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FOIA and Protecting Cultural Resources

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The Freedom of Information Act (FOIA)¹ provides citizens access to federal agency records. Sunshine laws, in some states, have a similar function at the state level. FOIA mandates which federal agency records must be accessible by law, and FOIA and other laws indicate which records may be withheld. Releasing information on cultural and natural resources may, under certain circumstances, undermine the protection of those resources. The National Park Service (NPS) and other federal bureaus and agencies must be cognizant of situations when withholding information is warranted and legal authorities for withholding. This paper outlines the basics on releasing and withholding information about NPS cultural resources.

What kinds of information are subject to FOIA?

Information in federal agency records is subject to FOIA. Records include books, papers, maps, photographs, machine-readable materials, or other documentary materials—but not all such materials meet the definition of federal agency records under FOIA. Federal agency records must be made or received by federal agencies in transacting public business.²

Does FOIA apply to NPS museum archives?

FOIA applies to some, but not all NPS museum archives. NPS museum archives are documentary materials, including papers, maps, photographs, and machine-readable materials, managed as part of NPS museum collections. NPS museum archives include resource management records, which are federal agency records subject to FOIA. FOIA does not apply to other nonrecord museum archival collections. Museum catalogue records, and other museum management records, are subject to FOIA because they are records NPS created to manage and control museum collections. The following examples illustrate when FOIA does and does not apply to various types of documentary materials.

- A Thomas Edison letter donated to a park is not a record. In fact, the entire Thomas Edison collection at Edison National Historic Site was donated and is not subject to FOIA.
- A map that a park archaeologist creates is a resource management record maintained in the park's museum archives. It is subject to FOIA, although numerous exemptions apply to protect the mapped archaeological resource.
- The park cooperating association's records in the museum archives are not federal agency records. They are not subject to FOIA.
- A deed of gift that a donor and a park superintendent sign is a record and subject to FOIA, although privacy exemptions may apply.

- The superintendent's annual report is a record managed in the park's records management program, not in the museum archives. It is subject to FOIA.

When should NPS release cultural resources information?

NPS should release cultural resources information unless it qualifies under an exemption. If information is protected, NPS should withhold it unless disclosure would further the NPS unit's mission and would not create unreasonable risk of harm, theft, or destruction of the resource, and would be consistent with other laws protecting the resource.

What are the primary authorities for withholding information about cultural resources?

FOIA lists nine exemptions under which information may be withheld:

1. Classified national security information;
2. Records related solely to the internal personnel rules and practices of the agency;
3. Information exempted from disclosure by another statute;
4. Trade secrets and commercial or financial information that is privileged or confidential;
5. Documents that are normally privileged in the civil discovery context, including agency predecisional, deliberative records;
6. Records containing information about individuals when disclosure would constitute a clearly unwarranted invasion of personal privacy;
7. Certain records or information compiled for law enforcement purposes;
8. Records relating to the regulation of financial institutions; and
9. Geological and geophysical information and data concerning wells.

In addition, the following laws, specific to protection of natural and cultural resources, provide exemptions to FOIA: National Historic Preservation Act of 1966, as amended (NHPA);³ Archaeological Resources Protection Act of 1979, as amended (ARPA);⁴ Federal Cave Resources Protection Act of 1988 (FCRPA);⁵ and National Parks Omnibus Management Act of 1998 (NPOMA).⁶

Section 304 of NHPA requires federal agencies and other public officials receiving grant assistance pursuant to the act, after consulting the secretary of the interior, to withhold from disclosure to the public information about the location, character, or ownership of historic resources if the secretary and the agency determine that disclosure may cause a significant invasion of privacy, risk harm to the historic resource, or impede the use of a traditional religious site by practitioners. When such a determination is made, the secretary, in consultation with such federal agency or official, must determine who may access the information.

Under Section 9 of ARPA, federal agencies must withhold information about the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under federal law unless the federal land manager determines that disclosure would further the purposes of ARPA or the Reservoir Salvage Act, as amended,⁷ or that it would not create a risk of harm to such resources or to the site at which such resources are located. ARPA provides an exception requiring federal land managers to

release information about the nature and location of archaeological resources in a state upon a governor’s written request stating the specific location and purpose for which the information is sought and a commitment to protect the information from commercial exploitation.

FCRPA prohibits release of information concerning the specific location of any significant cave unless the secretary of the interior determines that disclosure would further the purposes of the act and would not create substantial risk of harm, theft, or destruction to the cave. It makes an exception for the secretary to release information about significant caves upon written request of federal and state government agencies and bona fide educational and research institutions. Such written requests must state the specific location and purpose for which the information is sought and include assurances satisfactory to the secretary that adequate measures are being taken to protect the confidentiality of such information and to ensure the protection of such caves from destruction by vandalism and unauthorized use.

Section 207 of NPOMA states that, except as noted below, NPS may withhold information concerning the nature and specific location of the following resources:

- Endangered, threatened, rare, or commercially valuable national park system resources;
- Mineral or paleontological objects within units of the national park system; and
- Objects of cultural patrimony within units of the national park system.

The above information may be withheld unless the secretary determines that disclosure of the information would further the purposes of the unit of the national park system in which the resource or object is located and would not create an unreasonable risk of harm, theft, or destruction of the resource or object, including individual organic or inorganic specimens; and disclosure is consistent with other applicable laws protecting the resource or object.

What is an “object of cultural patrimony” as used in NPOMA?

“Object of cultural patrimony” is not defined in the NPOMA. NPS plans to provide the definition in NPS Reference Manual #66B, “Handling Protected Information,” when it is issued. The definition needs to be tailored to apply specifically to national park system resources and include the following concepts:

- NPS must identify the item as having importance for archaeology, history, ethnography, literature, art, physical or natural sciences, or culturally associated groups.
- The object must be within the administrative jurisdiction of a unit of the national park system.

These concepts reflect National Park Service considerations and are very similar to the definition of “cultural property” in the 1970 UNESCO [the United Nations Educational, Scientific, and Cultural Organization] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property⁸ and the definition of “cultural objects” in the 1995 UNIDROIT [the International Institute for the Unification of Private Law] Convention on Stolen or Illegally Exported Cultural Objects.⁹

What are some examples of information documenting the nature or character of a cultural resource that is likely to be withheld?

The following examples show when NPS might want to withhold information documenting the nature or character of a cultural resource:

- Certain architectural drawings of a monument that is a national icon might be withheld because terrorists could use them to determine where to plant a bomb to damage or destroy the monument.
- Information in field notes documenting numerous graves under the floor of a Spanish colonial church at an archaeological site that is open to the public might be withheld because releasing that information would create a high risk of disturbance and looting of the site.
- Information on the appraised value and location of a museum object could be withheld if release would increase the risk of theft.

What are some examples of location information that is likely to be withheld?

In the following situations, NPS might be likely to withhold information on location:

- Information on the location of archaeological sites that are not formally open for public visitation is routinely withheld to protect the sites from looting and vandalism. This information is in archaeological resource management records and museum records associated with artifacts from archaeological sites. For example, that the wreck of the HMS *Fowey* is within the boundaries of Biscayne National Park is public knowledge; however, the park has successfully denied a FOIA request for the specific location of the shipwreck.
- Information on the location of caves that are not formally open for public visitation is routinely withheld to protect the cave resources, whether natural or cultural, from theft and vandalism, as well as to protect the sensitive cave environment from contamination.

Can parks protect the confidentiality and physical integrity of sacred sites?

Although Executive Order 13007, “Indian Sacred Sites,”¹⁰ instructs agencies to accommodate religious practitioners from recognized American Indian and Alaskan native tribes in access to and ceremonial use of Indian sacred sites on federal land, to avoid adversely affecting the physical integrity, and to maintain the confidentiality of sites as permitted by law, it does not provide a specific FOIA exemption.

NPS cannot promise confidentiality of records created about sacred sites, unless that information falls under one of the nine FOIA exemptions, including exemptions provided by other laws. Effective management of the information collection process is the best approach to protecting confidential information about sacred sites. A park that collects and maintains the minimum information needed to justify administrative decisions and ensure that public trails avoid a sacred site reduces the risk of releasing sensitive information under FOIA. If releasing that information might result in harm to the resource, information about the nature (or character) and location of the resource could be withheld under exemptions in NHPA, ARPA, and, if the site is an object of cultural patrimony, NPOMA. In addition, information

about the character or location of the resource could be withheld under exemptions in NHPA if release would cause a significant invasion of privacy or impede the use of a traditional religious site by practitioners.

Can parks protect the confidentiality of ethnographic research notes?

NPS cannot guarantee to maintain the confidentiality of records created during ethnographic research (for example, records of consultations) unless the information falls under one of the nine FOIA exemptions, including exemptions provided by other laws. Although ethnographers use FOIA exemptions 3–6, exemption 6, addressing privacy, is the most used. The NPS ethnographer community is developing procedures to minimize the amount of confidential information that goes into federal agency records and is therefore subject to FOIA, and to maximize use of the privacy exemption to protect confidential information in those records.

May NPS withhold previously released cultural resources information?

NPS may withhold information about the nature and location of cultural resources if that information has changed since its previous release. For example, a national park may have allowed researchers to view a 1960 catalogue record for a painting showing its value at \$200. The recorded value has now changed to \$5,000. That information, as well as the location and other sensitive information, could be withheld even though it was released previously. The nature of the resource, the value, has changed, now placing the resource at an unreasonable risk of theft.

May NPS now withhold cultural resources information released before 9/11 even if the nature or location of the resource has not changed?

The answer is not known. Some parks may now withhold previously released information on cultural resources that are at higher risk after 9/11. The nature and location of the resource may not have changed, but the risk has changed. Whether this position will be upheld may be decided by the court system. A theoretical example of when a park might want to withhold cultural resources information that was released prior to 9/11 follows.

In 1990, a historical park that is a national icon released information from a fire protection survey for a historic structure that is a national historic landmark. The park now decides that releasing that information heightens the risk that terrorists might use the information to damage or destroy the resource. Under NPOMA, the park can withhold that information because release would be likely to cause an “unreasonable risk of destruction.” The park could also cite NHPA, which refers to a “risk of harm.” In addition, the park may assert that the nature of the resource has changed—it is now identified as a terrorist target.

As with many FOIA requests, the Office of the Solicitor should review the proposed response. If the information is withheld and challenged, courts will make the final decision on whether this position will be upheld.

How is cultural resources information often released inadvertently?

Allowing contractors, researchers, permittees, and partners to access sensitive data with-

out a written provision limiting use and release of confidential information may result in inadvertent release. Even when a confidentiality clause is in effect, employees should be cautious about releasing sensitive information, since there is some legal uncertainty as to whether confidentiality clauses will be held to be enforceable. When an employee provides information to the public, while remaining ignorant of the potential impact to the resource, the employee may put the resource at substantial risk. Employees and volunteers who create and maintain records without flagging sensitive data increase the risk that others will unwittingly release that data. Employees who fail to involve the FOIA officer in establishing standard operating procedures for responding to public requests, including FOIA requests, may also inadvertently release data.

How can NPS avoid inadvertent release of cultural resources information?

Employees who take the following precautionary actions are likely to avoid inadvertent release of cultural resources information:

- Include confidentiality clauses in all contracts, agreements, permits, and research permissions;
- Mark sensitive data as restricted when creating records;
- Consult the FOIA officer early in the FOIA process; and
- Consult the relevant resource manager about potential impacts to resources.

Any FOIA request is a challenge, but employees will best meet that challenge if they anticipate the request as they create and manage records. With careful management of federal records pertaining to natural and cultural resources, knowledge about sensitive data and the FOIA process, and early involvement of the FOIA officer, NPS employees should be able to make sound decisions about when to release information for public benefit and when to withhold information to protect NPS resources.

Endnotes

1. 5 USC 552.
2. Federal 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 the data in them (44 USC 3301).
3. 16 USC 470 et seq.; see Section 304 (16 USC 470w-3) regarding limitations on access to information.
4. 16 USC 470aa-mm; see Section 9 (16 USC 470hh), on confidentiality of information concerning nature and location of archeological resources.
5. 16 USC 4301-4310; see Section 4304 on confidentiality of information concerning nature and location of significant caves.

6. 16 USC 5901 et seq.; see Section 207 (16 USC 5937) on confidentiality of information.
7. 16 USC 469–469c-1.
8. In the 1970 UNESCO Convention, “cultural property” means property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art, or science and which belongs to certain listed categories. See http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml.
9. Under UNIDROIT, the definition for “cultural objects” refers to objects which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art, or science and belong to one of the categories listed in the annex to the Convention. See <http://www.unidroit.org/english/conventions/c-cult.htm>.
10. See <http://www.cr.nps.gov/local-law/eo13007.htm>.