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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

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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

from public release. There are nine exemptions that permit an agency to withhold records requested under a FOIA request. The exemptions are for records that apply to:

(1) Information that is currently and properly classified pursuant to an Executive Order in the interest of national defense or foreign policy.

(2) Information that pertains solely to the internal rules and practices of the Agency. This exemption has two profiles, high and low. The high profile permits withholding of a document that, 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 of the record if there is no public interest in the record, and it would be an administrative burden to process the request. Activities should not rely on the low profile exemption because the Department of Justice may not defend its use.

(3) Information specifically exempted from disclosure by a statute that establishes particular criteria for withholding the record. The language of the statute must clearly state that the information will not be disclosed.

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

(5) Inter- and intra-agency momoranda that are deliberative in nature. This exemption is appropriate for internal documents that are part of the decision-making process, and contain subjective evaluations, opinions, and recommendations. A document must be both deliberative and part of a decision-making process to qualify for this exemption.

(6) Information from personnel and medical files that would result in a clearly unwarranted invasion of personal privacy if disclosed or released.

(7) Records or information compiled for law enforcement purposes that:

(i) Could reasonably be expected to interfere with law enforcement proceedings.

(ii) Would deprive a person of a right to a fair trial or impartial adjudication.

(iii) Could reasonably be expected to constitute an unwarranted invasion of the personal privacy of others.

(iv) Would disclose the identity of a confidential source; would disclose investigative techniques and procedures; and

(v) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) The examination, operation, or condition reports prepared by, on behalf of, or for the use of any Agency responsible for the regulation or supervision of financial institutions.

(9) Geological and geophysical information and data (including maps) concerning wells.

*FOIA request.*

(1) *An FOIA request is a request, in writing, for agency records.* The request can either implicitly cite FOIA, but must reasonably describe the record being requested. In addition, the request must include language indicating the requester's willingness to pay fees associated with processing the FOIA request.

(2) Any person, including a member of the public (U.S. or foreign citizen or entity), an organization, or a business can make FOIA requests. Requests from officials of State or local Governments for NIMA records are considered the same as requests from any other requester. Requests from members of Congress not seeking records on behalf of a congressional committee or subcommittee, and requests from either House sitting as a whole or made on behalf of constituents are considered the same as requests from any other requester. Requests from foreign governments that do not invoke the FOA are referred to appropriate foreign disclosure channels and the requester is so notified by GC.

*Initial denial authority (IDA).* An agency employee who has been granted authority to make an initial determination for the Agency that records requested in a FOIA request should be withheld from disclosure or release.

*Mandatory declassification officer (MDO).* A senior agency official has been granted authority to perform mandatory declassification reviews for NIMA.

*Multi-track processing.* A system in which pending FOIA requests that cannot be processed within the statutory time limit of 20 working days are separated into distinct working tracks. The tracks are based on the date the FOIA request is received by GC, the amount of work and time involved in processing the request, and whether the request qualifies for expedited processing.

*NIMA operational file exemption.* 10 U.S.C. 457 provides that NIMA may withhold from public disclosure operational files that:

(1) As of September 22, 1996 were maintained by National Photographic Interpretations Center (NPIC) or

(2) Concern the activities of the Agency as of that date that were performed by NPIC. Questions on operational files created after 22 September 1996 should be directed to GC.

### § 293.5 Responsibilities.

(a) *Director of NIMA (D/NIMA).* (1) Designates the Agency initial denial authority (IDA) and appellate authority (AA).

(2) Appoints substitutes for the current IDA or AA if necessary.

(b) *The Chief of Staff (CS)* (or acting CS as designated by CS) serves as AA.

(c) *The Director of the Congressional Affairs Office (D/CA)* (or acting D/CA as designated by D/CA) serves as IDA.

(d) *Office of General Counsel (GC).* (1) Administers NIMA's FOIA program for processing FOIA requests received by NIMA.

(2) Processes all requests for mandatory declassification review in response to requests for declassificaton that meet the requirements of Executive Order 12958.

(3) Submits this part to the Department of Defense to publish in the Code of Federal Regulations and the FEDERAL REGISTER.

(e) Office Directors in the functional Directorates and the Office Directors who are aligned with D/NMA (for example, Office of General Counsel, Office of Inspector General, Chief of Staff, International and Policy Office, or Mission Support Office) with regard to search for records.

(1) Appoint an Office point of contact (POC) to whom FOIA requests can be directed from GC and who serves as a direct liaison with GC.

(2) Forward, through the POC, the FOIA request from GC to the organization most likely to hold or maintain the records being requested.

(3) Direct, through the POC, a search for the records be completed in a timely manner and respond directly to GC on the outcome of the search.

(f) *Office Directors in the functional Directorates and the Office Directors* who are aligned with D/NIMA (for example, Office of General Counsel, Office of Inspector General, Chief of Staff, International and Policy Office, or Mission Support Office) with regard to declassification review.

(1) Appoint an employee to act as the POC for the Office.

(2) Oversee and coordinate, through the POC, declassification reviews for FOIA.

(3) Make, through the POC, recommendations to the mandatory declassification officer (MDO) on the declassification of Agency records.

(g) *Chief, Mission Support Office, Security Programs Division, as MDO.* (1) Conducts declassification reviews for FOIA.

(2) Advises GC whether Agency records are properly classified in accordance with Executive Order 12958 and should be withheld from public release or disclosure.

### § 293.6 Procedures.

(a) *Administration of the FOIA program.* GC receives all FOIA requests submitted to NIMA, logs the requests into a database, and initiates the record search. If a final response cannot be made to the FOIA requester within the statutory time requirement of 20 working days, GC advises the requester of this fact and explains how the FOIA request will be processed within a multi-track processing system. As part of the administration FOIA process, GC:

(1) Assesses and collects fees for costs associated with processing FOIA requests, and approves or denies requests for fee waivers. Fees collected are forwarded through the Financial Management Directorate (CFO) to the U.S. Treasury.

(2) Approves or denies requests for expedited processing.

(3) Sends a "no records" response to FOIA requesters after a records search reveals that no Agency records exist that are responsive to the FOIA request.

(4) Provides training with NIMA on the FOIA law and Agency processing procedures.

(5) Conducts periodic reviews of NIMA's FOIA program.

(6) Maintains a public reading room for inspecting and copying Agency records and arranges appointments for access to reading room records.

(7) Maintains an "electronic" reading room for Agency records, an index for frequently requested records, a FOIA handbook, and other material as required by the FOIA on a public Internet website.

(8) Coordinates with other DoD Components, other members of the Intelligence Community, or the Department of Justice, as needed, on FOIA requests referred to NIMA.

(9) Coordinates with other DoD Components, other members of the Intelligence Community, or the Department of Justice, as needed, prior to releasing any records under the FOIA that may also be pertinent to litigation pending against the United States.

(10) Prepares the Annual Report—Freedom of Information Act (DD Form 2564) and forwards the report to the Directorate for Freedom of Information and Security Review, Washington Headquarters Services.

(11) Coordinates responses to all news media requests with the Public Affairs Office (PA) and congressional inquiries with CA.

(12) Coordinates denials of access to Agency records with NIMA's IDA and AA and prepares a legal synopsis and recommendation for release or denial of the record.

(13) Maintains FOIA case files in accordance with the NIMA records management schedules in NI 8040.1.

(b) Searching for responsive NIMA records. (1) GC forwards a copy of the FOIA request to the appropriate Agency POC. The POC fowards the request to the Office most likely to hold or maintain the records being requested.

(2) The Office conducts a search for records responsive to the FOIA request. all NIMA offices must promptly conduct searches to locate records responsive to a FOIA request, even if the search is likely to reveal classified, sensitive, or for official use only (FOUO) records. A reasonable search includes the search of all activities and locations most likely to have the records that have not been transferred to the National Archives and Records Administration (NARA).

(3) If a reasonable search does not identify or locate records responsive to the request, the Office must provide GC with a "no records" response and provide a recommendation of other Offices in which to conduct the search.

(4) If a reasonable search identifies or locates records responsive to the request, the Office must send two copies of the responsive record to GC and provide a recommendation regarding releasability of the record. Any objection to release of the record must be based on one or more of the FOIA exemptions. The office must also complete and forward DD Form 2086 or DD Form 2086–1, as appropriate, detailing the time and cost incurred in the search, review, and copying of the responsive records.

(5) *FOUO records.* When an office has identified FOUO records that are responsive to a FOIA request, the record must be evaluated to determine whether any FOIA exemptions are applicable to withhold either the entire record or portions of the record from release. Unless the requested record clearly falls into one or more of the FOIA exemptions, an FOUO marking all not prevent a record from being released to the FOIA requester.

(6) All Offices promptly forward or return any misaddressed FOIA requests to GC.

(c) *Mandatory declassification review.* When a request for a declassification review is received, or when an office has identified classified records that are responsive to a FOIA request and has forwarded copies to GC, GC forwards one copy of the record to the MDO for a declassification review. The MDO works with the declassification

POC to determine if the record in question is currently and properly classified under Executive Order 12958, and if any information contained in the record may be segregated for release to the FOIA requester. The MDO forwards the results of the declassification review to GC, in writing, along with any recommendations on whether information in the record can be reasonably segregated and released to the FOIA requester.

(d) Withholding Agency records from public release. If the requested record is not releasable because it is either currently and properly classified or falls within another FOIA exemption, GC prepares an analysis on the rationale for denying the record, prepares the initial denial letter to be sent to the FOIA requester, and forwards the materials to the Agency IDA. The Agency IDA reviews the FOIA request and rationale for withholding the record and, if he or she concurs, signs the letter prepared by GC. The letter signed by the Agency IDA advises the FOIA requester that the records requested are being withheld from release, states the amount of material withheld from release, states the FOIA exemptions supporting the denial, and provides information on appealing the decision to the Agency AA. A copy of all initial denial letters is forwarded to GC and maintained in the individual FOIA file.

(e) *Appeal rights of FOIA requesters.* (1) If a FOIA requester appeal the initial denial decision of the agency IDA, GC processes the appeal for review by the agency AA. The AA reviews the initial FOIA request, GC's analysis, and the denial decision made by the IDA. The AA has the authority to either uphold the decision made by the IDA, and withhold the requested records from release, or reverse the decision made by the IDA and release all or a portion of the records requested. GC prepares the written response to the FOIA requester for the AA's signature. If the AA makes a final determination to uphold the decision made by the agency IDA, the final Agency response includes the basis for the decision and advises the FOIA requester of the right to seek judicial review.

(2) In addition to denials of information, a FOIA requester also has a right to appeal initial assessments made by GC regarding fee categories, fee waivers, fee estimates, requests for expedited processing, no record determinations, failure to meet the statutory time limits, or any determination found to be adverse by the requester. The authority to uphold or reverse initial assessments made by GC in these areas is the agency AA. The decision of the AA is final.

(f) *Relationship between the FOIA and the Privacy Act.* Not all requesters will be knowledgeable of the appropriate act to cite when requesting records or access to records. In some instances, either the FOIA or the Privacy Act may be cited.

(1) Both the FOIA and the Privacy Act give the right to request access to records held by Federal Agencies. Access rights under the FOIA are given to any individual, business, or organization, but the Privacy Act gives access rights only to those individuals who are the subject of the records being requested.

(2) When responding to a request for records under the Privacy Act, detailed guidance on which act to apply may be found in 32 CFR part 286 and 32 CFR part 310. Additional assistance is also available from GC.

## PART 295—OFFICE OF THE INSPECTOR GENERAL, FREEDOM OF INFORMATION ACT PROGRAM

Sec.

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APPENDIX A TO PART 295—FOR OFFICIAL USE ONLY (FOUO)
APPENDIX B TO PART 295—EXEMPTIONS

AUTHORITY: 5 U.S.C. 552.

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### § 295.1 Purpose.

This part establishes the policy and sets forth the procedures by which the public may obtain information and