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Office of Information and Public Affairs, 1340 Braddock Place, Alexandria, Virginia 22314–1651. All other transactions will be conducted by mail.

(i) *Appeal of denial of DIS records and information*. (1) All appeals will be submitted in writing and reach the following appellate authority no later than 60 days after the date of the initial denial letter: Director, Defense Investigative Service (V0000), 1340 Braddock Place, Alexandria, Virginia 22314–1651.

(2) All appeals will contain at least the same identification of the records requested as the original request, and a copy of the letter denying the request, if available. Requesters will be given appeal rights when a search has been conducted and no records are located.

(3) All appeals will be reviewed by the Director, DIS, or the Special Assistant to the Director, DIS. Responses to appeals normally shall be made within 20 working days after receipt, unless an extension is required and the appellant is notified. When a request is approved on appeal, the procedures set forth in paragraph (f) of this section will be followed.

### § 298.5 Information requirements.

The DIS Office of Information and Public Affairs is responsible for preparation of the annual "Freedom of Information Act Report." This report has been assigned control symbol PA (TRA&AN) 1365. No forms or publications are required by this part.

## PART 299—NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE (NSA/CSS) FREEDOM OF INFORMATION ACT PROGRAM

Sec.

299.1 Purpose.
299.2 Definitions.
299.3 Policy.
299.4 Responsibilities.
299.5 Procedures.
299.6 Fees.
299.7 Exempt records.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 68 FR 28132, May 23, 2003, unless otherwise noted.

### § 299.1 Purpose.

(a) This part implements 5 U.S.C. 552, as amended, and DoD 5400.7–R,[1] assigns responsibility for responding to written requests made pursuant to 5 U.S.C. 552; and provides for the review required to determine the appropriateness of classification pursuant to DoD 5200.1–R.[2]

(b) This part applies to all NSA/CSS elements, field activities and personnel, and governs the release or denial of any information under the terms of the Freedom of Information Act (FOIA).

### § 299.2 Definitions.

Terms used in this part, with the exception of the terms in § 299.4, are defined in DoD 5400.7–R. For ease of reference, however, some terms are defined in this section.

(a) *FOIA request*. (1) A written request for NSA/CSS records, that reasonably describes the records sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), an organization or a business, but not including a Federal Agency or a fugitive from the law that either explicitly or implicitly invokes 5 U.S.C. 552, as amended, 5 U.S.C. 552a, as amended, DoD 5400.7–R, or NSA/CSS Freedom of Information Act Program, within the National Security Agency/Central Security Service. Requesters should also indicate a willingness to pay fees associated with the processing of their request or, in the alternative, why a waiver of fee may be appropriate.

(2) An FOIA request may be submitted by U.S. mail or its equivalent, by facsimile or electronically through the NSA FOIA Home Page on the Internet. The mailing address is FOIA/PA Services (DC321), National Security Agency, 9800 Savage Road STE 6248, Ft. George G. Meade, MD 20755–6248. The Web-based system contains a form to be completed by the requester, requiring name and postal mailing address. The URL is *http://www.nsa.gov/docs/efoia/*.

[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 this section.

(3) When a request meeting the requirements stated in this section is received by the FOIA office and there is no remaining question about fees, that request is considered perfected.

(b) *Privacy Act (PA) request.* A written request submitted by a U.S. citizen or an alien admitted for permanent residence for access to or amendment of records on himself/herself which are contained in a PA system of records. For purposes of this part, PA request refers to a request for copies of records. Regardless of whether the requester cites the FOIA, PA or neither law, the request will be processed under both this part and NSA/CSS Regulation 10–35, Implementation of the Privacy Act of 1974.[3].

(c) *Agency records.* (1) The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, including those in electronic form or format (including e-mails), or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in NSA/CSS's possession and control at the time the FOIA request is made. The term "records" does not include:

(i) Objects or articles such as structures, furniture, vehicles and equipment, whatever their historical value or value as evidence;

(ii) Intangible records such as an individual's memory or oral communication; and

(iii) Personal records 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.

(2) A record must exist and be in the possession and control of the NSA/CSS at the time of the request to be subject to this part. There is no obligation to create or compile a record or obtain a record not in the possession of the NSA/CSS to satisfy an FOIA request. The NSA/CSS may compile or create a new record when doing so would be less burdensome to the Agency than providing existing records and the requester does not object.

(3) Hard copy or electronic records that are subject to FOIA requests under 5 U.S.C. 552(a)(3) and are available through an established distribution system on the Internet, normally need not be processed under the FOIA. The Agency shall provide guidance to the requester on how to obtain the material outside of the FOIA process. If the requester insists that the request be processed under the FOIA, then it shall be so processed.

### § 299.3 Policy.

(a) Pursuant to written requests submitted in accordance with the FOIA, the NSA/CSS shall make records available to the public consistent with the Act and the need to protect government interests pursuant to subsection (b) of the Act. Oral requests for information shall not be accepted. Before the Agency responds to a request, the request must comply with the provisions of this part. In order that members of the public have timely access to unclassified information regarding NSA activities, requests for information that would not be withheld if requested under the FOIA or the Privacy Act (PA) may be honored through appropriate means without requiring the requester to invoke the FOIA or the PA. Although a record may require minimal redaction before its release, this fact alone shall not require the Agency to direct the requester to submit a formal FOIA or PA request for the record.

(b) Requests for electronic records shall be processed, and the records retrieved whenever retrieval can be achieved through reasonable efforts (in terms of both time and manpower) and these efforts would not significantly interfere with the operation of an automated information system. Reasonable efforts shall be undertaken to maintain records in forms of formats that render electronic records readily reproducible.

(c) The NSA/CSS does not originate final orders, opinions, statements of policy, interpretations, staff manuals, or instructions that affect members of

[3] Copies may be obtained through a FOIA request to the National Security Agency, Ft. George G. Meade, MD 20755–6248.

the public of the type generally covered by the indexing requirement of 5 U.S.C. 552. Therefore, it has been determined, pursuant to the pertinent statutory and executive order requirements, that it is unnecessary and impracticable to publish an index of the type required by 5 U.S.C. 552. However, should such material be identified, it will be indexed and placed in the library at the National Cryptologic Museum (NCM), which serves as the NSA/CSS FOIA reading room, and made available through the Internet. Copies of records which have been released under the FOIA and which NSA/CSS has determined are likely to become the subject of subsequent requests will be placed in the library of the NCM. In addition, these records are made available to the public through the Internet. An index of this material is available in hard copy in the museum library and on the Internet.

**§ 299.4 Responsibilities.**

(a) The Director's Chief of Staff (DC) is responsible for overseeing the administration of the FOIA, which includes responding to FOIA requests and for collecting fees from FOIA requesters.

(b) The Director of Policy (DC3), or the Deputy Director of Policy (D/DC3), if so designated, is the initial denial authority (IDA) and is responsible for:

(1) Receiving and staffing all initial, written requests for the release of information;

(2) Conducting the necessary reviews to determine the releasability of information pursuant to DoD 5200.1-R;

(3) Providing the requester with releasable material;

(4) Notifying the requester of any adverse determination, including informing the requester of his/her right to appeal an adverse determination to the appeal authority (*see* § 299.5(n));

(5) Assuring the timeliness of responses;

(6) Negotiating with the requester regarding satisfying his request (e.g., time extensions, modifications to the request);

(7) Authorizing extensions of time within Agency components (e.g., time needed to locate and/or review material);

(8) Assisting the Office of General Counsel (OGC) in judicial actions filed under 5 U.S.C. 552;

(9) Maintaining the FOIA reading room and the Internet home page; and

(10) Compiling the annual FOIA report.

(c) The Chief, Accounting and Financial Services (DF22) is responsible for:

(1) Sending initial and follow-up bills to FOIA requesters as instructed by the FOIA office, with a copy of all bills going to the FOIA office. In cases where an estimate of fees is provided to the requester prior to the processing of his/her request, no bill shall be sent. Although the FOIA office asks FOIA requesters to send payment to the FOIA office, for subsequent forwarding to Accounting and Financial Services, payment may be received directly in Accounting and Financial Services. Such payment may be identified by the payee as payment for a Freedom of Information Act request, by the letters "FOIA," or as payment for XXXXX. (FOIA requesters are provided a case number to refer to in correspondence with NSA);

(2) Receiving and handling all checks or money orders remitted in payment for FOIA requests, crediting them to the proper account and notifying the FOIA office promptly of all payments received;

(3) Notifying the FOIA office promptly of any payments received directly from requesters even if no bill was initiated by Accounting and Financial Services; and

(4) Issuing a prompt reimbursement of overpaid fees to the requester upon being notified of such overpayment by the FOIA office.

(d) The Deputy Director, NSA/CSS, is the FOIA Appeal Authority required by 5 U.S.C. 552 for considering appeals of adverse determinations by the Director of Policy. In the absence of the Deputy Director, the Director's Chief of Staff serves as the Appeal Authority.

(e) The General Counsel (GC) or his designee is responsible for:

(1) Reviewing responses to FOIA requests to determine the legal sufficiency of actions taken by the Director of Policy, as required on a case-by-case basis;

(2) Reviewing the appeals of adverse determinations made by the Director of Policy. The GC will prepare an appropriate reply to such appeals and submit that reply to the NSA/CSS FOIA Appeal Authority for final decision; and

(3) Representing the Agency in all judicial actions relating to 5 U.S.C. 552 and providing support to the Department of Justice.

(f) The Chief of Installation and Logistics (I&L) shall establish procedures to ensure that:

(1) All inquiries for information pursuant to 5 U.S.C. 552 are delivered promptly to the Director of Policy; and

(2) Any appeal of an adverse determination is delivered promptly and directly to the NSA/CSS Appeal Authority staff.

(g) The Directorates, Associate Directorates, and Field Elements shall:

(1) Establish procedures to ensure that any inquiries for information pursuant to 5 U.S.C. 552 are referred immediately and directly to the Director of Policy. Field Elements should forward, electronically, any requests received to the DIRNSA/CHCSS, ATTN: DC3; and

(2) Designate a senior official and an alternate to act as a focal point to assist the Director of Policy in determining estimated and actual cost data, in conducting searches reasonably calculated to retrieve responsive records and assessing whether information can be released or should be withheld.

(h) Military and civilian personnel assigned or attached to or employed by the NSA/CSS who receive a Freedom of Information Act request shall deliver it immediately to the Director of Policy. Individuals who are contacted by personnel at other government agencies and asked to assist in reviewing material for release under the FOIA must direct the other agency employee to the NSA/CSS FOIA office promptly.

### § 299.5 Procedures.

(a) Requests for copies of records of the NSA/CSS shall be delivered to the Director of Policy immediately upon receipt once the request is identified as a Freedom of Information Act or Privacy Act requestor appears to be intended as such a request.

(b) The Director of Policy, or Deputy Director of Policy, if so designated, shall endeavor to respond to a direct request to NSA/CSS within 20 working days of receipt. If the request fails to meet the minimum requirements of a perfected FOIA request, the FOIA office shall advise the requester of how to perfect the request. The 20 working day time limit applies upon receipt of the perfected request. In the event the Director of Policy cannot respond within 20 working days due to unusual circumstances, the chief of the FOIA office shall advise the requester of the reason for the delay and negotiate a completion date with the requester.

(c) Direct requests to NSA/CSS shall be processed in the order in which they are received. Requests referred to NSA/CSS by other government agencies shall be placed in the processing queue according to the date the requester's letter was received by the referring agency if that date is known, in accordance with Department of Justice Guidelines. If it is not known when the referring agency received the request, it shall be placed in the queue according to the date of the requester's letter.

(d) The FOIA office shall maintain six queues ("super easy," "sensitive/personal easy," "non-personal easy," "sensitive/personal voluminous," "non-personal complex," and "expedite") for the processing of records in chronological order. The processing queues are defined as follows:

(1) *Super easy queue*. The super easy queue is for requests for which no responsive records are located or for material that requires minimal specialized review.

(2) *Sensitive/personal easy queue*. The sensitive/personal easy queue contains FOIA and PA records that contain sensitive personal information, typically relating to the requester or requester's relatives, and that do not require a lengthy review. These requests are processed by DC321 staff members who specialize in handling sensitive personal information.

(3) *Non-personal easy queue*. The non-personal easy queue contains all other types of NSA records not relating to

the requester, that often contain classified information that may require coordinated review among NSA components, and that do not require a lengthy review. These requests are processed by DC321 staff members who specialize in complex classification Issues.

(4) *Sensitive/personal voluminous queue.* The sensitive/personal voluminous queue contains FOIA and PA records that contain sensitive personal information, typically relating to the request or the requester's relatives, and that require a lengthy review because of the high volume of responsive records. These records may also contain classified information that may require coordinated review in several NSA components. These requests are processed by DC321 staff members who specialize in handling sensitive personal information.

(5) *Non-personal complex queue.* The non-personal complex queue contains FOIA records not relating to the requester that require a lengthy review because of the high volume and/or complexity of responsive records. These records contain classified, often technical information that requires coordinated review among many specialized NSA components, as well as consultation with other government agencies. These requests are processed by DC321 staff members who specialize in complex classification issues.

(6) *Expedite queue.* Cases meeting the criteria for expeditious processing as defined in paragraph (f) of this section shall be processed in turn within that queue by the appropriate processing team.

(e) Requesters shall be informed immediately if no responsive records are located. Following a search for and retrieval of responsive material, the initial processing team shall determine which queue in which to place the material, based on the criteria in paragraph (d)(1) through (6) of this section and shall so advise the requester. If the material requires minimal specialized review (super easy), the initial processing team shall review, redact if required, and provide the non-exempt responsive material to the requester immediately. All other material shall be processed by the appropriate specialized processing team on a first-in, first-out basis within its queue. These procedures are followed so that a requester shall not be required to wait a long period of time to learn that the Agency has no records responsive to his request or to obtain records that require minimal review. For statistical reporting purposes for the Annual Report, super easy, sensitive/personal easy, and non-personal easy cases shall be counted as "Easy" cases, and sensitive/personal voluminous and non-personal complex cases shall be counted as "Hard" cases.

(f) Expedited processing shall be granted to a requester if he/she requests such treatment and demonstrates a compelling need for the information. A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of his/her knowledge. A compelling need is defined as follows:

(1) The failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(2) The information is urgently needed by an individual primarily engaged in disseminating information to inform the public about actual or alleged Federal Government activity. Urgently needed means that the information has a particular value that will be lost if not disseminated quickly.

(3) A request may also be expedited, upon receipt of a statement certified by the requester to be true and correct to the best of his/her knowledge, for the following reasons:

(i) There would be an imminent loss of substantial due process rights.

(ii) There is a humanitarian need for the material. Humanitarian need means that disclosing the information will promote the welfare and interests of mankind.

(4) Requests which meet the criteria for expedited treatment as defined in paragraph (f)(3) of this section will be placed in the expedite queue behind requests which are expedited because of a compelling need (*see* paragraphs (f)(1) and (2) of this section).

(5) A decision on whether to grant expedited treatment shall be made within

10 calendar days of receipt. The requester shall be notified whether his/her request meets the criteria for expedited processing within that time frame. If a request for expedited processing has been granted, a substantive response shall be provided within 20 working days of the date of the decision to expedite. If a substantive response cannot be provided within 20 working days, a response shall be provided as soon as practicable and the chief of the FOIA office shall negotiate a completion date with the requester, taking into account the number of cases preceding it in the expedite queue and the complexity of the responsive material.

(g) If the Director of Policy, in consultation with the GC, determines that the fact of the existence or non-existence of requested material is a matter that is exempt from disclosure, the requester shall be so advised.

(h) If the FOIA office determines that NSA/CSS may have information of the type requested, the office shall contact each Directorate or Associate Directorate reasonably expected to hold responsive records.

(i) The FOIA office shall assign the requester to the appropriate fee category under 5 U.S.C. 552, as amended, and DoD 5400.7–R, and, if a requester seeks a waiver of fees, the FOIA office shall, after determining the applicable fee category, determine whether to waive fees pursuant to DoD 5400.7–R. (See also § 299.6.) If fees are to be assessed in accordance with the provisions of 5 U.S.C. 552 and DoD 5400.7–R, the Directorate or Associate Directorate shall prepare an estimate of the cost required to locate, retrieve and, in the case of commercial requesters, review the records. Cost estimates shall include only direct search, duplication costs and review time (for commercial requesters) as defined in DoD 5400.7–R.

(1) If the cost estimate does not exceed $25.00, the component shall search for and forward to the FOIA office the documents responsive to the request. Fees $25.00 and under shall be waived.

(2) If the costs are estimated to exceed $25.00, the component shall provide an estimate to the FOIA office without conducting the search. The chief of the FOIA office shall advise the requester of the costs to determine a willingness to pay the fees. A requester's willingness to pay fees shall be satisfactory when the estimated fee does not exceed $250.00 and the requester has a history of prompt payment. A history of prompt payment means payment within 30 calendar days of the date of billing. If fees are expected to exceed $250.00, the requester shall be required to submit payment before processing is continued if the requester does not have a history of prompt payment. All payments shall be made by certified check or money order made payable to the Treasurer of the United States.

(3) When a requester has previously failed to pay a fee charged within a timely fashion (*i.e.*, within 30 calendar days from the date of billing) payment is required before a search is initiated or before review is begun. When a requester has no payment history, an advance payment may be required of the requester after the case has been completed, but prior to providing the final response.

(4) If a requester has failed to pay fees after three bills have been sent, additional requests from that requester and/or the organization or company he/she represents will not be honored until all costs and interest are paid.

(j) Upon receipt of a statement of willingness to pay assessable fees or the payment from the requester, the FOIA office shall notify the NSA/CSS component to search for the appropriate documents.

(1) The component conducting the search shall advise the FOIA office of the types of files searched (e.g., electronic records/e-mail, video/audio tapes, paper), the means by which the search was conducted (e.g., subject or chronological files, files retrievable by name or personal identifier) and any key words used in an electronic search.

(2) If the search does not locate the requested records, the Director of Policy shall so advise the requester and offer appeal rights.

(3) If the search locates the requested records, the holding organization shall furnish copies of these records immediately to the FOIA office. The Director of Policy shall make a determination as to the releasability of the

records in consultation with the GC, the Legislative Affairs Office (if any information relates to members of Congress or their staffs) and other Agency components, as appropriate. This determination shall also state, with particularity, that a search reasonably calculated to locate responsive records was conducted and that all reasonably segregable, non-exempt information was released. The located records will be handled as follows:

(i) All exempt records or portions thereof shall be withheld and the requester so advised along with the statutory basis for the denial; the volume of material being denied, unless advising of the volume would harm an interest protected by exemption (see 5 U.S.C. 552); and the procedure for filing an appeal of the denial.

(ii) All segregable, non-exempt records or portions thereof shall be forwarded promptly to the requester.

(k) Records or portions thereof originated by other agencies or information of primary interest to other agencies found in NSA/CSS records shall be handled as follows:

(1) The originating agency's FOIA Authority shall be provided with a copy of the request and the stated records.

(2) The requester shall be advised of the referral, except when notification would reveal exempt information.

(l) Records of portions thereof originated by a commercial or business submitter and containing information that is arguably confidential commercial or financial information as defined in Executive Order 12600 (52 FR 23781, 3 CFR, 1987 Comp., p. 235) shall be handled as follows:

(1) The commercial or business submitter shall be provided with a copy of the records as NSA/CSS proposes to release them, and the submitter shall be given an opportunity to inform the FOIA office about its objections to disclosure in writing.

(2) The Director of Policy or his/her designee shall review the submitter's objections to disclosure and, if DC3 decides to release records or portions thereof to the requester, provide the submitter with an opportunity to enjoin the release of such information.

(m) Records may be located responsive to an FOIA request which contain portions not responsive to the subject of the request. The non-responsive portions shall be processed as follows:

(1) If the information is easily identified as releasable, the non-responsive portions shall be provided to the requester.

(2) If additional review or coordination with other NSA/CSS elements or other government agencies or entities is required to determine the releasability of the information, and the processing of the material would be facilitated by excluding those portions from review, the requester should be consulted regarding the need to process those portions. If the requester states that he is interested in the document in its entirety, including those portions not responsive to the subject of his request, the entire document shall be considered responsive and reviewed accordingly.

(3) If the conditions as stated in paragraph (m)(2) of this section pertain, but it is not a simple matter to contact and/or reach an agreement with the requester, the non-responsive portions shall be marked to differentiate the removal of non-responsive material from the removal of exempt portions. The requester shall be advised that portions were removed as non-responsive. In addition, he/she shall be given an indication of the manner in which those portions would be treated if responsive (e.g., the information would be protected by exemptions, would require extensive review/consultation). Such a response is not considered an adverse determination. If the requester informs the FOIA office of his interest in receiving the non-responsive portions, the request shall be placed in the same location within the processing queue as the original request and those portions of the documents shall be processed.

(4) If the requester states in his initial request that he/she wants all non-responsive portions contained within documents containing responsive information, then the documents shall be processed in their entirety.

(n) Any person advised of an adverse determination shall be notified of the right to submit an appeal postmarked

within 60 days of the date of the response letter and that the appeal must be addressed to the NSA/CSS FOIA Appeal Authority, National Security Agency, Ft. George G. Meade, MD 20755–6248. The following actions are considered adverse determinations:

(1) Denial of records or portions of records;

(2) Inability of NSA/CSS to locate records;

(3) Denial of a request for the waiver or reduction of fees;

(4) Placement of requester in a specific fee category;

(5) Amount of estimate of processing costs;

(6) Determination that the subject of a request is not within the purview of NSA/CSS and that a search for records shall not be conducted;

(7) Denial of a requester for expeditious treatment; and

(8) Non-agreement regarding completion date of request.

(o) The GC or his designee shall process appeals and make a recommendation to the Appeal Authority.

(1) Upon receipt of an appeal regarding the denial of information or the inability of the Agency to locate records, the GC or his designee shall provide a legal review of the denial and/or the adequacy of the search for responsive material, and make other recommendations as appropriate.

(2) If the Appeal Authority determines that additional information may be released, the information shall be made available to the requester within 20 working days from receipt of the appeal. The conditions for responding to an appeal for which expedited treatment is sought by the requester are the same as those for expedited treatment on the initial processing of a request. (*See* paragraph (f) of this section.)

(3) If the Appeal Authority determines that the denial was proper, the requester must be advised within 20 days after receipt of the appeal that the appeal is denied. The requester likewise shall be advised of the basis for the denial and the provisions for judicial review of the Agency's appellate determination.

(4) If a new search for records is conducted and produces additional material, the additional records shall be forwarded to the Director of Policy, as the IDA, for review. Following his/her review, the Director of Policy shall return the material to the GC with his/her recommendation for release or withholding. The GC shall provide a legal review of the material, and the Appeal Authority shall make the release determination. Upon denial or release of additional information, the Appeal Authority shall advise the requester that more material was located and that the IDA and the Appeal Authority each conducted an independent review of the documents. In the case of denial, the requester shall be advised of the basis of the denial and the right to seek judicial review of the Agency's action.

(5) When a requester appeals the absence of a response to a request within the statutory time limits, the GC shall process the absence of a response as it would denial of access to records. The Appeal Authority shall advise the requester of the right to seek judicial review.

(6) Appeals shall be processed using the same multi-track system as initial requests. If an appeal cannot be responded to within 20 working days, the requirement to obtain an extension from the requester is the same as with initial requests. The time to respond to an appeal, however, may be extended by the number of working days (not to exceed 10) that were not used as additional time for responding to the initial request. That is, if the initial request is processed within 20 working days so that the extra 10 days of processing which an agency can negotiate with the requester are not used, the response to the appeal may be delayed for that 10 days (or any unused portion of the 10 days).

### § 299.6 Fees.

(a) Upon receipt of a request, DC3 shall evaluate the request to determine the fee category or status of the requester, as well as the appropriateness of a waiver or reduction of fees if requested. There are no fees associated with a Privacy Act request, except as stated in NSA/CSS Regulation 10–35, Implementation of the Privacy Act of 1974. If fees are assessable, a search

cost estimate shall be sent to the Directorate(s) and Associate Directorate(s) expected to maintain responsive records. If DC3 assigns a fee category to a requester which differs from that claimed by the requester or determines that a waiver or reduction of fees is not appropriate, DC3 shall notify the requester of this discrepancy and of the estimated cost of processing the request. The requester shall be given 60 days to provide additional substantiation for the fee status claimed or for a fee waiver or reduction. The requester shall be advised that his/her request shall not be processed until the discrepancy over the fee category, fee waiver or reduction, or both are resolved. He/she shall also be advised of his/her right to appeal/DC3's determination. A fee waiver or reduction shall be granted or denied in accordance with DoD 5400.7–R and based on information provided by the requester. If the requester does not respond to DC3's initial notification of the discrepancy in fee assessment within the 60 days, DC3's determination about that requester's fee status shall be final.

(b) Fees shall reflect only direct search, review (in the case of commercial requesters) and duplication costs, recovery of which are permitted by 5 U.S.C. 552. Fees shall not be used to discourage requesters.

(c) No minimum fee may be charged. Fees under $25.00 shall be waived.

(d) Fees shall be based on estimates provided by appropriate organizational focal points. Upon completion of the processing of the request and computation of all assessable fees, the request shall be handled as follows:

(1) If the earlier cost estimate was under $250.00 and the requester has not yet paid and has no payment history, the requester shall be notified of the actual cost and shall be sent a bill under separate cover. Upon receipt of payment, processing results and non-exempt information shall be provided to the requester.

(2) In cases where the requester paid prior to processing, if the actual costs exceed the estimated costs, the requester shall be notified of the remaining fees due. Processing results and non-exempt information shall be provided to the requester upon payment of the amount in excess or, if less than $250.00, receipt of the requester's agreement to pay. If the requester refuses to pay the amount in excess, processing of the request will be terminated with notice to the requester.

(3) In cases where the requester paid prior to processing, if the actual costs are less than estimated fees which have been collected from the requester, processing results and the non-exempt information shall be provided to the requester, and the FOIA office shall advise Accounting and Financial Services of the need to refund funds to the requester.

(e) Fees for manual searches, review time and personnel costs associated with computer searches shall be computed according to the following schedule:

| Type | Grade | Hourly rate |
|---|---|---|
| (1) Clerical | E9/GS8 and below | $20 |
| (2) Professional | O1–O6/GS9–GS15 | 44 |
| (3) Executive | O7/SCE/SLE/SLP | 75 |
| (4) Contractor | | 44 |

(f) Fees for machine time involved in computer searches shall be based on the direct cost of retrieving information from the computer, including associated input/output costs.

(g) Search costs for audiovisual documentary material shall be computed as for any other record. Duplication costs shall be the actual, direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

(h) Duplication fees shall be assessed according to the following schedule:

| Type | Cost per page |
|---|---|
| (1) Office Copy | $.15 |
| (2) Microfiche | .25 |
| (3) Printed Material | .02 |

### § 299.7 Exempt records.

(a) Records meeting the exemption criteria of 5 U.S.C. 552 need not be published in the FEDERAL REGISTER, made available in a reading room, or provided in response to requests made under 5 U.S.C. 552.

(b) The first seven of the following nine FOIA exemptions may be used by the NSA/CSS to withhold information in whole or in part from public disclosure when there is a sound legal basis for protecting the information. Discretionary releases shall be made following careful Agency consideration of the interests involved.

(1) Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified pursuant to such Executive Order.

(2) Records relating solely to the internal personnel rules and practices of an agency.

(3) Records which concern matters that a statute specifically exempts from disclosure, so long as the statutory exemptions permit no discretion on what matters are exempt; or matters which meet criteria established for withholding by the statute, or which are particularly referred to by the statute as being matters to be withheld. Examples of such statutes are:

(i) The National Security Agency Act of 1959 (Public Law 86–36 Section 6);

(ii) 18 U.S.C. 798;

(iii) 50 U.S.C. 403–3(c)(6);

(iv) 10 U.S.C. 130; and

(v) 10 U.S.C. 2305(g).

(4) Records containing trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(5) Interagency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records:

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

(ii) Would deprive a person of the right to a fair trial or to an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a source within NSA/CSS, state, local, or foreign agency or authority, or any private institution which furnishes the information on a confidential basis, or could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; and

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

(8) Records contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

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

(c) Information which has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of FOIA exemptions 2 through 9 cited in paragraphs (b)(2) through (b)(9) of this section, shall be considered "UNCLASSIFIED//FOR OFFICIAL USE ONLY" (U//FOUO). No other material shall be considered or marked U//FOUO. The marking of appropriate records with the U//FOUO designation at the time of their creation provides notice of U//FOUO content and shall facilitate review when a record is requested under the FOIA. However, records requested under the FOIA which do not bear the U//FOUO designation shall not be assumed to be releaseable without examination for

the presence of information that requires continued protection and qualifies as exempt from public release.