



The Freedom of Information Act and Confidentiality of Cultural Resources



SYNOPSIS

Cultural resource professionals and information managers may find that their responsibilities appear to conflict with the Freedom of Information Act (FOIA) when they receive requests for materials protected under different statutory authorities. FOIA, passed in 1966 to ensure public access to U.S. government records, may, for example, appear to conflict with laws that protect cultural resources by restricting dissemination of certain information about them. This Brief provides a guide to navigating requests for information about cultural resources and harmonizing the various applicable statutes.

Within the Department of Energy (DOE), the Office of Environmental Policy and Assistance, within the Office of Health, Safety and Security, is responsible for providing information and developing guidance on compliance with cultural resource laws. This information brief describes the various legal requirements that DOE staff members should consider when responding to FOIA requests that include information protected under cultural resource protection laws.

If you have additional questions after receiving a FOIA request for information about cultural resources, please feel free to contact Beverly Whitehead at 202 586-6073, the FOIA Office, or the Office of General Counsel.

INTRODUCTION

Cultural resources include, but are not limited to, a range of items and locations (DOE Guidance Memorandum, February 23, 1990), including the following:

- archeological materials (i.e., artifacts) and sites dating to the prehistoric, historic, and

ethnohistoric periods that are located on the ground surface or are buried beneath it;

- standing structures that are over 50 years of age or are important because they represent a major historical theme or era;
- cultural and natural places, select natural resources, and sacred objects that have importance for Native Americans and ethnic groups; and
- American folk-life traditions and arts.

DOE is required to protect cultural resources that are found on the property it manages or controls. Protection is more stringent for those resources that are listed on or eligible for listing on the National Register of Historic Places (the National Register). DOE must also consider the impacts of its "undertakings" on cultural resources wherever they are found, even if not on DOE managed or controlled land. The National Historic Preservation Act (NHPA) defines an undertaking as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of [DOE], including those carried out by or on behalf of [DOE]; those carried out with [DOE] financial assistance; and those requiring a [DOE] permit, license, or approval."

In the process of complying with requirements regarding cultural resources under the NHPA or the National Environmental Policy Act (NEPA), sensitive information about these resources may become part of DOE's official records. Such details may be withheld from the public to protect the cultural resources, by, for example, withholding location information to prevent looting and desecration.

The importance of restricting confidential information is emphasized throughout DOE Guide 450.1-3, *Environmental Guidelines for Development of Cultural Resource Management Plans—Update*. For example, sections 3.3 and 3.4 state the following:

The Archeological Resources Protection Act (ARPA) precludes public access to maps or other information concerning the nature and location of cultural resources under the Freedom of Information Act...or under any other provision of law unless certain conditions specified in the Act are met. Sections of the [Cultural Resource Management Plans] that contain maps or other information of this type should be considered sensitive, and distribution should be restricted appropriately.

FREEDOM OF INFORMATION ACT

FOIA carries a presumption of disclosure; the burden is on the government—not the public—to substantiate why information may not be released. Thus, a written request under FOIA requires DOE, as a federal agency, to release its records or explain why they cannot be released. FOIA lists, in Section 552(b), nine specific exemptions that allow agencies to withhold either certain information contained in records or entire records from public disclosure. One of the FOIA exemptions allows an agency to withhold records "specifically exempted from disclosure by statute." This exemption includes two qualifications: the statute must "(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) [establish] particular criteria for withholding or [refer] to particular types of matters to be withheld." This exemption includes cultural resource information (e.g., electronic and hardcopy inventory and evaluation records, maps, raw data, reports) that is exempt from disclosure under the cultural resource statutes discussed below. According to its 2007 Annual Report on the administration of FOIA, DOE has used this exemption to withhold cultural resource information.

CULTURAL RESOURCE STATUTES

NHPA and ARPA specifically restrict disclosure of certain types of sensitive information regarding cultural resources. These statutory provisions may result in information developed under these acts being withheld from public disclosure under the FOIA exemption discussed above.

National Historic Preservation Act

NHPA is the principal federal law dealing with historic preservation. As defined in Section 301(5) of the Act, "historic property" or "historic resource" means "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource."

Section 304 of the NHPA protects some information about historic resources from public disclosure. Specifically, it requires federal agencies, such as DOE, to "withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the agency and the Secretary of the Interior agree that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners." For purposes of this section of NHPA the Secretary of the Interior acts through the director of the National Park Service (NPS). DOE, therefore, consults with the NPS to make a determination to withhold information from the public.

Once a determination to withhold information from the public has been made, the NPS, in consultation with DOE, will determine who (if anyone) may have access to the information for NHPA purposes. If the information was developed in order to comply with NHPA Section 106 or Section 110(f), the NPS must consult with the Advisory Council on Historic Preservation (the Advisory Council) in making the determinations regarding withholding the information from the public and restricting access to the site.

NHPA Section 106 requires DOE to "take into account" the effect of its "undertakings" on historical and archaeological resources and to give the Advisory Council the opportunity to comment on such effects. Section 110(f) of NHPA requires DOE to give the Advisory Council the opportunity to comment specifically on undertakings that may directly and adversely affect any National Historic Landmark and, to the maximum extent possible, to complete such planning and actions as may be necessary to minimize harm to them before approving any such undertaking.