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

January 12, 2012

POLICY BULLETIN **POL-4, Change 1**

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 marking security-related information currently protected as Official Use Only (OUO) under "Exemption 2, Circumvention of Statute," in DOE Classification Guides.

II. Cancellation. Policy Bulletin 4 (POL-4), Change 1, cancels Policy Bulletin 4, dated June 8, 2011.

III. 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of a more substantial nature whose disclosure would significantly risk the circumvention of a legal requirement, is no longer valid.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, it is likely that Exemption 7 will be the predominant exemption that applies to Department of Energy security-related information formerly protected under Exemption 2 in our classification guides. As our 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 provisional Exemption assigned to any guidance-related OUO determination that would have been based on Exemption 2. The provisional Exemption serves as the interim basis pending further review.

As a reminder, irrespective of any OUO 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.

IV. Guidance. Effective immediately, "Exemption 7, Law Enforcement," will be used as a provisional 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.

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

VI. OUO Determinations not Based on Guidance. This policy does not apply to OUO determinations that are not based on guidance. For such determinations where Exemption 2 would have been used as a basis prior to the Supreme Court's decision, the individual making the determination must examine all other FOIA Exemptions to determine what, if any, other Exemption should be marked on the document to identify it as OUO.

VII. 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 Nick Prospero (301-903-5203) or Lesley Nelson-Burns (301-903-4861).

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