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Approved by Sam Kaplan, Chief Privacy Officer

FREEDOM OF INFORMATION ACT COMPLIANCE ON EMPLOYEE NOTIFICATION

I. Purpose

This Instruction implements the Department of Homeland Security (DHS or the Department) Directive 262-11, “Freedom of Information Act (FOIA) Compliance,” and creates an employee notification process to inform current Department employees when their employment records, as defined in section IV. paragraph E., are about to be released under the FOIA.

II. Scope

This Instruction applies throughout DHS, on behalf of, or in coordination with the Department.

III. References

- A. Title 5, United States Code (U.S.C.), § 552, “Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings” [The Freedom of Information Act, as amended]
- B. Title 5, United States Code (U.S.C.), § 552a, “Records maintained on individuals” [The Privacy Act of 1974, as amended]
- C. Title 6, United States Code (U.S.C.), § 142, “Privacy Officer”
- D. Title 6, Code of Federal Regulation (C.F.R.), Part 5, “Freedom of Information Act Regulations” (November 22, 2016)
- E. DHS Delegation 13001, “Delegation to the Chief Privacy Officer”
- F. DHS Directive 262-11, “Freedom of Information Act Compliance”

G. DHS Privacy Policy Guidance Memorandum 2017-01, “DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Personally Identifiable Information” (April 25, 2017)

IV. Definitions

- A. **Chief FOIA Officer**: The Secretary of DHS designates the DHS Chief Privacy Officer to serve concurrently as the Chief FOIA Officer.
- B. **Deputy Chief FOIA Officer**: An individual reporting to the Chief FOIA Officer who serves as the DHS principal point of contact and agency representative on FOIA-related matters.
- C. **FOIA Officer**: Designated DHS official appointed by the Component head whose delegable responsibilities are to receive and respond to FOIA requests, FOIA appeals, and FOIA litigation and to provide assistance in administrative matters pertaining to FOIA request processing.
- D. **Responsible Official**: The individual designated by the Component FOIA Officer to be responsible to respond to each FOIA request received or assigned.
- E. **Employment Records**: Past and present personnel information. These records may contain personal information of the employee including name; present/past position titles and occupational series; grades; past and present salary rates; performance awards or bonuses; ~~disciplinary action~~; position descriptions; past and present duty station. Federal employees generally have no expectation of privacy in such information¹.
- F. **Protected Personnel Information**: Personnel information that is withheld from disclosure because there is a significant privacy interest and the disclosure would constitute a clearly unwarranted invasion of privacy.
- G. **Released under the FOIA**: this includes partial and final responses pertaining to FOIA requests, FOIA appeals, and FOIA litigation.

¹ Per DOJ Office of Information Policy's guide to FOIA “Civilian federal employees who are not involved in law enforcement of sensitive occupations generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees or regarding parts of their successful employment applications that show their qualifications for their positions.” OPM Regulations, 5 C.F.R. 293.311 (2011), FLRA v. U.S. Dep't of Commerce, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992); Core v. USPS, 730 F.2d 946, 948 (4th Cir. 1984); Leadership Conference on Civil Rights v. Gonzales, 404 F. Supp. 2d 246, 257 (D.D.C. 2005); Knittel v. IRS, No. 07-1213, 2009 WL 2163619, at *6 (W.D. Tenn. July 20, 2009); Cowdery, Ecker & Murphy, LLC v. Dep't of Interior, 511 F. Supp. 2d 215, 219 (D. Conn. 2007); Barvick v. Cisneros, 941 F. Supp. 1015, 1020 n.4 (D. Kan. 1996).

V. Responsibilities

A. The Deputy Chief FOIA Officer:

1. Monitor Components' implementation of the employee notification process for current Department employees to inform them when their employment records that are about to be released under the FOIA.
2. Ensure Department employees and FOIA Officers are notified of their responsibilities regarding current Department employees' employment records that are about to be released under the FOIA.

B. The FOIA Officers:

1. Oversee the responsible official who is responding to each FOIA request seeking personnel information regarding federal employees.
2. Ensure that release of employment records is based upon the case-by-case analysis involving a balancing test between the privacy interest of the individual's information and the public's interest in that information.
3. Implement a process to notify current Department employees when their employment information will be released to a requester.

VI. Content and Procedures

A. The Department routinely receives FOIA requests seeking personnel information of federal employees.

B. Determinations made under FOIA regarding the extent to which personal privacy can be protected generally require an individualized case-by-case analysis.

C. Employment records may be releasable, under the FOIA, as it pertains to federal employees pursuant to Office of Personnel Management (OPM) regulations.² OPM regulations indicate that federal employees generally have no expectation of privacy regarding their names, titles, grades, salaries, bonuses, position descriptions, and duty stations. However, there are some components and offices within the Department in which the names of employees are protected due to occupational duties.³

² *ibid.*

³ Law enforcement components may redact personally identifying information including employee names, phone numbers, and email addresses under FOIA Exemption 6 given the substantial personal privacy interests of law

D. Furthermore it is the policy of the Department, in light of prevailing FOIA case law⁴, to release additional items of information in personnel files, particularly pertaining to the professional qualifications of federal employees. Such information generally disclosed includes post-graduate or technical education in preparation for the employee's professions; all prior employment in State or Federal Government positions; prior employment in the private sector related to an employee's duties; awards and honors received; and membership in professional groups.

E. Protected personnel information typically withheld from third parties, pursuant to Exemption 6 is dependent on a case-by-case balancing test.⁵ The information being withheld could include, but is not limited to: place and date of birth; age; marital status; home address and telephone number; medical information and records; details of health and insurance benefits; the substance of promotion recommendations; supervisory assessments of professional conduct and ability; information concerning or provided by relatives and references; prior employment not related to the employee's occupation; allegations of misconduct or arrests; security clearances; military service number; Social Security number; and matters capable of causing embarrassment and or harassment and which are not pertinent to the employee's duties.

F. DHS and components notify their employees when their employment records will about to be released to a requester.

enforcement personnel in their individual contact information. In addition, Exemption 7(C) may allow these components to withhold certain personnel information compiled for law enforcement purposes. Intelligence components may redact personally identifying information including employee names, phone numbers, and email addresses under FOIA Exemption 6 or other applicable exemptions, such as Exemption 3, given the strong personal privacy interest in withholding the names of employees with intelligence duties.

⁴ Per DOJ Office of Information Policy's guide to FOIA "Civilian federal employees who are not involved in law enforcement of sensitive occupations generally have no expectation of privacy regarding their names, titles, grades, salaries, and duty stations as employees or regarding parts of their successful employment applications that show their qualifications for their positions." OPM Regulations, 5 C.F.R. 293.311 (2011), *FLRA v. U.S. Dep't of Commerce*, 962 F.2d 1055, 1059-61 (D.C. Cir. 1992); *Core v. USPS*, 730 F.2d 946, 948 (4th Cir. 1984); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005); *Knittel v. IRS*, No. 07-1213, 2009 WL 2163619, at *6 (W.D. Tenn. July 20, 2009); *Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007); *Barvick v. Cisneros*, 941 F. Supp. 1015, 1020 n.4 (D. Kan. 1996).

⁵ In order to determine whether Exemption 6 protects against disclosure, an agency should engage in the following two lines of inquiry: first, determine whether the information at issue is contained in a personnel, medical, or "similar" file covered by Exemption 6; and, if so, determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy" by balancing the privacy interest that would be compromised by disclosure against any public interest in the requested information. See *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007).

G. The employee notification will consist of an email (refer to Appendices [A](#) and [B](#)), which will contain a copy of the employment record and a copy of the request. The employment record(s) may contain segregated text in order to ensure the employee is only receiving information concerning him/herself. The request will disclose the name of the requester, and/or company if applicable, and the subject matter of FOIA request.⁶

H. The DHS or Component FOIA Office makes the final determination which records are released under the FOIA. DHS employees shall not be involved in the processing of the FOIA request that contains their employment records or the determination of the releasability of the personnel information.

I. This instruction does not apply to requests for access under the Privacy Act.

VII. General Provision

This instruction is not intended to, and does not create any rights or benefit, substantive or procedural, enforceable by law or in equity by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

VIII. Questions

Address any questions or concerns regarding these Instructions to the DHS Privacy Office or to the relevant Component FOIA Office.



Sam Kaplan
Chief FOIA Officer

2/20/2018

Date

⁶ "FOIA requesters . . . have no general expectation that their names will be kept private." *Agee v. CIA*, 1 GDS ¶ 80,213 at 80,532 (D.D.C. 1980).

**SAMPLE E-MAIL #1
WHEN RECORDS ARE RELEASED TO A REQUESTER FROM AN ORGANIZATION
SENT VIA E-MAIL TO: [CURRENT DHS EMPLOYEE]**

**SUBJECT LINE IN E-MAIL: [FOR YOUR AWARENESS] – Employee Notification
(FOIA)**

Good morning/afternoon, [CURRENT DHS EMPLOYEE]:
In accordance with DHS Instruction XX (Employee Notification Instruction)⁷, the DHS Privacy Office (Component FOIA Office) provides the notification below for your awareness.

On [DATE], our office will release employment records that may be of interest to [REQUESTER NAME] with [REQUESTER ORGANIZATION], in response to a Freedom of Information Act (FOIA) request. Please see the attached records.

If you have any questions regarding this release, please contact me.

[FOIA PROGRAM ANALYST]
[CONTACT INFORMATION]

⁷ This guidance is available at <https://www.dhs.gov/foia-statutes-resources>.

Appendix B: Employee Notification (Sample # 2)

**SAMPLE E-MAIL #2
WHEN RECORDS ARE RELEASED TO A REQUESTER NOT FROM AN
ORGANIZATION
SENT VIA E-MAIL TO: [CURRENT DHS EMPLOYEE]**

**SUBJECT LINE IN E-MAIL: [FOR YOUR AWARENESS] – Employee Notification
(FOIA)**

Good morning/afternoon, [CURRENT DHS EMPLOYEE]:
In accordance with DHS Instruction XX (Employee Notification Instruction)⁸, the DHS Privacy Office (Component FOIA Office) provides the notification below for your awareness.

On [TODAY'S DATE], our office will release personnel records that may be of interest to [REQUESTER NAME], an individual, in response to a Freedom of Information Act (FOIA) request. Please see the attached records.

If you have any questions regarding this release, please contact me.

[FOIA PROGRAM ANALYST]
[CONTACT INFORMATION]

⁸ This guidance is available at <https://www.dhs.gov/foia-statutes-resources>.