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profiles, "high" and "low." The "high" profile permits withholding of a document which, if released, would allow circumvention of an agency rule, policy, or statute, thereby impeding the agency in the conduct of its mission. The "low" profile permits withholding if there is no public interest in the document, and it would be an administrative burden to process the request.

(b)(3) Applies to information specifically exempted by a statute establishing particular criteria for withholding. The language of the statute must clearly state that the information will not be disclosed.

(b)(4) Applies to information such as trade secrets and commercial or financial information obtained from a company on a privileged or confidential basis which, if released, would result in competitive harm to the company.

(b)(5) Applies to inter- and intra-agency memoranda which are deliberative in nature; this exemption is appropriate for internal documents which are part of the decision making process, and contain subjective evaluations, opinions and recommendations.

(b)(6) Applies to information release of which could reasonably be expected to constitute a clearly unwarranted invasion of the personal privacy of individuals; and

(b)(7) Applies to records or information compiled for law enforcement purposes that (A) could reasonably be expected to interfere with law enforcement proceedings, (B) would deprive a person of a right to a fair trial or impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of others, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures, or (F) could reasonably be expected to endanger the life or physical safety or any individual.

(b)(8) Permits the withholding of matters contained in, or related to, examination, operating or conditions reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation and supervision of financial institutions.

(b)(9) Permits the withholding of geological information and data including maps, concerning wells.

PART 292—DEFENSE INTELLIGENCE AGENCY (DIA) FREEDOM OF INFORMATION ACT

Sec.

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APPENDIX A TO PART 292—UNIFORM AGENCY FEES FOR SEARCH AND DUPLICATION UNDER THE FREEDOM OF INFORMATION ACT (AS AMENDED)

AUTHORITY: 5 U.S.C. 552.

SOURCE: 57 FR 38775, Aug. 27, 1992, unless otherwise noted.

§ 292.1 Purpose.

This document implements the "Freedom of Information Act (FOIA)," 5 U.S.C., as amended, with the Defense Intelligence Agency (DIA) and outlines policy governing release of records to the public.

§ 292.2 Applicability.

This part applies to all DIA elements, and governs the public release of records of these elements.

§ 292.3 Basic policy.

(a) Upon receipt of a written request, the DIA will release to the public, records concerning its operations and activities which are rightfully public information. Generally, information, other than that exempt in § 292.6, will be provided to the public. The following policy will be followed in the conduct of this program.

(1) The provisions of the FOIA, as implemented by 32 CFR part 286 and this part, will be supported in both letter and spirit.

(2) Requested records will be withheld only when a significant and legitimate governmental purpose is served by withholding them. Records which require protection against unauthorized release in the interest of the national defense or foreign relations of the United States will not be provided.

(3) Official requests from Members of Congress, acting in their official capacity, will be governed by DoD Directive 5400.4,[1] (see DoD 5400.7–R,[2] paragraph 5–103); from the General Accounting Office by DoD Directive 7650.1;[3] and from private parties, and officials of state or

[1] Copies may be obtained at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to § 292.3(a)(3).

[3] See footnote 1 to § 292.3(a)(3).

local governments by DoD 5400.7–R, paragraphs 5–101 and 102.

(4) Records will not be withheld solely because their release might result in criticism of the Department of Defense or this Agency.

(5) The applicability of the FOIA depends on the existence of an "identifiable record" (5 U.S.C. 552(a)(3)). Accordingly, if the DIA has no record containing information requested by a member of the public, it is under no obligation to compile information to create or obtain such a record.

(6) The mission of the DIA does not encompass regulatory or decision-making matters in the sense of a public use agency; therefore, extensive reading room material for the general public is not available.

(7) Pursuant to 5 U.S.C. 552 (a)(4)(A) fees may apply with regard to services rendered the public under the Freedom of Information Act (See appendix A to this part). With regard to fees, the specific guidance of DoD, as set forth in DoD 5400.7–R will be followed.

(b) This basic policy is subject to the exemptions recognized in 5 U.S.C. 552 (b) and discussed in section 292.6.

§ 292.4 Specific policy.

(a) *Definition of a Record*. The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by the DIA in connection with the transaction of public business and in the DIA's possession and control at the time the FOIA request is made.

(b) The following are not included within the definition of the word "record:"

(1) Objects or articles, such as structures, furniture, paintings, sculptures, three-dimensional models, vehicles and equipment, whatever their historical value or value as evidence.

(2) Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of a DoD Component. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of medium are not agency records. (This does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software.) Exceptions to this position are outlined in paragraph (b)(2)(i) of this section.

(i) In some instances, computer software may have to be treated as an agency record and processed under the FOIA. These situations are rare, and shall be treated on a case-by-case basis. Examples of when computer software may have to be treated as an agency record are:

(A) When the data are embedded within the software and cannot be extracted without the software. In this situation, both the data and the software must be reviewed for release or denial under the FOIA.

(B) When the software itself reveals information about organizations, policies, functions, decisions, or procedures of the Agency, such as computer models used to forecast budget outlays, calculate system costs, or optimization models on travel costs.

(3) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(4) Personal notes of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

(5) Information stored within a computer for which there is no existing computer program or printout for retrieval of the requested information.

(c) The prior application of FOR OFFICIAL USE ONLY (FOUO) markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it will be evaluated to determine whether, under current circumstances, FOIA exemptions apply and whether a significant and legitimate Governmental purpose is served by withholding the record or portions of it.

(d) A record must exist and be in the possession or control of the DIA at the time of the request to be considered

subject to this regulation. There is no obligation to create, compile, or obtain a record to satisfy an FOIA request.

(e) *Identification of the Record.* (1) Identification of the record desired is the responsibility of the member of the public who requests a record. The requester must provide a description of the desired record that enables the DIA to locate the record with a reasonable amount of effort. The Act does not authorize "fishing expeditions." When the DIA receives a request that does not "reasonably describe" the requested record, it will notify the requester of the deficiency. The deficiency should be highlighted in a distinctive letter, asking the requester to provide the type of information outlined below. This Agency is not obligated to act on the request until the requester responds to the distinctive letter. When practicable, the DIA will offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the Agency in complying with the Act.

(2) The following guidelines are provided to deal with "fishing expedition" requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories.

(i) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(3) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non-random search based on the DIA's filing arrangements and existing retrieval systems, or unless the record contains enough Category II information to permit inference of the Category I elements needed to conduct such a search.

(f) Requests for records may be denied only when the official designated in § 292.8 determines that such denial is authorized by the FOIA.

(g) When an initial request is denied, the requester will be apprised of the following:

(1) The basis for the refusal shall be explained to the requester, in writing, identifying the applicable statutory exemption or exemptions invoked under provisions of this part.

(2) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review.

(3) The final denial shall include the name and title or position of the official responsible for the denial.

(4) The response shall advise the requester with regard to denied information whether or not any reasonably segregable portions were found.

(5) The response shall advise the requester of the right to appeal within 60 days of the date of the initial denial letter.

(h)(1) Initial availability, releasability, and cost determinations will normally be made within 10 working days of the date on which a written request for an identifiable record is received by the DIA. If, due to unusual circumstances, additional time is needed, a written notification of the delay will be forwarded to the requester within the 10 working day period. This notification will briefly explain the circumstances for the delay and indicate the anticipated date for a substantive response. The period of delay, by law, may not exceed 10 additional working days.

(2) Requests shall be processed in order of receipt. However, this does not preclude DIA from completing action on a request which can easily be answered, regardless of its ranking within the order of receipt. DIA may expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of DIA.

§ 292.5 How the public submits requests for records.

(a) Requests to obtain copies of records must be made in writing. The

requests should contain at least the following information:

(1) Reasonable identification of the desired record as specified in § 292.4(e), including (if known) title or description, date, and the issuing office.

(2) With respect to matters of official records concerning civilian or military personnel, the first name, middle name or initial, surname, date of birth, and social security number of the individual concerned, if known.

(b) Persons desiring records should direct inquiry to: Defense Intelligence Agency, ATTN: DSP–1A (FOIA), Washington, DC 20340–3299.

§ 292.6 FOIA exemptions.

The following type of records may be withheld in whole or in part from public disclosure unless otherwise prescribed by law.

(a) *Exemption (b)(1).* Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1–R.[4] Although material may not be classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures outlined in DIAR 50–2[5] regarding classification apply. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, DIA shall neither confirm or deny the existence or nonexistence of the record being requested. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no record" response when a record does not exist, and a "refusal to confirm or deny" when a record does exist will itself disclose national security information.

(2) Information that concerns one or more of the classification categories established by Executive Order and DoD 5200.1–R shall be classified if its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

(b) *Exemption (b)(2).* Those containing or constituting rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or practices of the DIA if their release to the public would substantially hinder the effective performance of a significant function of the Department of Defense, and they do not impose requirements directly on the general public. This exemption has two profiles, high (b)(2) and low (b)(2).

(1) Records qualifying under high (b)(2) are those containing or constituting, rules, regulations, orders, manuals, directives, and instructions the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the Department of Defense.

(2) Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records.

(c) *Exemption (b)(3).* Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld.

(d) *Exemption (b)(4).* (1) Those containing trade secrets or commercial or financial information that the DIA receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets or commercial or financial records the disclosure of which is likely to cause substantial

[4] See footnote 1 to § 292.3(a)(3).

[5] Forward requests to: Defense Intelligence Agency, ATTN: DSP–1A (FOIA), Washington, DC 20340–3299.

harm to the competitive position of the source providing the information, impair the Government's ability to obtain necessary information in the future, or impair some other legitimate Governmental interest.

(2) When a request is received for a record that was obtained or provided by a non-U.S. Government source, the source of the record or information (also known as "the submitter" for matters pertaining to proprietary data) shall be notified promptly of that request and afforded reasonable time (e.g. 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under Exemption (b)(4). For further guidance, see DoD 5400.7–R, paragraph 5–207.

(e) *Exemption (b)(5)*. Those concerning internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies or within or among DoD components. Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(f) *Exemption (b)(6)*. Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to the requester, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act system of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

(g) *Exemption (b)(7)*. Records or information compiled for the purpose of enforcing civil, criminal, or military law, including the implementation of Executive Orders or regulations issued pursuant to law, 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 constitute an unwarranted invasion of the personal privacy of others (also see DoD 5400.7–R, paragraph 3–200, Number 7 a. 3. (a)–(c)).

(4) Could disclose the identity of a confidential source.

(5) Would disclose investigative techniques and procedures, or

(6) Could endanger the life or physical safety of law enforcement personnel. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for, law enforcement purposes.

§ 292.7 Filing an appeal for refusal to make records available.

(a) A requester may appeal an initial decision to withhold a record. Further, if a requester determines a "no record" response in answer to a request to be adverse, this determination may also be appealed. Appeals should be addressed to: Defense Intelligence Agency, ATTN: DSP–1A (FOIA), Washington, DC 20340–3299.

(b) The requester shall be advised that the appellate authority must receive an appeal no later than 60 calendar days after the date of the initial denial letter.

(c) Final determination on appeals normally will be made within 20 working days of receipt of the appeal at the above address. If additional time is needed to decide the appeal because of unusual circumstances, the final determination may be delayed for the number of working days, not to exceed 10, which were not utilized as additional time for responding to the initial request. Appeals shall be processed in order of receipt. However, this does not preclude DIA from completing action on an appeal request which can easily be answered, regardless of its ranking within the order of receipt. DIA may expedite action on an appeal request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of DIA.

(d) When an appeal is denied, the requester will be apprised of the following:

(1) The basis for the refusal shall be explained to the requester, in writing, identifying the applicable statutory exemption or exemptions invoked under provisions of this part.

(2) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review.

(3) The final denial shall include the name and title or position of the official responsible for the denial.

(4) The response shall advise the requester with regard to denied information whether or not any reasonably segregable portions were found.

(5) The response shall advise the requester of the right to judicial review.

§ 292.8 Responsibilities.

When a request for information or records is received, the following will apply:

(a) *DSP–1A.* (1) Receives requests and assigns tasking.

(2) Maintains appropriate suspenses and authorizes all extensions of response time.

(3) Acts as the responsible operating office for all Agency actions related to the FOIA.

(4) Drafts and transmits responses on:

(i) The release of records and/or information.

(ii) Obtaining supplemental information from the requester.

(iii) Informing the requester of any fees required.

(iv) The transfer to another element or agency of the initial request.

(5) Fulfills the annual reporting requirement and maintains appropriate records.

(6) Acts as the responsible official for all initial denials of access to the public.

(b) All DIA elements:

(1) When identified by DSP–1A as the Office of Primary Responsibility (OPR) will:

(i) Search files for any relevant records, and/or

(ii) Review records for possible public release within the time constraints assigned, and

(iii) Prepare a documented response in any case of nonrelease.

(2) All employees are required to read this part to ensure familiarity with the requirements of the FOIA as implemented.

(c) *The General Counsel.* (1) Ensures uniformity in the FOIA legal positions within the DIA and with the Department of Defense.

(2) Secures coordination when necessary with the General Counsel, DoD, on denials of public requests.

(3) Acts as the focal point in all judicial actions.

(4) Reviews all final denials.

(d) The Director, and on his behalf, the Chief of Staff:

(1) Exercises overall staff supervision of the FOIA activities of the Agency.

(2) Acts as the responsible official for all denials of appeals.

APPENDIX A TO PART 292—UNIFORM AGENCY FEES FOR SEARCH AND DUPLICATION UNDER THE FREEDOM OF INFORMATION ACT (AS AMENDED)

Search + Review (only in the case of commercial requesters)

a. Manual search or review—

Type	Grade	Hourly rate
Clerical	E9/GG–08 and below	$12.00
Professional	O1–O6/GG–09–GG–15	25.00
Executive	O7/GG–16/ES1 and above	45.00

b. Computer search is based on direct cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The salary scale (equating to paragraph a. above) for the computer/operator/programmer determining how to conduct and subsequently executing the search will be recorded as part of the computer search.

c. Actual time spent travelling to a search site, conducting the search and return may be charged as FOIA search costs.

General

Pre-Printed material, per printed page ..... .02
Office copy, per page ..... .15
Microfiche, per page ..... .25

Aerial Photography Reproduction

Per Print.....$2.50

d. See Chapter VI of DoD 5400.7–R for further guidance on fees.

PART 293—NATIONAL IMAGERY MAPPING AGENCY (NIMA) FREEDOM OF INFORMATION ACT PROGRAM

Sec.
293.1 Purpose.
293.2 Policy.
293.3 Applicability and scope.
293.4 Definitions.
293.5 Responsibilities.
293.6 Procedure.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 65 FR 38201, June 20, 2000, unless otherwise noted.

§ 293.1 Purpose.

This part implementations the Freedom of Information Act (FOIA) and 32 CFR part 286 to establish a uniform process in responding to FOIA requests received by the National Imagery Mapping Agency (NIMA).

§ 293.2 Policy.

It is NIMA policy that:

(a) Agency records that, if disclosed, would cause no foreseeable harm to an interest protected by a FOIA exemption, will be made readily accessible to the public.

(b) NIMA organizations will ensure that internal procedural matters do not unnecessarily impede a FOIA requester from promptly obtaining NIMA records.

§ 293.3 Applicability and scope.

This part applies to all NIMA organizations and is intended as a brief overview of the FOIA process within NIMA. To obtain complete guidance, this instruction must be used in conjunction with 32 CFR part 286. Additional assistance is also available from the Office of General Counsel (GC).

§ 293.4 Definitions.

Agency records.

(1) A product of data compilation (such as all books, papers, maps, photographs, and machine-readable materials including those in electronic form or format) or other documentary materials (such as letters, memos, or notes) regardless of physical form or characteristics that is made or received by NIMA in connection with the transaction of public business, and is in NIMA's possession and control at the time the FOIA request is made.

(2) The following are not considered Agency records:

(i) Objects or articles, such as structures, furniture, vehicles, and equipment.

(ii) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(iii) Personal records of an individual not subject to agency creation or retention requirements, that have been created and maintained primarily for the convenience of the Agency employee, and that are not distributed to other Agency employees for their official use. Personal records fall into three categories: those created before entering Government service; private materials brought into, created, or received in the Office that were not created or received in the course of transacting Government business; and work-related personal papers that are not used in the transaction of Government business.

(3) Agency records available to the public through an established public distribution system, the FEDERAL REGISTER, the National Technical Information Service (NTIS), or the Internet normally need not be processed as FOIA requests, unless the requester insists that the request be processed under the FOIA.

(4) To be subject to the FOIA, the Agency record being requested must actually exist and be in the possession and control of the Agency at the time a FOIA request is made. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

Appellate authority (AA). An agency employee who has been granted authority to review the decision of the initial denial authority (IDA) (see IDA definition) that has been appealed by a FOIA requester and make the appeal determination for the Agency on the releasability of the records in question.

FOIA exemption. Agency records, which if disclosed, would cause a foreseeable harm to an interest protected by a FOIA exemption, may be withheld