



Department of Energy

Washington, DC 20585

June 8, 2011

MEMORANDUM FOR DISTRIBUTION

FROM:


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DIRECTOR
OFFICE OF CLASSIFICATION
OFFICE OF HEALTH, SAFETY AND SECURITY

SUBJECT:

Use of Exemption 2 in Classification Guidance

In March 2011, the Supreme Court ruled that the Freedom of Information Act (FOIA) Exemption 2 does not apply to Circumvention of Statute information. Therefore, FOIA Exemption 2 may no longer be used as a basis for an Official Use Only (OUO) determination. Attached is Policy Bulletin 4 (POL-4), *Exemption 2 Guidance*, which provides background and information on how to deal with Exemption 2 in classification guidance.

The Office of Quality Management is updating OUO brochures and training materials. You will be notified when these materials are available on the Office of Classification's OUO website at <http://www.hss.doe.gov/classification/QualityMgt/ouo.html>.

If you have any questions concerning the bulletin, please contact Nick Prospero at (301) 903-9967 or Lesley Nelson-Burns at (301) 903-4861.

Attachment





U. S. Department of Energy
Office of Classification
Washington, DC 20585

June 1, 2011

POLICY BULLETIN

POL-4

SUBJECT: Exemption 2 Guidance

- I. Purpose. The purpose of this bulletin is to provide guidance on which Freedom of Information Act (FOIA) exemption should be used as the basis for security-related information currently protected as Official Use Only (OUO) under "Exemption 2, Circumvention of Statute," in DOE Classification Guides.
- II. Discussion. As a result of a recent Supreme Court ruling (*Milner v. Department of the Navy*), the scope of Exemption 2 has been significantly narrowed to apply only to that information that meets the plain meaning of "personnel rules and practices." The concept of "High-2" information, which concerned internal matters of a more substantial nature whose disclosure would significantly risk the circumvention of a legal requirement, is no longer valid. Consequently, "Exemption 2, Circumvention of Statute," may no longer be used in our classification guides as a basis for OUO determinations.

Based on guidelines recently issued by the Department of Justice, Exemption 7 appears to be the appropriate exemption to use for Department of Energy security-related information formerly protected under Exemption 2 in our classification guides. As guides are updated, the originating Classification Office will review all OUO guide topics to ensure that the information requiring protection falls under an appropriate Exemption and revise guide topics as appropriate. Until these reviews are completed, "Exemption 7, Law Enforcement," shall be the basis for any guidance-related OUO determination that would have been based on Exemption 2.

- III. Guidance. Effective immediately, "Exemption 7, Law Enforcement," will be used as a basis for OUO determinations in lieu of "Exemption 2, Circumvention of Statute," for all topics in DOE classification guides that currently cite Exemption 2. It is not necessary to make pen and ink changes to every topic in guides so long as the users are aware of this policy change.
- IV. Legacy Documents. Existing OUO documents that cite a classification guide and use "Exemption 2, Circumventions of Statute," as the basis for the OUO determination do not have to be re-marked. If information is extracted from such

a document for use in a new document, "Exemption 7, Law Enforcement," should be used as the basis for OOU on the new document.

- IV. Issuing Office. The Office of Quality Management is the issuing office for this bulletin. Additional advice and assistance about this policy can be obtained from the Director, Office of Quality Management.

As a reminder, irrespective of any OOU marking on a document, an organization's FOIA Denying Official determines whether information is actually exempt from public release under a FOIA, Mandatory Declassification Review, or Privacy Act request.



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