

## § 5.60

which the agency records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4)(B).

[44 FR 50287, Aug. 27, 1979. Redesignated at 53 FR 2740, Feb. 1, 1988]

### § 5.60 Disciplinary action against employees for “arbitrary or capricious” denial.

Pursuant to 5 U.S.C. 552(a)(4)(F), whenever the district court, described in § 5.59 orders the production of any FEMA records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether FEMA personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel in the Merit Systems Protection Board is required to initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who primarily was responsible for the withholding. The Special Counsel after investigation and consideration of the evidence submitted, submits findings and recommendations to the Director of FEMA and sends copies of the findings and recommendations to the officer or employee or his or her representative. The law requires the Director to take any corrective action which the Special Counsel recommends.

[44 FR 50287, Aug. 27, 1979, as amended at 45 FR 1422, Jan. 7, 1980. Redesignated and amended at 53 FR 2740, Feb. 1, 1988]

### § 5.61 Contempt for noncompliance.

In the event of noncompliance by FEMA with an order of a district court pursuant to § 5.60, the district court may punish for contempt the FEMA employee responsible for the noncompliance, pursuant to 5 U.S.C. 552(a)(4)(G).

[44 FR 50287, Aug. 27, 1979, as amended at 45 FR 1422, Jan. 7, 1980; 50 FR 40006, Oct. 1, 1985. Redesignated and amended at 53 FR 2740, Feb. 1, 1988]

## 44 CFR Ch. I (10–1–03 Edition)

### Subpart E—Exemptions

#### § 5.70 General.

The exemptions enumerated in 5 U.S.C. 552(b), under which the provisions for availability of records and informational materials will not apply, are general in nature. FEMA will decide each case on its merits in accordance with the FEMA policy expressed in subpart A.

#### § 5.71 Categories of records exempt from disclosure under 5 U.S.C. 552.

5 U.S.C. 552(b) provides that the requirements of the statute do not apply to matters that are:

(a) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are, in fact, properly classified pursuant to such Executive Order.

(b) Related solely to the internal personnel rules and practices of an agency.

(c) Specifically exempted from disclosure by statute other than section 552(b) of title 5, provided that such statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (2) establishes particular criteria for withholding or refers to particular types of matter to be withheld.

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(e) Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(g) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings;

(2) Would deprive a person of a right to a fair trial or an impartial adjudication;

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(4) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(6) Could reasonably be expected to endanger the life or physical safety of any individual.

(h) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) Geological and geophysical information and data, including maps, concerning wells. Any reasonably segregable portion of a record shall be provided to any person requesting the record after deletion of the portions which are exempt under this section.

(j) Whenever a request is made which involves access to records described in paragraph (g)(1) of this section and the investigation or proceeding involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, FEMA may, during only such time as that circumstance continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

[44 FR 50287, Aug. 27, 1979, as amended at 52 FR 13679, Apr. 24, 1987]

#### § 5.72 Executive privilege exemption.

Where application of the executive privilege exemption is desired, the matter shall be forwarded to the Director for consideration. If the request for information is Congressional, only the President may invoke the exemption. Presidential approval is not necessarily required if the request for information is in connection with judicial or adjudicatory proceedings or otherwise. In connection with judicial proceedings, the response shall be coordinated with the Department of Justice.

### Subpart F—Subpoenas or Other Legal Demands for Testimony or the Production or Disclosure of Records or Other Information

SOURCE: 54 FR 11715, Mar. 22, 1989, unless otherwise noted.

#### § 5.80 Scope and applicability.

(a) This subpart sets forth policies and procedures with respect to the disclosure or production by FEMA employees, in response to a subpoena, order or other demand of a court or other authority, of any material contained in the files of the Agency or any information relating to material contained in the files of the Agency or any information acquired by an employee as part of the performance of that person's official duties or because of that person's official status.

(b) This subpart applies to State and local judicial, administrative and legislative proceedings, and Federal judicial and administrative proceedings.

(c) This subpart does not apply to Congressional requests or subpoenas for testimony or documents, or to an employee making an appearance solely in his or her private capacity in judicial or administrative proceedings that do not relate to the Agency (such as cases arising out of traffic accidents, domestic relations, etc.).

#### § 5.81 Statement of policy.

(a) It is the policy of FEMA to make its records available to private litigants to the same extent and in the same manner as such records are made available to members of the general