explains that DOC used this information to formulate a plan for how DOC would support Circinus’s efforts with respect to providing services to a foreign government. Id. at ¶ 5. DOC knew that Circinus would not have provided the information pertaining to its business plans, strategies and opportunities absent an implicit understanding that DOC would maintain this information in confidence, which DOC did. Id. at ¶¶ 5-6. As Mr. Lieberman further explains:

If Circinus or any other business could not be assured that DOC would treat as confidential information about its commercial plans and operations submitted to DOC to support the business in its efforts, then DOC would not be able to sustain the trust of the American business community, which is vital to DOC's mission to facilitate the growth of American commerce domestically and abroad. DOC has been able to sustain this trust because businesses understand that DOC carefully guards sensitive commercial information and only uses it to further DOC efforts to help these businesses expand their reach.

Id. at ¶ 7.

Thus, because the information withheld consists of confidential commercial information that the business would not ordinarily share publicly, and it was provided to DOC under an implied assurance of confidentiality, DOC properly invoked Exemption 4 to withhold it.

III. Pursuant to Exemption 5, DOC Properly Withheld Information Subject to the Deliberative Process Privilege.

With respect to the application of Exemption 5, plaintiff challenges the withholding of an email sent by Eric Branstad, then Senior White House Adviser at the DOC, to Rick Gates, a private individual, transmitting draft Congressional testimony needed for the Secretary's review. Lieberman Decl., ¶¶ 23, 27; Vaughn Index, Lines 42, 43 and 46. Plaintiff argues that DOC waived the privilege by disclosing this information outside of the agency. Plaintiff's Mem. at 4-7. Notably, plaintiff does not dispute that the information at issue is predecisional and deliberative. Id.

The Court of Appeals for this Circuit has made clear that "Since executive privilege exists to aid the government decisionmaking process, a waiver should not be lightly inferred." In re Sealed Case, 121 F.3d 729, 741 (D.C. Cir. 1997). A waiver may occur when the agency "voluntarily reveals to third parties" a specific document. Id. at 742. Such third parties, however, must be considered "unnecessary third parties". Id. at 741; Heffernan v. Azar, 317 F. Supp.3d 94, 120 (D.D.C. 2018) (waiver occurs in this Circuit by a voluntary disclosure to

“unnecessary third parties”); Mannina v. District of Columbia, 2019 WL 1993780, at *8 (D.D.C. May 6, 2019) (“Waiver of the deliberative process privilege occurs where privileged material has been voluntarily disclosed to ‘unnecessary third parties[.]’”). Thus, in order for a waiver to be found, there must be a purposeful disclosure of predecisional deliberative material to an unnecessary third party.

Here, there was no intent by DOC to make a voluntary disclosure of information protected by the deliberative process privilege. As Mr. Branstad explains in the accompanying declaration:

On May 1, 2017, I was accompanying Secretary of Commerce Wilbur Ross (Secretary) on an official trip, when an adviser to the Secretary forwarded to me an email containing deliberative comments and analysis by a senior DOC official, Earl Comstock, of draft testimony for John H. Thompson, Director of the U.S. Census Bureau, before the House of Representatives Appropriations Committee’s Subcommittee on Commerce, Justice, Science and Related Agencies, and an attachment containing the draft testimony. The adviser stated that the Secretary needed this printed “as soon as possible” so he could review it. The forwarded email from Mr. Comstock also indicated that he urgently needed the Secretary to review and approve the testimony.

Branstad Declaration, ¶ 2. At the time, Mr. Branstad and the Secretary were en route to a private residence and had no access to a governmental computer system and printer. Id. at ¶ 3. It was important for the Secretary to have immediate access to the information, so Mr. Branstad forwarded the email to Rick Gates, a private individual at the residence to which Mr. Branstad and the Secretary were headed. Id. Mr. Branstad asked Mr. Gates to print out the email and attachment and give it to the Secretary upon his arrival. Id. Mr. Branstad knew at the time he forwarded the email that he was not authorized to do so under DOC policy and had no intent to make an authorized disclosure on behalf of DOC. Id. at ¶ 6. Instead, he states that he “acted

completely on my own, though with the sole intention to ensure the Secretary had timely access to documents requiring his immediate attention.” Id. There is no evidence that Mr. Gates or the owner of the residence looked at the documents or disseminated them to anyone else. Id.

These facts demonstrate the following. There was no intentional, voluntary disclosure to unnecessary third parties on the part of DOC with regard to the information that has been withheld under Exemption 5. Indeed arguably there has been no disclosure at all, since there is no evidence that Mr. Gates looked at anything in the email beyond Mr. Branstad’s request at the top of the email that he print it out, along with the attachment. Indeed, the evidence is to the contrary. Branstad Decl., ¶ 5.

Moreover, to the extent there was a disclosure, it was not to an “unnecessary third party.” As Mr. Branstad explains, he needed to get the information at issue to the Secretary immediately and there was no government computer or printer available. At that point, Mr. Gates became the only option. Branstad Decl., ¶ 3. Under such circumstances, Mr. Gates became a necessary party, acting to facilitate the flow of information from one government official to another government official. This is not much different than in years past, when a fax was the only way to get information from one official to another quickly. Had Mr. Branstad been staying at a hotel, and had necessary information faxed to him, it would be unreasonable to find a waiver because a hotel employee picked up the fax and handed it to Mr. Branstad. The circumstances surrounding Mr. Gates’ participation in the exchange between two government employees is little different. Under these circumstances, Mr. Gates became a necessary person to be the conduit to receive the information, briefly as it was, and thus no waiver should be found with respect to this transaction.

But even if a disclosure to an unnecessary third party is found to have occurred, it was not an inadvertent one; it was purposefully done. Id. at ¶¶ 3, 6. Given that there was nothing “inadvertent” about this disclosure, plaintiff’s citation to cases about inadvertent disclosures and obligations attendant to such disclosures misses the mark. Plaintiff’s Mem. at 6-7. Those cases essentially stand for the proposition that if the government is sloppy in the way in which it handles its information, a waiver may be found depending upon the circumstances. Id. This disclosure not the result of inattention to the proper handling of privileged information; it was knowingly done by Mr. Branstad. Id.

The Branstad Declaration also makes clear that this disclosure was not a voluntary disclosure by DOC it was directly contrary to DOC policy and unauthorized. Id. at ¶ 6; Lieberman Decl., ¶ 24. DOC’s published policy clearly states that DOC records are not allowed to leave the custody or control of DOC, even on a temporary basis, except as permitted under Departmental Administrative Orders. Ex. 1 at § 7.01; see also § 7.08 (c). As this disclosure was not permitted under these orders, its transmission to a third party was without proper authority. Id. at § 7.01.

Here, by contrast, the disclosing party, Mr. Branstad, knew such a disclosure was against DOC policy and unauthorized. Id. Such a disclosure, therefore, does not waive the applicability of Exemption 5. See, e.g., Medina-Hincapie v. Department of State, 700 F.2d 737, 742, n.20 (D.C. Cir. 1983) (“An *unauthorized* disclosure of documents” by agency officials “does [not] constitute a waiver of the applicable of the applicable FOIA exemption.”) (emphasis in original). DOC should not be prejudiced by the actions of an employee engaged in an unauthorized act, especially in light of the well established

recognition of the importance of protecting the government's decision-making process.

E.g., Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 148-51 (1975).

Under the circumstances of this case, plaintiff's claim of a waiver should fail, and DOC's invocation of Exemption 5 for undisputed predecisional documents should be upheld.

CONCLUSION

For the foregoing reasons, and those set forth in DOC's opening memorandum, DOC's motion for summary judgment should be granted, and plaintiff's cross-motion for summary judgment should be denied.

Respectfully submitted,

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**DEFENDANT’S RESPONSE TO PLAINTIFF’S
STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7(h), Defendant, the United States Department of Commerce (“DOC”), responds to plaintiff’s statement of material facts as follows:

- 1. Undisputed.
- 2. Undisputed.
- 3. Undisputed.
- 4. Undisputed.
- 5. Undisputed.

6. Undisputed that Eric Branstad forwarded an email to Rick Gates, a private individual, containing draft Census Testimony for the Secretary of DOC. Mr. Gates’ work status at the time, aside from being a private individual, is not a material fact.

- 7. Undisputed.

8. Undisputed but not required by law under these circumstances.

9. Undisputed.

10. Undisputed that DOC made no express assurance of confidentiality but the information was supplied to DOC under an implied assurance of confidentiality.

Supplemental Lieberman Declaration, ¶¶ 5-7.

Respectfully submitted,

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ORDER

Upon consideration of defendant’s motion for summary judgment, plaintiff’s opposition and cross-motion for summary judgment, and the entire record in this case, the Court finds that there are no issues of material fact and the defendant is entitled to judgment as a matter of law. Therefore, it is hereby

ORDERED that defendant’s motion for summary judgment is granted; and it is further ORDERED that plaintiff’s cross-motion for summary judgment is denied.

This is a final, appealable order.

UNITED STATES DISTRICT JUDGE

Exhibit 1

[HOME](#) [PRIVACY](#) [OPEN GOVERNMENT](#) [FOIA](#) [PRIVACY ACT](#) [FACA](#)
[DIRECTIVES](#) [ABOUT](#) [CONTACT US](#)

[E-mail a link to this directive](#)

RECORDS MANAGEMENT

Number: DAO 205-1

Effective Date: 1992-06-26

SECTION 1. PURPOSE.

.01 This Order prescribes the policies, responsibilities, and procedures for carrying out a Department program for the creation, maintenance, use, and disposition of all records and other documentary materials throughout the Department in compliance with Title 44, U.S. Code, Chapters, 29, 31, and 33, and the relevant requirements of Title 36, Code of Federal Regulations (CFR), Parts 1220 through 1238, Records Management.

.02 This revision incorporates the changes in legal authority, policy, responsibilities, and functions resulting from recent changes in the CFR, including Federal Information Resources Management Regulations (41 CFR, Chapter 201); and updates the general language of the Order and refers to other laws affecting records, such as laws concerning privacy and freedom of information. This revision represents a complete reissuance of this DAO, therefore, text change highlighting, as prescribed in Appendix A to DAO 200-3, is not shown.

SECTION 2. DEFINITIONS.

.01 Records include "all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and sticks of publications and of processed documents are not included." (44 U.S.C. 3301.)

.02 Documentary materials is a collection term for records, nonrecord materials, and personal papers that refers to all media containing recorded information, regardless of the nature of the media or the method(s) or circumstance(s) of recording.

.03 Nonrecord materials are those Federally owned informational materials that do not meet the statutory definition of records (44 U.S.C. 301) or that have been excluded from coverage by the definition. Excluded materials are extra copies of documents kept only for reference, stocks of publications and processed documents, and library or museum materials intended solely for reference or exhibit.

.04 Working files are preliminary drafts, rough notes, and similar materials that were used to prepare final copies. Working files may meet a statutory definition of records and shall be maintained to ensure adequate and proper documentation in:

- a. They are circulated and made available to employees other than the creator for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and
- b. They contain unique information, such as substantive annotations, or comments, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

.05 Personal papers are documentary materials, or any reasonably segregable portion thereof, of a private or nonpublic character that do not relate to or have an effect on agency business. Personal papers do not meet the definition of Federal records and are not owned by the Government. (Personal papers shall be clearly designated as such and shall at all times be maintained separately from the office's records.)

.06 Records management is the planning, controlling, directing, organizing, training, promoting, and other managerial activities related to the creation, maintenance, use, and disposition of records to achieve adequate and proper documentation of Federal policies and transactions and effective and economical management of agency operations.

.07 Adequate and proper documentation means a record of the conduct of Government business that is complete and accurate to the extent required to document the organization, function, policies, decisions, procedures, and essential transactions of the agency and that is designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

.08 Recordkeeping requirements are all statements in statutes, regulations, Department Orders, and operating unit directives that provide general and specific guidance for personnel on particular records to be created and maintained.

.09 Records schedule is a document, approved by the National Archives and Records Administration (NARA), which provides authority for the final disposition of recurring or nonrecurring records. Includes Standard Form 115, Request for Records Disposition Authority, and the General Records Schedules (GRS). Records shall not be destroyed except as authorized by an approved records schedule.

.10 Record series are file units or documents arranged according to a filing system or kept together because they relate to a particular subject or function, result from the same activity, document a specific kind or transaction, take a particular physical form, or have some other relationship arising out of their creation, receipt, or use, such as restrictions on access or use.

.11 Disposition is the action taken with regard to records after their appraisal by NARA. It includes:

- a. Destruction of temporary records no longer needed for the conduct of business;
- b. Transfer of inactive records to a Federal records center;
- c. Transfer to the National Archives of records determined to have sufficient historical or other value to warrant continued preservation; or
- d. Donation of temporary records to an eligible person or organization after the authorized retention period had expired and after NARA has approved the donation.

.12 Subject correspondence files are records arranged and filed according to their general informational, or subject, content. Such files are mainly letters and memorandums but may also consist of forms, reports, and other materials, all relating to program and/or administrative functions, not to specific cases.

.13 Case files are records, regardless of media, documenting a specific action, event, person, place, project, other matter. They are usually filed by a unique name or number and a particular event or action causes the case to be closed or become inactive.

.14 Cutoff is the breaking, or ending, of files at regular intervals, usually at the end of a fiscal or calendar year to permit their disposal or transfer in complete blocks and, for subject correspondence files, to permit the setting up of new files. Case files are generally cut off at the end of the year in which the case is closed.

.15 Microform is a medium containing greatly reduced images or microimages. Types of microforms include microfilm, microfiche, aperture cards, and computer output microfilm.

.16 Vital records are records essential to the continued functioning or reconstitution of the Department and its operating units during and after an emergency (emergency operating records) and also those records essential to protect the rights and interests of the Department and of individuals directly affected by its activities (rights-and-interests records). Vital records are duplicate or extra copies stored off-site.

SECTION 3. AUTHORITY.

.01 Title 44, U.S. Code, Chapter 29, Records Management by the Archivist of the United States and by the Administrator of General Services; Chapter 31, Records Management by Federal Agencies; and Chapter 33, Disposal of Records.

.02 Title 36, CFR, Parts 1220 through 1238.

.03 Title 18, U.S. Code, Section 2071, covering criminal penalties for unlawful, concealment, removal or destruction of Federal records.

.04 Title 18 U.S. Code, Sections 793, 794, and 798, covering unlawful disclosure of certain recorded information pertaining to national security.

.05 Title 8, General Accounting Office (GAO) Policy and Procedures Manual for Guidance of Federal Agencies, Records Management.

.06 In addition, various statutes and implementing rules provide for the confidential or protected treatment of certain information in the custody of the United States Government and restrict the removal of such recorded information. For example, such statutes include, but are not limited to, 18 U.S.C. 798 governing the disclosure of security classified information; 18 U.S.C. 1905 prohibiting the unauthorized disclosure of confidential information relating to the business of financial affairs of identifiable businesses; 13 U.S.C. 9 providing for the confidentiality of certain census information; 50 U.S.C. Appendix 2411 copyright covering confidentiality of certain information obtained under the Export Administration Act; and 5 U.S.C. 552a providing for specified protection of certain personnel information about individuals.

.07 Department Organization Order 20-28, Office of Federal Assistance and Management Support, dated August 24, 1990.

SECTION 4. POLICIES.

.01 All offices shall create and maintain proper and adequate documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Department.

.02 Records shall be maintained so as to be easily retrievable and designed to furnish information necessary to protect the legal and financial rights of the Government and of persons directly affected by the Department's actions.

.03 Records and nonrecord materials are the property of the Federal government, not the property of individual employees, and may not be removed from the Department without proper authority. All officers and employees shall maintain records and nonrecord materials separately from one another.

.04 All records of the Department shall be listed and described in an approved records schedule and shall be disposed of only as authorized by that schedule. Schedules shall be reviewed annually to ensure they accurately reflect current records created and the functions they document.

.05 Records and other documents which are no longer sufficiently active to warrant retention in office space shall be removed as rapidly as possible, either by transfer to a Federal records center or, if authorized, by disposal.

.06 Official file stations shall be designated throughout the operating units of the Department. Each operating unit shall maintain a centralized list and description of the records at its official file stations.

.07 Operating units shall strive to standardize file arrangement systems and filing procedures and techniques at official file stations. These shall be designed to enhance the current use of the files, the preservation of archival records, and the prompt and systematic disposition of temporary records according to the appropriate records schedule.

.08 All officers and employees shall clearly designate s personal, and maintain separately from the records of the office, those papers of a private or nonofficial nature that pertain to their personal affairs. If information about private matters and Department business appear in the same document, the document shall be copied at the time of receipt, with the personal information deleted, and treated as a Federal record.

.09 Operating units shall provide adequate training to officers and employees to ensure they are aware of their responsibilities to maintain and safeguard Department records.

.10 Operating units and program offices shall, as necessary, maintain a program for the selection, protection, and reporting of vital records.

SECTION 5: RESPONSIBILITIES.

.01 Department Records Management Officer. As designated by the Director, Office of Federal Assistance and Management Support (OFAMS), the Department Records Management Officer is responsible for the coordination and staff supervision of the Departmentwide records management program. This official shall:

- a. Serve as liaison with NARA and the General Services Administration (GSA) on matters pertaining to records management.
- b. Provide leadership and guidance to Records Management Officers of the Department's operating units and staff offices to ensure reasonable uniformity in records management activities throughout the Department.
- c. Develop policies, standards, and procedures for records management throughout the Department.
- d. Conduct triennial reviews and evaluations of operating unit programs to ensure conformance with Governmentwide and Department records management standards.
- e. Develop and implement management systems and procedures to ensure that officials and employees do not remove Federal records from Department custody without appropriate authorization.
- f. Establish procedures for the participation of operating unit Records Management Officers in developing new or revised agency programs, processes, systems, and procedures to ensure that adequate recordkeeping requirements are established and implemented.

.02 Operating Unit Records Management Officers. As designated by the head of the operating unit, the Records Management Officers are responsible for administering the operating unit records management program. They shall:

- a. Develop and maintain the operating unit records management program in conformance with central agency and Department policies and standards.
- b. Develop and maintain current schedules for all operating unit records. Review schedules annually or more frequently, if necessary.
- c. Cooperate with the Department Records Management Officer in administering the records management program to ensure reasonable uniformity throughout the Department.
- d. Provide the Department Records Management Officer with information and documentation requested for the triennial review of the operating unit records management program. If requested, serve on the review team conducting an evaluation of another operating unit.
- e. As requested, report to the Department Records Management Officer on the status or particular aspects of the operating unit program.
- f. Establish and implement procedures to ensure that officials and employees do not remove records from the custody of the Department without appropriate authorization.
- g. Ensure that adequate recordkeeping requirements are established and implemented for new or revised programs, processes, systems, and procedures.
- h. Designate and maintain a current descriptive list of all official files stations and the name of the responsible official.
- i. Conduct an annual review of all official file stations to ensure adequate and proper documentation is maintained, permanent records are preserved, and other records are disposed of in accordance with applicable schedules. Report to the Department Records Management Officer on the results of this review.

.03 Program Officials. Program officials have the primary responsibility for creating, maintaining, protecting, and disposing of records of their program area. They shall:

- a. Create those records needed to ensure adequate and proper documentation of their area of responsibility.
- b. Implement procedures to ensure that records are protected from theft, loss, and unauthorized access.

- c. Establish a filing system and implement procedures to ensure that records are maintained in such a manner that information and documents are readily retrievable.
- d. Cut off subject correspondence files on an annual basis and close out case files promptly on the completion of the case.
- e. Transfer or destroy inactive records according to the appropriate schedule.
- f. Cooperate with the Department and/or operating unit Records Management Officer in requests for information and the management of records.
- g. Notify the operating unit Records Management Officer of organization or program changes that will result in the establishment of new types of records, the transfer or termination of records no longer required, or an increase or decrease in the retention time of the records.

SECTION 6. CREATION AND MAINTENANCE OF RECORDS.

.01 All program officials shall create and maintain adequate and proper documentation of the program for which they are responsible. This means a record of the conduct of Government business that is complete and accurate to the extent required to document the organization, functions, policies, decisions, procedures, and essential transactions of their office and to protect the legal and financial interests of the Government and of persons directly affected by the activities of their office.

.02 Each operating unit shall establish procedures to ensure the participation of the Records Management Officer in developing new or revised programs, processes, systems, and procedures to ensure that adequate recordkeeping requirements are established and implemented. This is especially important in the development of electronic records systems to ensure that system designers correctly determine and incorporate disposition requirements into the system programming, thereby avoiding potentially costly changes after the system is developed. Early involvement of the Records Management Officer is especially critical in the case of major systems that may contain permanent records. For additional guidance regarding electronic record, see DAO 205-16, "Managing Electronic Records."

.03 Each office shall establish and maintain an appropriate records maintenance program so that:

- a. complete records are filed and can be located and retrieved when needed;
- b. the identification, preservation, and retirement of permanent records is facilitated;
- c. permanent and temporary records are segregated;
- d. records and nonrecord materials are segregated;
- e. temporary records are disposed of promptly when their retention period expires; and
- f. permanent records are transferred to the National Archives in a timely manner.

.04 Each operating unit Records Management Officer shall formally specify official file stations for the maintenance of records. Records shall be filed according to a preplanned system, and there should be standard procedures for their maintenance and safekeeping. Subject correspondence shall be cut off on an annual basis to facilitate transfer of inactive files to the Federal records center and to permit the establishment of new files. Case files shall be cut off in the year in which they are closed.

.05 Each operating unit Records Management Officer shall maintain, and update annually or more frequently, a directory of file stations and a descriptive list of records maintained at each file station.

.06 Operating units shall strive to standardize file arrangement systems and filing procedures and techniques at official file stations. These shall be designed to enhance the current use of the files, the preservation of archival records, and the prompt and systematic disposition of temporary records according to the appropriate records schedule.

.07 Operating unit Records Management Officers shall conduct an annual review and evaluation of file stations to ensure

that proper records management standards are adhered to, especially that permanent records are properly maintained and transferred to the Federal records center on a timely basis. The results of this review, including findings and recommendations, shall be reported to the Department Records Management Officer.

SECTION 7. SAFEGUARDING RECORDS.

.01 Each Department officer or employee having custody or control over records or other nonrecord materials is responsible to ensure their proper use and protection. No officer or employee shall allow Department records or nonrecord materials to leave the custody or control of the Department, even on a temporary basis, other than as authorized by this Order or DAO 205-12, "Public Information." This restriction does not apply to the authorized release of records or other documents in the conduct of official business.

.02 Records and nonrecord materials are the property of the Federal Government, not the property of individual employees, and may not be removed from the Department without proper authority. All officers and employees shall maintain records and nonrecord materials separately from one another.

.03 In creating records, offices shall use materials and recording techniques that will ensure the preservation of the records and the information therein for as long as they will be needed by the Department. Long-term information should not be recorded on media that will degrade in a relatively short time, resulting in the loss of information that continues to be needed.

.04 All officers and employees shall clearly designate as personal those papers of a private or nonofficial nature pertaining solely to their personal affairs. These papers shall be filed separately from the records of the office.

.05 The responsibility to determine what documentary materials in the Department constitute records, as defined by 44 U.S.C. 3301, rests with the Secretary of Commerce. Offices may ask for an initial determination from the Department Records Management Officer, in consultation with the Office of the General Counsel.

.06 No departing officer or employee shall remove any materials, whether records or not, which contain national security information or other information of a confidential nature. Questions about national security information should be addressed to the Office of the Secretary. Questions about other kinds of confidential or protected information should be addressed to the Office of the General Counsel.

.07 No departing officer or employee shall remove records or nonrecord materials relating to any pending or contemplated civil, criminal, or administrative proceeding or other program activity when the information, if released, would impair or prejudice the outcome of the proceeding or Government policy determinations, decisions, or other actions.

.08 Departing officers, or employees may not remove nonrecord materials if their removal would:

- a. hinder the efficient, continued functioning of the office or of successor officials or employees;
- b. diminish the information needed for the official business of the Department;
- c. violate national security, privacy rights, or other interests protected by law; and
- d. exceed normal administrative economies.

.09 Conversely, nonrecord materials may be removed by departing officers and employees, in accordance with DAO 202-299, "Clearance of Employee Accountability," if their removal is not prohibited by one of the conditions or criteria listed in paragraph .08 of this section. Any documentary materials to be removed should be reviewed by the operating unit Records Management Officer.

.10 Operating unit Records Management Officers shall establish informational programs to ensure that all officers and employees are aware of their records management responsibilities.

Periodic memorandums to all employees, briefings, posters, and brochures are suitable techniques for disseminating this information. The following information, at a minimum, should be disseminated:

- a. the concealment, mutilation, obliteration, falsification, or unauthorized removal or destruction of Federal records is

against the law and may lead to a \$2,000 fine, three years imprisonment, or both, and forfeiture of his or her position and disqualification from holding any other Federal office (18 U.S.C. 2071(b));

b. employees are required to report any apparent instances of unauthorized disposition to their supervisor and the operating unit Records Management Officer; and

c. each Records Management Officer will report to the Department Records Management Officer and NARA any unlawful or accidental removal, defacing, alteration, or destruction of Department records (44 U.S.C. 3106).

.11 Operating units and program offices shall develop a program for the identification, selection, protection, and reporting of vital records, in accordance with the provisions of 36 CFR 1236 and DAO 210-2, "Vital Records Program." Program officials should exercise sound judgement in identifying records essential in case of an emergency and should keep in mind that during an emergency those who will be using the records may not be the same as those who refer to them under normal conditions. Vital records should consist of extra copies or duplicates of documents and should be stored off-site, where they will be readily accessible in an emergency. Federal records centers, regardless of geographic location, are available to store, protect, and service that category of vital records referred to as rights and interests records. In addition, each Federal records center has environmentally controlled space suitable for the storage of vital records on magnetic tape and photographic film.

SECTION 8. DONATION AND LOAN OF RECORDS.

.01 The Archivist of the United States has authority over the location of permanent records (44 U.S.C. 2107 and 2904). Unscheduled records should be deemed permanent for this purpose, since they have not been appraised and approved for disposal. No permanent or unscheduled records shall be loaned to non-Federal recipients without prior written approval from NARA. NARA authorization is not required for temporary loan of permanent and unscheduled records between Federal agencies, but the approval of the operating unit Records Management Officer is required.

.02 When the public interest will be served, operating units may propose the transfer of records eligible for disposal to an appropriate person, organization, institution, corporation, or government (including a foreign government) that has requested them. Records may not be transferred without the prior written approval of NARA.

SECTION 9. SCHEDULING RECORDS.

.01 Preparing records schedules. Federal records may generally not be disposed of unless approved by the Archivist of the United States and, in the case of some records, with the concurrence of the GAO (44 U.S.C. 3301-3314).

a. Schedules may be initiated by the responsible program official with the advice and assistance of the operating unit Records Management Officer. The schedule shall be on a Standard Form 115, "Request for Records Disposition Authority," and shall be approved by the operating unit Records Management Officer before submission to the Department Records Management Officer. The Department Records Management Officer shall review and approve all SF 115s before they are submitted to NARA.

b. Ultimately, all records of an operating unit must be scheduled, but they need not all be scheduled at the same time. Records of one function, program, or organization element may be scheduled at a time. A schedule may also be prepared for one block (series) of records.

c. Obtaining approval of a records schedule required several months or longer. They should be developed and written in such a way as to minimize the need for updating. Blocks of records should be described in general terms that will not be likely to change frequently. Specific forms, names of reports, and similarly detailed references should be avoided.

d. It is generally advisable to prepare at one time schedules for large organizational elements or functions that are unlikely to be abolished or transferred frequently. Such schedules should not be subdivided to identify records as those of division or lower level elements that are more likely to be abolished, transferred, or realigned as the result of internal reorganizations.

e. Obtaining approval for the disposition of electronic, audiovisual, and cartographic records often required more time than needed for textual records. It is advisable to prepare separate schedules for these records so as not to delay approval for textual records. Permanent electronic and audiovisual records should not be proposed for long-term storage at Federal records centers. Because they are relatively fragile and degrade in a shorter time than textual records, it is preferable to transfer them directly to the National Archives. (See Section 11. of this Order.)

f. Microforms and source documents (originals) must both be scheduled. Regardless of whether they have been microfilmed, source documents may not be disposed of before NARA authorization is received. The original records shall not be destroyed after microfilming when NARA determines that the original records have intrinsic permanent historical or other value, or when NARA concludes that the microforms present reference problems because of the access restrictions, including security classification, or other characteristics of the original records. As with audiovisual and electronic records, permanent microforms should not be proposed for long-term storage at Federal records centers, but should be transferred directly to the National Archives under Section 11. of this Order.

g. Once all the records of an operating unit are scheduled, a comprehensive manual of all the schedules should be issued. Each record series description must include the job and item numbers NARA assigned and under which it approved the disposition of those particular records.

h. NARA has issued GRS for many administrative records common to most Federal agencies. The disposition instructions in the GRS are mandatory and must be adhered to unless an exception is approved by the Archivist of the United States on an SF 115.

i. GAO concurrence must be obtained for the disposal of program records less than three years old, records relating to claims or demands by or against the Government, and records of accounts in which the Government is concerned, in accordance with the GAO "Policy and Procedures manual for guidance of Federal Agencies," Title 8 0 Records Management. Records schedules containing such records must be approved by GAO before approval by NARA, but the request may be submitted concurrently to NARA and GAO.

.02 Applying records schedules. The disposition instructions in operating unit records schedules are mandatory. Officials may not dispose of records prior to their authorized disposal date or retain them beyond that date. If a program official determines that records need to be retained longer than authorized by the schedule, the operating unit Records Management Officer shall be contacted to obtain approval from NARA and, if necessary, to revise the schedule.

a. Program officials shall review annually the particular items on the records schedule that pertain to the records for which they are responsible to ensure they remain current. If changes are required, they shall contact their operating unit Records Management Officer.

b. Nonrecord materials are not generally included on records schedules because their disposal is not covered by 44 U.S.C. Chapter 33. Officials should dispose of nonrecord materials as soon as they have served their purpose and are no longer needed. The operating unit Records Management Officer should be contacted for advice if there is any question whether particular documentary materials are records or nonrecord materials.

SECTION 10. USING FEDERAL RECORDS CENTERS.

NARA operates a network of Federal records centers for the storage of records no longer needed to conduct current business and which will be referred to infrequently. Such records should be transferred to a Federal records center.

a. Each operating unit Records Management Officer shall maintain a program for the orderly and timely transfer of records to Federal records centers. Records that do not have at least one remaining year before their scheduled disposition and nonrecord materials may not be transferred.

b. Although exceptions may be granted, Federal records centers do not generally accept records not covered by a current schedule. Since obtaining approval for records schedules may

take several months, program officials should work with their Records Management Officer to develop, and obtain approval for, a current schedule before they need to transfer records.

c. The maintenance and use of operating unit records storage areas should be minimized. Such areas frequently serve to store unscheduled records that should be scheduled and transferred to a Federal records center. Ideally, these areas should have only as much space as needed to stage or hold records pending transfer to a Federal records center.

d. Procedures for transferring records are well established and relatively simple. Failure to adhere precisely to them may result in extensive reboxing or return of the records from the Federal records center. Following are the basic steps for preparing and transferring records. Operating units Records Management Officers are encouraged to develop and issue

more detailed procedures appropriate for their specific requirements.

1. Except as noted below, records must be shipped in 15" x 12" x 10" boxes specifically designed for records storage (National Stock Number 8115-00-117-8249). Program offices should consult their Records Management Officer to obtain NARA-approved boxes for shipping oversized records, drawings, ledgers, and other records not appropriate for standard records storage boxes.

2. The document used to transfer records is SF 135, Records Transmittal and Receipt. (See Exhibit 1 of this Order.) Instructions for its completion are on the back of the form. A detailed folder list or inventory of the contents of each box must accompany the SF 135 when it is sent to the Records Management Officer for review, approval, and assignment of an accession number. This list is essential to identify and retrieve temporary records and is required to be sent to the Federal records center for permanent records.

3. A separate SF 135 must be prepared for each records series or item in the records schedule. For example, contract case files may not be included with contract administration subject files. In addition, except in the case of a one box shipment, all the records covered by the SF 135 must be for the same year. For example, contract case files closed in Fiscal Year (FY) 1991 may not be transferred under the same SF 135 as contract case files closed in FY 1990. Similarly, contract administration subject files from different years must be transferred separately. For this reason, program offices should cutoff and transfer records on regular basis rather than allow files to accumulate and become intermingled. Because it will affect the month of disposition, the records description on the SF 135 should indicate whether the records span the fiscal year or the calendar year.

4. When packing boxes, all correspondence files must be in folders with labels to facilitate retrieval. Letter size files should face the front of the box, i.e., the narrow side of the box opposite the side on which the box is stapled. Legal size files should face the left side of the box. The boxes should not be marked or labeled in any way until after the proposed shipment is reviewed and approved by the operating unit Records Management Officer. Box tops should never be sealed with tape. The box top flaps should be interfolded instead.

5. After reviewing and approving the proposed transfer, the operating unit Records Management Officer will assign an accession to the shipment and enter it on the SF 135. This number, which will consist of seven or eight digits, must be written, using a heavy black felt tip marker, in 1/16-inch high digits on the upper left-hand corner of the front of the box, i.e., the narrow side opposite the side on which the box is stapled together. On the upper right-hand corner of the front of the box should be written the specific box number and the total number of boxes in the shipment, e.g., 1/10, 2/10, and 3/10, or, alternatively, 1 of 10, 2 of 10, and 3 of 10. (See Exhibit 2 of this Order.) It is imperative that the marking be done correctly the first time. The Federal records center will not accept boxes with corrections, and the records will have to be reboxed by the program office. It is not necessary to write any other information on the box, although individual operating units may establish specific requirements in this regard.

e. Records transferred to a Federal records center remain the property of the Department and may be retrieved upon request by the operating unit Records Management Officer. Routine requests are normally honored within two weeks, but Federal records centers can provide expedited service in special situations. Urgent requests may be submitted by facsimile machine, and operating units may arrange for pickup of records at the center instead of waiting for delivery.

f. Many Federal records centers provide reimbursable microfilming services, including the preparation, indexing, and filming of records, inspection of film, and labeling of film containers. Program offices should contact their Records Management Officer for further information.

SECTION 11. TRANSFERRING PERMANENT RECORDS TO THE NATIONAL ARCHIVES.

.01 Records which have sufficient historical or other value to warrant permanent preservation in the custody of the Archivist of the United States shall be offered for transfer to the National Archives under the provisions of 36 CFR 1228, Subpart J. The National Archives will send the operating unit Records Management Officer an SF 258, Request to Transfer, approval, and Receipt of Records to National Archives of the United States, for permanent records stored in Federal records centers when they are scheduled for transfer to the National Archives. Upon approval by the Records Management Officer and acceptance by the National Archives, the records will become the legal property of the National Archives.

.02 Records that are not scheduled, or are scheduled for permanent retention but remain in the Department, should be offered to the National Archives as provided for in the records schedule or when no longer needed for current business.

The operating unit Records Management Officer shall initiate an SF258 and send it, along with an inventory of the records, to the National Archives for review and approval of the proposed transfer.

.03 Permanent records that have been in existence for more than 30 years must be offered to the National Archives unless the Secretary of Commerce certifies in writing to the Archivist that the records must be retained in the Department for use in its regular current business.

.04 Permanent or unscheduled audiovisual or electronic records and microforms should be offered for transfer to the National Archives as soon as they are no longer needed for regular current business. They should not be transferred to the Federal records center for long-term storage or maintained in Department space. Prompt transfer to the National Archives will protect them against possible degradation and loss of the information recorded on them.

.05 Records transferred to the National Archives remain available for loan to the Department or for review and research at the National Archives. Existing security classification, privacy, and other restrictions should be noted on the SF 258 and remain in force.

SECTION 12. REFERENCES.

.01 The Freedom of Information Act (5 U.S.C. 552), and the Privacy Act of 1974 (5 U.S.C. 552a.).

.02 FIRMR Part 201-9 and Subchapter B contains records management policies and guidance established by the Administrator of General Services.

.03 A Federal Records Management Glossary contains definitions of traditional records management terms, as well as terms from related disciplines, such as automated data processing and information science. Also included are lists of selected abbreviations and acronyms and records management handbooks and other publications issued by the National Archives and Records Administration. Copies may be obtained from the Records Administration Information Center, Agency Services Division (NIA), National Archives, Washington, D.C. 20408.

.04 Department of Commerce Administrative Orders (DAOs). The following DAOs, which contain information regarding the maintenance, retention, safeguarding, and disposition of particular categories of records, should be consulted as necessary:

a. DAO 201-2, "Committee Management," together with the supplementary Department of Commerce Committee Management Handbook, provides guidance on the maintenance of records of committees, commissions, boards, and panels.

b. DAO 202-293, "Official Personnel Folders," provides instructions for maintaining and disposing of personnel records.

c. DAO 202-299, "Clearance of Employee Accountability," explains policies on the removal of records, nonrecords, and personal papers by department official and employees.

d. DAO 205-12, "Public Information," provides policies governing the release of information to the public under 5 U.S. Code 552, the Freedom of Information Act and amendments.

e. DAO 205-14, "Processing Requests under the Freedom of Information Act, covers procedures for processing FOIA requests.

f. DAO 205-15, "Handbook of Privacy Act Administration," provides specific guidance on implementing 5 U.S. Code 552a, the Privacy Act, and Department policies and procedures regarding Privacy Act systems of records.

g. DAO 205-16, "Managing Electronic Records," contains standards and guidelines for managing records and information in electronic form.

h. DAO 207-1, "Security Programs," together with supplementary manuals, such as National Security Information, Personnel Security, Physical Security, and Operations Security, provides guidance on measures and standards for the safekeeping of security classified and other sensitive information.

i. DAO 210-2, "Vital Records Program," provides instructions for selecting, protecting, and reporting on records that are

essential to continue Departmental operations in an emergency.

j. DAO 215-7, "Collection and Management of Racial and National Origin and Medical Disability Data," contains restrictions on the release of this information.

SECTION 13. EFFECT ON OTHER ORDERS.

This Order supersedes Department Administrative order 205-1, 205-2, and 205-3, all dated August 28, 1978.

Signed by: Chief Financial Officer and Assistant Secretary for Administration

Office of Primary Interest: Office of Federal Assistance and Management Support

For copies of Exhibits, please call (202) 482-7873.

Questions and Comments

Send Questions or Comments on the Commerce Directives Management program to Directives@doc.gov.

Office of Privacy and Open Government
Office of the Chief Financial Officer and Assistant Secretary for Administration
U.S. Department of Commerce

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