

SUBCHAPTER N—FREEDOM OF INFORMATION ACT PROGRAM

PART 285—DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

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AUTHORITY: 5 U.S.C. 552.

SOURCE: 72 FR 71793, Dec. 19, 2007, unless otherwise noted.

§ 285.1 Purpose.

This part:

- (a) Updates policies and responsibilities for implementing the DoD FOIA Program in accordance with 5 U.S.C. 552 (commonly known as the “FOIA”).
(b) Continues to authorize 32 CFR part 286 to implement the FOIA Program.
(c) Implements E.O. 13392 within the Department of Defense.
(d) Continues to delegate authorities and responsibilities for the effective administration of the FOIA Program consistent with DoD Directive 5105.53¹.

§ 285.2 Applicability.

This part applies to:

- (a) The Office of the Secretary of Defense (OSD), the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the “DoD Components”).
(b) National Security Agency/Central Security Service records, unless the records are exempt according to 50 U.S.C. 402.
(c) Defense Intelligence Agency, National Reconnaissance Office, and National Geospatial-Intelligence Agency

records, unless the records are exempt according to 50 U.S.C. 403–5e, 10 U.S.C. 424 and 455, or other applicable law.

§ 285.3 Policy.

It is DoD policy to:

- (a) Promote public trust by making the maximum amount of information available to the public, in both hard copy and electronic formats, on the operation and activities of the Department of Defense, consistent with the DoD responsibility to protect national security and other sensitive DoD information.
(b) Allow a requester to obtain records from the Department of Defense that are available through other public information services without invoking the FOIA.
(c) Make available, according to the procedures established by DoD 32 CFR part 286, DoD records requested by a member of the public who explicitly or implicitly cites the FOIA.
(d) Answer promptly all other requests for DoD information and records under established procedures and practices.
(e) Release DoD records to the public unless those records are exempt from disclosure as outlined in 5 U.S.C. 552.
(f) Process requests by individuals for access to records about themselves contained in a Privacy Act system of records according to the procedures set forth in 32 CFR part 310 and this part, as amplified by DoD 32 CFR part 286.
(g) Provide FOIA requesters with citizen-centered ways to learn about the FOIA process, about DoD records that are publicly available, and about the status of a FOIA request and appropriate information about the DoD response.

(e) Release DoD records to the public unless those records are exempt from disclosure as outlined in 5 U.S.C. 552.

(f) Process requests by individuals for access to records about themselves contained in a Privacy Act system of records according to the procedures set forth in 32 CFR part 310 and this part, as amplified by DoD 32 CFR part 286.

(g) Provide FOIA requesters with citizen-centered ways to learn about the FOIA process, about DoD records that are publicly available, and about the status of a FOIA request and appropriate information about the DoD response.

§ 285.4 Responsibilities.

(a) The Director, Administration and Management (DA&M) shall:

- (1) Serve as the DoD Chief FOIA Officer in accordance with E.O. 13392.
- (2) Direct and oversee the DoD FOIA Program to ensure compliance with the

¹Copies of DoD Directives, Instructions, and Publications may be obtained at <http://www.dtic.mil/whs/directives/>.

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policies and procedures that govern administration of the program.

(3) Designate the FOIA Public Liaisons for the Department of Defense in accordance E.O. 13392. The FOIA Public Liaisons for OSD, the Office of the Chairman of the Joint Chiefs of Staff, and the Combatant Commands shall be appointed from the Defense Freedom of Information Policy Office (DFOIPO).

(4) Prepare and submit to the Attorney General the DoD Annual Freedom of Information Act Report as required by 5 U.S.C. 552 and other reports as required by E.O. 13392.

(5) Serve as the appellate authority for appeals to the decisions of the respective Initial Denial Authorities within OSD, the Office of the Chairman of the Joint Chiefs of Staff, the DoD Field Activities (listed in DoD 32 CFR part 286), and the Combatant Commands. The DA&M may delegate this responsibility to an appropriate member of the DA&M or Washington Headquarters Services (WHS) staff.

(6) Prepare and maintain a DoD issuance and other discretionary information to ensure timely and reasonably uniform implementation of the FOIA in the Department of Defense.

(b) The Director, WHS, under the authority, direction, and control of the DA&M, shall administer the FOIA Program, inclusive of training, for OSD and the Office of the Chairman of the Joint Chiefs of Staff.

(c) The General Counsel of the Department of Defense shall:

(1) Provide uniformity in the legal interpretation of this part.

(2) Ensure affected OSD legal advisors, public affairs officers, and legislative affairs officers are aware of releases through litigation channels that may be of significant public, media, or Congressional interest or of interest to senior DoD officials.

(3) Establish procedures to centralize processing of FOIA litigation documents when deemed necessary.

(d) The Under Secretary of Defense for Intelligence shall establish uniform procedures regarding the declassification of national security information made pursuant to requests invoking the FOIA.

(e) The Heads of the DoD Components shall:

(1) Internally administer the DoD FOIA Program; publish any instructions necessary for the administration of this part within their Components that are not prescribed by this part or by other DA&M issuances in the FEDERAL REGISTER.

(2) Serve as, or appoint another Component official as, the FOIA appellate authority for the Component.

(3) Establish one or more FOIA Requester Service Centers as prescribed by E.O. 13392.

(4) Submit names of personnel to the DA&M for designation as FOIA Public Liaisons.

(5) Ensure their respective chains of command, affected legal advisors, public affairs officers, and legislative affairs officers are aware of releases through the FOIA, inclusive of releases through litigation channels, that may be of significant public, media, or Congressional interest or of interest to senior DoD officials.

(6) Conduct training on the provisions of this part, 5 U.S.C. 552, and DoD 32 CFR part 286 for officials and employees who implement the FOIA.

(7) Submit to DFOIPO inputs to the DoD FOIA Annual Report prescribed in DoD 32 CFR part 286 and E.O. 13392.

(8) Make the records specified in 5 U.S.C. 552(a)(2) unless such records are published and copies are offered for sale, available for public inspection and copying in an appropriate facility or facilities according to rules published in the FEDERAL REGISTER. These records shall be made available to the public in both hard copy and electronic formats.

(9) Maintain and make current indices of all records available for public inspection and copying as required by 5 U.S.C. 552(a)(2).

§ 285.5 Information requirements.

Reporting requirements are in DoD 32 CFR part 286 and have been assigned Report Control Symbol DD-DA&M(A)1365 in accordance with DoD 8910.1-M.

PART 286—DOD FREEDOM OF INFORMATION ACT PROGRAM REGULATION

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 AUTHORITY: 5 U.S.C. 552.

SOURCE: 63 FR 65420, Nov. 25, 1998, unless otherwise noted.

Subpart A—General Provisions

§ 286.1 Purpose and applicability.

(a) *Purpose.* This part provides policies and procedures for the DoD implementation of the Freedom of Information Act, as amended (5 U.S.C. 552), and DoD Directive 5400.7,¹ and promotes uniformity in the DoD Freedom of Information Act (FOIA) Program.

(b) *Applicability.* This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Command, the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as “the DoD components”). This part takes precedence over all DoD Component publications that supplement and implement the DoD FOIA Program. A list of DoD Components is at appendix F.

§ 286.2 DoD public information.

(a) *Public information.* (1) The public has a right to information concerning the activities of its Government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall not be withheld in whole or in part unless the record is exempt from mandatory partial or total disclosure under the FOIA. As a matter of policy, DoD Components shall make discretionary disclosures of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court. In order that the public may have timely information concerning DoD activities, records requested through public information

¹Copy may be viewed via internet at <http://web7.whs.osd.mil/corres.htm>.

channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other members of the public for information that would not be withheld under the FOIA should continue to be honored through appropriate means without requiring the requester to involve the FOIA.

(2) Within the OSD, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, as Chief Information Officer, in conjunction with the Assistant Secretary of Defense for Public Affairs, is responsible for ensuring preparation of reference material or a guide for requesting records or information from the Department of Defense, subject to the nine exemptions of the FOIA. This publication shall also include an index of all major information systems, and a description of major information and record locator systems, as defined by the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence. DoD FOIA Components shall coordinate with the appropriate office(s) to insure that this is also accomplished within their department or organization.

(3) DoD Components shall also prepare, in addition to normal FOIA regulations, a handbook for the use of the public in obtaining information from their organization. This handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each DoD Component should explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the DoD Component determines whether the record can be released. The handbook should also explain how to make a FOIA request, how long the requester can expect to wait for a reply, and explain the right of appeal. The handbook should supplement

other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The handbook should be available on paper and through electronic means and contain the following additional information, complete with electronic links to the below elements; the location of reading room(s) within the Component and the types and categories of information available, the location of Component's World Wide Web page, a reference to the component's FOIA regulation and how to obtain a copy, a reference to the Component's FOIA annual report and how to obtain a copy and the location of the Component's GILS page. Also, the DoD Components' Freedom of Information Act Annual Reports should refer to the handbook and how to obtain it.

(b) *Control system.* A request for records that invokes the FOIA shall enter a formal control system designed to ensure accountability and compliance with the FOIA. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this part, unless otherwise required by § 286.4(m).

§ 286.3 Definitions.

As used in this part, the following terms and meanings shall be applicable:

Administrative appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority of a DOD Component to reverse a decision: to withhold all or part of a requested record; to deny a fee category claim by a requester, to deny a request for waiver or reduction of fees; to deny a request to review an initial fee estimate; to deny a request for expedited processing due to demonstrated compelling need under § 286.4(d)(3) of this part; to confirm that no records were located during the initial search. Requesters also may appeal the failure to receive a response determination within the statutory time limits, and any determination that the requester believes is adverse in nature.

Agency record. (1) The products of data compilation, such as all books, papers, maps, and photographs, machine

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readable materials, inclusive of those in electronic form or format, 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 Department of Defense possession and control at the time the FOIA request is made. Care should be taken not to exclude records from being considered agency records, unless they fall within one of the categories in paragraph (2) of this definition.

(2) The following are not included within the definition of the word “record”.

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

(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, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers 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 (see “Personal Papers of Executive Branch Officials: A Management Guide”²).

(3) A record must exist and be in the possession and control of the Department of Defense at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. See § 286.4(g)(2) on creating a record in the electronic environment.

(4) Hard copy or electronic records, that are subject to FOIA requests

under 5 U.S.C. 552(a)(3), and that are available to the public through an established distribution system, or through the FEDERAL REGISTER, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, DoD Components shall provide that requester with guidance inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. If there is any doubt as to whether the request must be processed, contact the Directorate for Freedom of Information and Security Review.

Appellate authority. The Head of the DoD Component or the Component head’s designee having jurisdiction for this purpose over the record, or any of the other adverse determinations outlined in definitions “Initial denial authority (IDA)” and “Administrative appeal”.

DoD Component. An element of the Department of Defense, as defined in § 286.1(b), authorized to receive and act independently on FOIA requests. (See appendix F of this part.) A DoD Component has its own initial denial authority (IDA), appellate authority, and legal counsel.

Electronic record. Records (including e-mail) that are created, stored, and retrievable by electronic means.

Federal agency. As defined by 5 U.S.C. 552(f)(1), a Federal agency is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

FOIA request. A written request for DoD records that reasonably describes the record(s) 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

² Available from the Records Administration Information Center, Agency Service Division (NIA), Washington, DC 20408.

implicitly invokes the FOIA, DoD Directive 5400.7, this part, or DoD Component supplementing regulations or instructions. Requesters should also indicate a willingness to pay fees associated with the processing of their request or, in the alternative, why a waiver of fees may be appropriate. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. Requests received by facsimile or electronically must have a postal mailing address included since it may be practical to provide a substantive response electronically. The request is considered properly received, or perfected, when the above conditions have been met and the request arrives at the FOIA office of the Component in possession of the records.

Initial denial authority (IDA). An official who has been granted authority by the head of DoD component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure. IDA's may also deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need under § 286.4(d)(3) of this part; deny a request for a waiver or reduction of fees; review a fee estimate; and confirm that no records were located in response to a request.

Public interest. The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or officials own conduct.

§ 286.4 Policy.

(a) *Compliance with the FOIA.* DoD personnel are expected to comply with the FOIA, this part, and DoD FOIA policy in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create

conditions that will promote public trust.

(b) *Openness with the public.* The Department of Defense shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

(c) *Avoidance of procedural obstacles.* DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this part and any supplemental regulations published by the DoD Components.

(d) *Prompt action on requests.* (1) Generally, when a member of the public complies with the procedures established in this part and DoD Component regulations or instructions for obtaining DoD records, and after the request is received by the official designated to respond, DoD Components shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, DoD Components shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system (see § 286.4(d)(2)). A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons in § 286.23(b). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. If a request fails to meet minimum requirements as set forth in

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§ 286.3, definition “FOIA request”, Components shall inform the requester how to perfect or correct the request. The statutory 20 working day time limit applies upon receipt of a perfected or correct FOIA request which complies with the requirements outlined in § 286.3, definition “FOIA request”.

(2) *Multitrack processing.* When a Component has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing as described in paragraph (d)(3) of this section. DoD Components may establish as many processing queues as they wish; however, as a minimum, three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request. One track shall be a processing queue for simple requests, one track for complex requests, and one track shall be a processing queue for expedited processing as described in paragraph (d)(3) of this section. Determinations as to whether a request is simple or complex shall be made by each DoD Component. DoD Components shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing as described in paragraph (d)(3) of this section), an opportunity to limit in writing hard copy, facsimile, or electronically, the scope of the request in order to qualify for the fastest queue. This multitrack processing system does not obviate components’ responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(3) *Expedited processing.* A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester’s compelling need shall be provided to the re-

quester within 10 calendar days after receipt of the request in the DoD Component’s office that will determine whether to grant expedited processing. Once the DoD Component has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by DoD Components to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review.

(i) Compelling need means that 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.

(ii) Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media (see § 286.28(e)) would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(A) Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(B) [Reserved]

(iii) 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 their knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(iv) *Other reasons for expedited processing.* Other reasons that merit expedited processing by DoD Components are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interest of mankind. A demonstration of humanitarian need shall be also made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Both statements mentioned above must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(v) These same procedures also apply to requests for expedited processing of administrative appeals.

(e) *Use of exemptions.* It is DoD policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. It is DoD policy that DoD Components shall make discretionary releases whenever possible; however, a discretionary release is normally not appropriate for records clearly exempt under exemptions 1, 3, 4, 6, 7(C) and 7(F) (see subpart C of this part). Exemptions 2, 5, and 7(A)(B)(D) and (E) (see subpart C of this part) are discretionary in nature, and DoD Components are encouraged to exercise discretionary releases whenever possible. Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.

(f) *Public domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in Components' reading rooms in paper form, as well as electronically, to facilitate public access. Discretionary releases to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise

apply. Disclosure to a properly constituted advisory committee, to Congress, or to other Federal Agencies does not waive the exemption. (See § 286.22(d).) Exempt records disclosed without authorization by the appropriate DoD official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this Part apply if the same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* (1) A record must exist and be in the possession and control of the Department of Defense at the time of the search to be considered subject to this part and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. A DoD Component, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessments shall be in accordance with subpart F of this part.

(2) About electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Components should apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant expenditure of resources in both time and manpower, that would cause a significant interference with the operation of

the Component's automated information system would not be a business as usual approach.

(h) *Description of requested record.* (1) Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. In order to assist DoD Components in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When a DoD Component receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined in paragraph (h)(2) of this section. DoD Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DoD Components shall 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 generalized 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 DoD Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(4) The following guidelines deal with requests for personal records: Ord-

inarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records in a Privacy Act System of records that can be retrieved by personal identifiers need be searched. However, if a DoD Component has reason to believe that records on the requester may exist in a record system other than a Privacy Act system, the DoD Component shall search that system under the provisions of the FOIA. In either case, DoD Components may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the Privacy Act. If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure. See paragraph (m) of this section for the relationship between the FOIA and the Privacy Act.

(5) The previous guidelines notwithstanding, the decision of the DoD Component concerning reasonableness of description must be based on knowledge of its files. If the description enables DoD Component personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DoD Component to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the DoD Component's staff to reasonably ascertain and locate which records are being requested.

(i) *Referrals.* (1) The DoD FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DoD Component receives a request for records originated by another DoD Component, it should contact the DoD Component to determine if it also received the request, and if not, obtain concurrence from the other DoD Component to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DoD Components from the responsibility of making a release decision on a

record should the requester object to referral of the request and the record. Should this situation occur, DoD Components should coordinate with the originator of the information prior to making a release determination. A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other DoD Component has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD Component, the DoD Component receiving the initial request shall consult with the other DoD Component to determine if that DoD Component's association with the material is exempt. If the association is exempt, the DoD Component receiving the initial request will protect the association and any exempt information without revealing the identity of the protected DoD Component. The protected DoD Component shall be responsible for submitting the justifications required in any litigation. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DoD Components making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address.

(2) A DoD Component shall refer for response directly to the requester, a FOIA request for a record that it holds to another DoD Component or agency outside the DoD, if the record originated in the other DoD Component or outside agency. Whenever a record or a portion of a record is referred to another DoD Component or to a Government Agency outside of the DoD for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

(3) A DoD Component may refer a request for a record that it originated to another DoD Component or agency when the other DoD Component or agency has a valid interest in the record, or the record was created for the use of the other DoD Component or

agency. In such situations, provide the record and a release recommendation on the record with the referral action. Ensure you include a point of contact with the telephone number. An example of such a situation is a request for audit reports prepared by the Defense Contract Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor shall be at the discretion of the contracting officer. A FOIA request shall be referred to the appropriate DoD Component and the requester shall be notified of the referral, unless exempt information would be revealed. Another example is a record originated by a DoD Component or agency that involves foreign relations, and could affect a DoD Component or organization in a host foreign country. Such a request and any responsive records may be referred to the affected DoD Component or organization for consultation prior to a final release determination within the Department of Defense. See also § 286.22(e) of this part.

(4) Within the Department of Defense, a DoD Component shall ordinarily refer a FOIA request and a copy of the records it holds, but that was originated by other DoD Component or that contains substantial information obtained from another DoD Component, to that Component for direct response, after direct coordination and obtaining concurrence from the Component. The requester then shall be notified by such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component, except as provided in § 286.22(e) of this part.

(5) DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA, this part, and their multitrack processing queues, based upon the date of initial receipt of the request at the referring component or agency.

(6) Agencies outside the Department of Defense that are subject to the FOIA.

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(i) A DoD Component may refer a FOIA request for any record that originated in an agency outside the Department of Defense or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DoD Component must respond to the request.

(ii) A DoD Component shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the Department of Defense for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DoD Component may only respond directly to the requester after coordination with the outside agency.

(7) DoD Components that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. DoD records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DoD Components' files shall be forwarded to the Directorate for Freedom of Information and Security Review (DFOISR). The DFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

(8) To the extent referrals are consistent with the policies expressed by this section, referrals between offices of the same DoD Component are authorized.

(9) On occasion, the Department of Defense receives FOIA requests for General Accounting Office (GAO) records containing DoD information. Even though the GAO is outside the executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing DoD information received either from the public, or on referral from the GAO, shall be processed under the provisions of the FOIA.

(j) *Authentication.* Records provided under this part shall be authenticated with an appropriate seal, whenever

necessary, to fulfill an official government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of \$5.20 for each authentication.

(k) *Combatant Commands.* (1) The Combatant Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department or the Chairman of the Joint Chiefs of Staff, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3;³ it authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 and this part. The Combatant Commands shall forward directly to the Director, Freedom of Information and Security Review all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. Procedures to effect this administrative requirement are outlined in appendix A of this part.

(2) Combatant Commands shall maintain an electronic reading room for FOIA-processed 5 U.S.C. 552(a)(2)(D) records in accordance with subpart B of this part. Records qualifying for this means of public access also shall be maintained in hard copy for public access at Combatant Commands' respective locations.

(1) *Records management.* FOIA records shall be maintained and disposed of in accordance with the National Archives and Records Administration General Records Schedule, and DoD Component records schedules.

(m) *Relationship between the FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records, nor are all of them aware of appeal procedures. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access

³See footnote 1 to § 286.1(a).

rights under both Acts. See also § 286.24 regarding appeal rights.

(1) If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure. Unlike the FOIA, the Privacy Act applies only to U.S. citizens and aliens admitted for permanent residence.

(2) Requesters who seek records about themselves contained in a Privacy Act system of records and who cite or imply only the Privacy Act, will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records, or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate Privacy Act and FOIA exemption. Appeals shall be processed under both Acts.

(3) Requesters who seek records about themselves that are not contained in a Privacy Act system of records and who cite or imply the Privacy Act will have their requests processed under the provisions of the FOIA, since the Privacy Act does not apply to these records. Appeals shall be processed under the FOIA.

(4) Requesters who seek records about themselves that are contained in a Privacy Act system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate Privacy Act and FOIA exemption. Appeals shall be processed under both Acts.

(5) Requesters who seek access to agency records that are not part of a Privacy Act system of records, and who cite or imply the Privacy Act and FOIA, will have their requests processed under the FOIA since the Privacy Act does not apply to these records. Appeals shall be processed under the FOIA.

(6) Requesters who seek access to agency records and who cite or imply the FOIA will have their requests and appeals processed under the FOIA.

(7) Requesters shall be advised in the final response letter which Act(s) was (were) used, inclusive of appeal rights as outlined in paragraphs (m)(1) through (m)(6) of this section.

(n) *Non-responsive information in responsive records.* DoD Components shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DoD Components desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempt under (state appropriate exemption(s)). Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures in paragraph (n)(2) of this section. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester that even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552(b)(1), and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the

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same location within the processing queue as the original request.

(o) *Honoring form or format requests.* DoD Components shall provide the record in any form or format requested by the requester if the record is readily reproducible in that form or format. DoD Components shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, DoD Components shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the DoD Components' automated information system. Such determinations shall be made on a case by case basis. See also paragraph (g)(2) of this section.

[63 FR 65420, Nov. 25, 1998; 63 FR 67724, Dec. 8, 1998]

Subpart B—FOIA Reading Rooms

§ 286.7 Requirements.

(a) *Reading room.* Each DoD Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the records described in paragraph (b) of this section and § 286.8(a). In addition to the records described in paragraph (b) of this section and § 286.8(a), DoD Components may elect to place other records in their reading room, and also make them electronically available to the public. DoD Components may share reading room facilities if the public is not unduly inconvenienced, and also may establish decentralized reading rooms. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with the provisions of subpart F of this part.

(b) *Record availability.* The FOIA requires that records described in 5 U.S.C. 552(a)(2) (A), (B), (C), and (D) created on or after November 1, 1996, shall be made available electronically by November 1, 1997, as well as in hard copy in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. Personal privacy information, that if disclosed to a third party requester, would result in an invasion of the first party's personal pri-

vacy, and contractor submitted information, that if disclosed to a competing contractor, would result in competitive harm to the submitting contractor shall be deleted from all 5 U.S.C. 552(A)(2) records made available to the general public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DoD Component may publish in the FEDERAL REGISTER a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. 5 U.S.C. 552(a)(2) (A), (B), (C) and (D) records are:

(1) *(a)(2)(A) records.* Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

(2) *(a)(2)(B) records.* Statements of policy and interpretations that have been adopted by the agency and are not published in the FEDERAL REGISTER.

(3) *(a)(2)(C) records.* Administrative staff manuals and instructions, or portions thereof, that establish DoD policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DoD Component. Examples of manuals and instructions not normally made available are:

(i) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics,

standards of performance, or criterial for defense, prosecution, or settlement of cases.

(ii) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and intelligence activities.

(4) *(a)(2)(D) records.* Those 5 U.S.C. 552(a)(3) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as FOIA-processed (a)(2) records.

(i) DoD Components shall decide on a case by case basis whether records fall into this category, based on the following factors:

(A) Previous experience of the DoD Component with similar records.

(B) Particular circumstances of the records involved, including their nature and the type of information contained in them.

(C) The identify and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

(ii) This provision is intended for situations where public access in a timely manner is important, and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. DoD Components may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

(iii) Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, DoD Components shall process the FOIA request. However, DoD Components have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2) (A), (B), and (C) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

§ 286.8 Indexes.

(a) *“(a)(2)” materials.* (1) Each DoD Component shall maintain in each facility prescribed in § 286.7(a), an index of materials described in § 286.7(b) that are issued, adopted, or promulgated, after July 4, 1967. No “(a) (2)” materials issued, promulgated, or adopted after

July 4, 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this part.

(2) Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of “(a)(2)” materials or supplements thereto unless it publishes in the FEDERAL REGISTER an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in subpart F of this part.

(3) Each index of “(a)(2)” materials or supplement thereto shall be arranged topical or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

(4) A general index of FOIA-processed (a)(2) records referred to in § 286.7(b)(4), shall be made available to the public, both in hard copy and electronically by December 31, 1999.

(b) *Other materials.* (1) Any available index of DoD Component material published in the FEDERAL REGISTER, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms, and electronically to the public.

(2) Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, “(a)(1)” materials shall, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of “(a)(1)” materials are: descriptions of any agency’s central and field organization, and to the extent they affect the public, rules of

procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

Subpart C—Exemptions

§ 286.11 General provisions.

Records that meet the exemption criteria of the FOIA may be withheld from public disclosure and need not be published in the FEDERAL REGISTER, made available in a library reading room, or provided in response to a FOIA request.

§ 286.12 Exemptions.

The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law: A discretionary release of a record (see also § 286.4(e)) to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11-R⁴ and by a FOIA exemption.

(a) *Number 1 (5 U.S.C. 552(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.⁵ Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be

classified. The procedures in DoD 5200.1-R apply. If the information qualifies as exemption 1 information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or non-existence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or non-existence 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) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and DoD 5200.R-1, and is not otherwise revealed in the individual items of information.

(b) *Number 2 (5 U.S.C. 552(b)(2))*. Those related solely to the internal personnel rules and practices of the Department of Defense or any of its Components. This exemption is entirely discretionary. This exemption has two profiles, high (b)(2) and low (b)(2). Paragraph (b)(2) of this section contains a brief discussion on the low (b)(2) profile; however, that discussion is for information purposes only. When only a minimum Government interest would be affected (administrative burden), there is a great potential for discretionary disclosure of the information. Consequently, DoD Components shall not invoke the low (b)(2) profile.

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

⁴ See footnote 1 to § 286.1(a).

⁵ See footnote 1 to § 286.1(a).

of the Department of Defense. Examples include:

(i) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, and examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

(ii) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(iii) Computer software, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(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. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. DoD Components shall not invoke the low (b)(2) profile.

(c) *Number 3 (5 U.S.C. 552(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. The Directorate for Freedom of Information and Security Review maintains a list of (b)(3) statutes used within the Department of Defense, and provides updated lists of these statutes to DoD Components on a periodic basis. A few examples of such statutes are:

(1) *Patent Secrecy, 35 U.S.C. 181-188*. Any records containing information relating to inventions that are the sub-

ject of patent applications on which Patent Secrecy Orders have been issued.

(2) *Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162*.

(3) *Communication Intelligence, 18 U.S.C. 798*.

(4) *Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25.*⁶

(5) *Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. 1102f*.

(6) *Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128*.

(7) *Protection of Intelligence Sources and Methods, 50 U.S.C. 403-3(c)(6)*.

(8) *Protection of Contractor Submitted Proposals, 10 U.S.C. 2305(g)*.

(9) *Procurement Integrity, 41 U.S.C. 423*.

(d) *Number 4 (5 U.S.C. 552(b)(4))*. Those containing trade secrets or commercial or financial information that a DoD Component 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 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 Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm (see paragraph (d)(8) of this section). If the information qualifies as exemption 4 information, there is no discretion in its release. Examples include:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by

⁶See footnote 1 to §286.1(a).

reference in a contract entered into between the DoD Component and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. See also § 286.23(h)(2) of this part. Additionally, when the provisions of 10 U.S.C. 2305(g), and 41 U.S.C. 423 are met, certain proprietary and source selection information may be withheld under exemption 3.

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), Chapter 2 of 48 CFR, Subpart 227.71-227.72. Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 (see paragraph (c)(4) of this section).

(7) Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(8) Proprietary information submitted strictly on a voluntary basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is not voluntary. (See also § 286.23(h)(3).)

(e) *Number 5 (5 U.S.C. 552(b)(5))*. Those containing information considered privileged in litigation, primarily under the deliberative process privilege. Except as provided in paragraphs (e)(2) through (e)(5) of this section, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)), or within or among DoD Components. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is entirely discretionary.

(1) Examples of the deliberative process include:

(i) The non factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

(ii) Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(iii) Those non factual portions of evaluations by DoD Component personnel of contractors and their products.

(iv) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(v) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

(vi) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(vii) Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

(2) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(3) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available

through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(4) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(5) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(f) *Number 6 (5 U.S.C. 552(b)(6))*. Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, 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. If the information qualifies as exemption 6 information, there is no discretion in its release.

(1) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(i) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(2) Home addresses, including private e-mail addresses, are normally not releasable without the consent of the individuals concerned. This includes lists of home addresses and military quarters' addresses without the occupant's name. Additionally, the names and duty addresses (postal and/or e-mail) of DoD military and civilian personnel who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(i) *Privacy interest.* A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(ii) Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(3) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to

the immediate next of kin as defined in DoD Directive 5154.24.⁷

(4) A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

(5) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DoD Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption 6 must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies before referring a record that is exempt under the Glomar concept.

(i) 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 records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

(ii) Refusal to confirm or deny should not be used when:

(A) The person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights.

(B) The person initiated or directly participated in an investigation that lead to the creation of any agency record seeks access to that record.

(C) The person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family. See paragraph (f)(3) of this section.

⁷ See footnote 1 to § 286.1(a).

(g) *Number 7 (5 U.S.C. 552(b)(7))*. Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. With the exception of parts (C) and (F) (see paragraph (g)(1)(iii) of this section) of this exemption, this exemption is discretionary. If information qualifies as exemption (7)(C) or (7)(F) (see paragraph (g)(1)(iii) of this section) information, there is no discretion in its release.

(1) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(i) Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A)).

(ii) Would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B)).

(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 (5 U.S.C. 552(b)(7)(C)).

(A) this exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This a Glomar response, and exemption (7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies before referring a record that is exempt under the Glomar concept.

(B) 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 records” response when a record does not exist and a “refusal to confirm or

deny” when a record does exist will itself disclose personally private information.

(C) Refusal to confirm or deny should not be used when:

(1) The person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights.

(2) The person whose personal privacy is in jeopardy is deceased, and the Agency is aware of that fact.

(D) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and 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 (5 U.S.C. 552(b)(7)(D)).

(E) 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 (5 U.S.C. 552(b)(7)(E)).

(F) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) Some examples of exemption 7 are:

(i) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings.

(ii) The identify of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States.

(iii) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized

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agency or office with a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(3) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500) is not diminished.

(4) *Exclusions.* Excluded from exemption 7 are the following two situations applicable to the Department of Defense. (Components considering invoking an exclusion should first consult with the Department of Justice, Office of Information and Privacy.):

(i) Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstances continues, treat the records of information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(ii) Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7), the response to the request will state that no records were found.

(h) *Number 8 (U.S.C. 552 (b)(8)).* Those contained in or related to 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.

(i) *Number 9 (5 U.S.C. 552(b)(9)).* Those containing geological and geophysical

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information and data (including maps) concerning wells.

Subpart D [Reserved]

Subpart E—Release and Processing Procedures

§ 286.22 General provisions.

(a) *Public information.* (1) Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD record made under the provisions of 5 U.S.C. 552(a)(3) of the FOIA may be denied only when:

(i) Disclosure would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is subject to one or more of the exemptions of FOIA.

(ii) The record has not been described well enough to enable the DoD Component to locate it with a reasonable amount of effort by an employee familiar with the files.

(iii) The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the DoD Component concerned. When personally identifiable information in a record is requested by the subject of the record or the subject's attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

(2) Individuals seeking DoD information should address their FOIA requests to one of the addresses listed in appendix B of this part.

(b) *Requests from private parties.* The provisions of the FOIA are reserved for persons with private interest as opposed to U.S. Federal Agencies seeking official information. Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also

sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, DoD Components shall still process the request. DoD Components should encourage requesters to send requests by mail, facsimile, or by electronic means. Disclosure of records to individuals under the FOIA is considered public release of information, except as provided for in § 286.4(f) and § 286.12.

(c) *Requests from government officials.* Requests from officials of State or local Governments for DoD Component records shall be considered the same as any other requester. Requests from members of Congress not seeking records on behalf of a Congressional Committee, Subcommittee, either House sitting as a whole, or made on behalf of their constituents shall be considered the same as any other requester (see also § 286.4(f) and paragraph (d) of this section). Requests from officials of foreign governments shall be considered the same as any other requester. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(d) *Privileged release outside of the FOIA to U.S. Government officials.* (1) Records exempt from release to the public under the FOIA may be disclosed in accordance with DoD Component regulations to agencies of the Federal Government, whether legislative, executive, or administrative, as follows:

(i) In response to a request of a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4.

(ii) To other Federal Agencies, both executive and administrative, as determined by the head of a DoD Component or designee.

(iii) In response to an order of a Federal court, DoD Components shall release information along with a description of the restrictions on its release to the public.

(2) DoD Components shall inform officials receiving records under the provisions of this paragraph that those

records are exempt from public release under the FOIA. DoD Components also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1-R, and information contained in Privacy Act systems of records is subject to DoD 5400.11-R.

(e) *Consultation with affected DoD component.* (1) When a DoD Component receives a FOIA request for a record in which an affected DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected DoD organization is required. As an example, where a DoD Component receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

(2) The affected DoD Component shall review the circumstances of the request for host-nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component regarding release of information. Responding DoD Components shall provide copies of responsive records to the affected DoD Component when requested by the affected DoD Component. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

(3) Nothing in paragraphs (e)(1) and (e)(2) of this section shall impede the processing of the FOIA request initially received by a DoD Component.

§ 286.23 Initial determinations.

(a) *Initial denial authority.* (1) Components shall limit the number of IDAs appointed. In designating its IDAs, a DoD Component shall balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding the each request within the time limitations of the FOIA.

(2) The initial determination whether to make a record available upon request may be made by any suitable official designated by the DoD Component in published regulations. The presence of the marking "For Official

Use Only” does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under the FOIA is applicable.

(3) The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media.

(b) *Reasons for not releasing a record.* The following are reasons for not complying with a request for a record under 5 U.S.C. 552(a)(3):

(1) *No records.* A reasonable search of files failed to identify responsive records.

(2) *Referrals.* The request is transferred to another DoD Component, or to another Federal Agency.

(3) *Request withdrawn.* The request is withdrawn by the requester.

(4) *Fee-related reason.* The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.

(5) *Records not reasonably described.* A record has not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.

(6) *Not a proper FOIA request for some other reason.* The requester has failed unreasonably to comply with procedural requirements, other than fee-related, imposed by this part or DoD Component supplementing regulations.

(7) *Not an agency record.* The information requested is not a record within the meaning of the FOIA and this part.

(8) *Duplicate request.* The request is a duplicate request (e.g., a requester asks for the same information more than once). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.

(9) *Other (specify).* Any other reason a requester does not comply with pub-

lished rules other than those outlined paragraphs (b)(1) through (b)(8) of this section.

(10) *Partial or total denial.* The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

(c) *Denial tests.* To deny a requested record that is in the possession and control of a DoD Component, it must be determined that disclosure of the record would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is exempt under one or more of the exemptions of the FOIA. An outline of the FOIA’s exemptions is contained in subpart C of this part.

(d) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In no case shall the deleted areas be left “white” without the use of brackets to show the bounds of deleted information. In the case of electronic deletion, or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the exemption under which the deletion is made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information. When a record is denied in whole, the responsive advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

(e) *Response to requester.* (1) Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days

after receipt of the request by the official designated to respond. When a DoD Component has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether their request qualifies for the fast track or slow track within the DoD Components' multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing. See also § 286.4(d)(2), for greater detail on multitrack processing and compelling need meriting expedited processing.

(2) When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

(3) When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based, inclusive of a brief statement describing what the exemption(s) cover. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable Executive Order criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the DoD Component.

(4) The final response to the requester should contain information concerning the fee status of the request, consistent with the provisions of subpart F of this part. When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response let-

ter. Components also shall provide the requester with a complete cost breakdown (e.g., 15 pages of office reproduction at \$0.15 per page; 5 minutes of computer search time at \$43.50 per minute, 2 hours of professional level search at \$25 per hour, etc.) in the response letter.

(5) The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this part; e.g., 5 U.S.C. 552(b)(1). Merely referring to a classification; to a "For Official Use Only" marking on the requested record; or to this part or a DoD Component's regulation does not constitute a proper citation or explanation of the basis for invoking an exemption.

(6) When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

(7) When denying a request for records, in whole or in a part, a DoD Component shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation, unless the volume is otherwise indicated through deletions on records disclosed in part.

(8) When denying a request for records in accordance with a statute qualifying as a FOIA exemption 3 statute, DoD Components shall, in addition to sitting the particular statute relied upon to deny the information, also state whether a court has upheld the decision to withhold the information under the particular statute, and a concise description of the scope of the information being withheld.

(f) *Extension of time.* (1) In unusual circumstances, when additional time is needed to respond to the initial request, the DoD Component shall acknowledge the request in writing the 20 day period, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as follows:

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(2) With respect to a request for which a written notice has extended the time limits by 10 additional working days, and the Component determines that it cannot make a response determination within that additional 10 working day period, the requester shall be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame shall be considered a factor in determining whether exceptional circumstances exist with respect to DoD Components' request backlogs. Exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD Component demonstrates reasonable progress in reducing its backlog.

(3) Unusual circumstances that may justify delay are:

(i) The need to search for and collect the requested records from other facilities that are separate from the office determined responsible for a release or denial decision on the requested information.

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are requested in a single request.

(iii) The need for consultation, which shall be conducted with all practicable speed, with other agencies having a substantial interest in the determination of the request, or among two or more DoD Components having a substantial subject-matter interest in the request.

(4) DoD Components may aggregate certain requests by the same requester, or by a group of requesters acting in concert, if the DoD Component reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances set forth in paragraph (f)(3) of this section, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated. If the requests are aggregated under these con-

ditions, the requester or requesters shall be so notified.

(5) In cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. DoD Components are reminded that the requester still retains the right to treat this delay as a de facto denial with full administrative remedies.

(6) As an alternative to the taking of formal extensions of time as described in § 286.23(f), the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

(g) *Misdirected requests.* Misdirected requests shall be forwarded promptly to the DoD Component or other Federal Agency with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the DoD Component that manages the records requested.

(h) *Records of non-U.S. government source.* (1) When a request is received for a record that falls under exemption 4 (see § 286.12(d)), that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been 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 under 5 U.S.C. 552, Exemption (b)(4) (§ 286.12(d), this part and E.O. 12600 (3 CFR, 1987 Comp., p. 235))) 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) of 5 U.S.C. 552. If, for example, the record

or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

(2) If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DoD, and meets the requirements of 10 U.S.C. 2305(g), the proposal shall not be disclosed, and no submitter notification and subsequent analysis is required. The proposal shall be withheld from public disclosure pursuant to 10 U.S.C. 2305(g) and exemption (b)(3) of 5 U.S.C. 552. This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between a DoD Component and the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted in accordance with paragraph (h)(1) of this section, except for sealed bids that are opened and read to the public. The term proposal means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive

proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in 10 U.S.C. 2305(g).

(3) If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and after consultation with the submitter, it is absolutely clear that the record or information would customarily not be released to the public, the submitter need not be notified. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Records or information submitted under these authorities are not voluntary in nature. When it is not clear whether the information was submitted on a voluntary basis, absent any exercised authority, and whether it would customarily be released to the public by the submitter, notify the submitter and ask that it describe its treatment of the information, and render an objective evaluation. If the decision is made to release the information over the objection of the submitter, notify the submitter and afford the necessary time to allow the submitter to seek a restraining order, or take court action to prevent release of the record or information.

(4) The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the DoD from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, or foreign governments. Coordination with foreign governments under the provisions of this paragraph may be made through Department of State, or the specific foreign embassy.

(i) *File of initial denials.* Copies of all initial denials shall be maintained by each DoD Component in a form suitable for rapid retrieval, periodic statistical compilation, and management

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evaluation. Records denied for any of the reasons contained in paragraph (b) of this section shall be maintained for a period of six years to meet the statute of limitations requirement.

(j) *Special mail services.* Components are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. The requester shall be notified that they are responsible for the full costs of special services.

(k) *Receipt accounts.* The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts, which are described in paragraphs (k)(1) and (k)(2) of this section shall be used for depositing all FOIA receipts, except receipts for Working Capital and non appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Working Capital and non appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(1) *Receipt account 3210 sale of publications and reproductions, Freedom of Information Act.* This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles.

(2) *Receipt account 3210 fees and other charges for services, Freedom of Information Act.* This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

§ 286.24 Appeals.

(a) *General.* If the official designated DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated

appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, not providing a response determination to a FOIA request within the statutory time limits, or *any* determination found to be adverse in nature by the requester. When denials have been made under the provisions of the Privacy Act and the FOIA, and the denied information is contained in a Privacy Act system of records, appeals shall be processed under both the Privacy Act and the FOIA. If the denied information is not maintained in a Privacy Act system of records, the appeal shall be processed under the FOIA. Appeals of Office of the Secretary of Defense and Chairman of the Joint Chiefs of Staff determinations may be sent to the address in appendix B of this part. If a request is merely misaddressed, and the receiving DoD Component simply advises the requester of such and refers the request to the appropriate DoD Component, this shall not be considered a no record determination.

(b) *Time of receipt.* A FOIA appeal has been received by a DoD Component when it reaches the office of an appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(c) *Time limits.* (1) The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day period, the appeal may be considered closed. However, exceptions to the above may be considered on a case by case basis. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal

shall not begin until the date of the final response. Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement.

(2) Final determinations on appeals normally shall be made within 20 working days after receipt. When a DoD Component has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multi-track processing system, based at a minimum, on the three processing tracks established for initial requests. See § 286.4(d) of this part. All of the provisions of § 286.4(d) apply also to appeals of initial determinations, to include establishing additional processing queues as needed.

(d) *Delay in responding to an appeal.*

(1) If additional time is needed due to the unusual circumstances described in § 286.23(f), the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request.

(2) If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in § 286.23(f), they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The DoD component shall continue to process the case expeditiously.

(e) *Response to the requester.* (1) When an appellate authority makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(2) Final refusal of an appeal must be made in writing by the appellate authority or by a designated representa-

tive. The response, at a minimum, shall include the following:

(i) The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and with respect to other appeal matters as set forth in paragraph (a) of this section.

(ii) 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 cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

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

(iv) In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable.

(v) When the denial is based upon an exemption 3 statute (subpart C of this part), the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.

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

(f) *Consultation.* (1) Final refusal involving issues not previously resolved or that the DoD Component knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the DoD Office of the General Counsel.

(2) Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the DoD Office of the General Counsel.

[63 FR 65420, Nov. 25, 1998; 63 FR 67724, Dec. 8, 1998]

§ 286.25 Judicial actions.

(a) *General.* (1) This section states current legal and procedural rules for the convenience of the reader. The statements of rules do not create rights or remedies not otherwise available, nor do they bind the Department of Defense to particular judicial interpretations or procedures.

(2) A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond within the time limits prescribed by the FOIA and in this part.

(b) *Jurisdiction.* The requester may bring suit in the U.S. District Court in the district in which the requester resides or is the requester's place of business, in the district in which the record is located, or in the District of Columbia.

(c) *Burden of proof.* The burden of proof is on the DoD Component to justify its refusal to provide a record. The court shall evaluate the case de novo (anew) and may elect to examine any requester record in camera (in private) to determine whether the denial was justified.

(d) *Actions by the court.* (1) When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

(2) If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

(3) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether DoD Component personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit System Protection Board shall conduct an investigation to determine whether or not disciplinary

action is warranted. The DoD Component is obligated to take the action recommended by the special counsel.

(4) The court may punish the responsible official for contempt when a DoD Component fails to comply with the court order to produce records that it determines have been withheld improperly.

(e) *Non-United States government source information.* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

(f) *FOIA litigation.* Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a copy of the complaint by any means to the Director, Freedom of Information and Security Review with an information copy to the DoD Office of the General Counsel, ATTN: Office of Legal Counsel.

Subpart F—Fee Schedule**§ 286.28 General provisions.**

(a) *Authorities.* The Freedom of Information Act, as amended; the Paperwork Reduction Act (44 U.S.C. Chapter 35), as amended; the Privacy Act of 1974, as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.); and 10 U.S.C. 2328.

(b) *Application.* (1) The fees described in this subpart apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and

Guidelines. They reflect direct costs for search, review (in the case of commercial requesters); and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as DoD 7000.14-R,¹¹ which does not supersede the collection of fees under the FOIA. Nothing in this subpart shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. A “statute specifically providing for setting the level of fees for particular types of records” (5 U.S.C. 552(a)(4)(a)(vi)) means any statute that enables a Government Agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(2) The term “direct costs” means those expenditures a Component actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed at § 286.29 of this subpart. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(3) The term “search” includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material

in the record to determine if it, or portions thereof are responsive to the request. Components should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Component and the requester. For example, Components should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time. See paragraph (b)(5) of this section, for the definition of review, and paragraph (c)(5) of this section and § 286.29(b)(2), for information pertaining to computer searches.

(4) The term “duplication” refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably usable, the requester shall be notified that the copy provided is the best available and that the Agency’s master copy shall be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator’s time, shall be charged. In practice, if a Component estimates that assessable duplication charges are likely to exceed \$25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(5) The term “review” refers to the process of examining documents located in response to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does

¹¹ See footnote 1 to § 286.1(a).

not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Components may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(c) *Fee restrictions.* (1) No fees may be charged by any DoD Component if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Components shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and ten minutes of search time, and resulted in one hundred and five pages of documents, a Component would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than, the cost to the Component for billing the requester and processing the fee collected, no charges would result.

(2) Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if a Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another Federal Agency to action their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(3) The elements to be considered in determining the "cost of collecting a fee" are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for

deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

(4) For the purposes of these restrictions, the word "pages" refers to paper copies of a standard size, which will normally be 8½"×11" or 11"×14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout however, might meet the terms of the restriction.

(5) In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$24.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search. See § 286.29, this subpart, for further details regarding fees for computer searches.

(d) *Fee waivers.* (1) Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in paragraph (e) of this section when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester.

(2) When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

(3) Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

(i) Disclosure of the information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government.”

(A) *The subject of the request.* Components should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Department of Defense. Requests for records in the possession of the Department of Defense which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of the Department of Defense. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of Defense; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the Department of Defense, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester’s stated purpose for desiring the records and the potential for public understanding of the operations and activities of the Department of Defense.

(B) *The informative value of the information to be disclosed.* This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determinate whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of Defense. While the subject of a request may contain information that concerns operations or activities of the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily re-

acted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the Department of Defense must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the Department of Defense.

(C) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* The key element in determining the applicability of this factor is whether disclosure will inform, or have the potential to inform the public, rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigence are insufficient without demonstrating the capacity to further disclose the information in a manner that will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(D) *The significance of the contribution to public understanding.* In applying this factor, Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public? A

decision regarding significance requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant understanding of the issue. Components shall not make value judgments as to whether the information is important enough to be made public.

(ii) Disclosure of the information “is not primarily in the commercial interest of the requester.”

(A) *The existence and magnitude of a commercial interest.* If the request is determined to be of a commercial interest, Components should address the magnitude of that interest to determine if the requester’s commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profitmaking organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, Components may draw inference from the requester’s identity and circumstances of the request. In such situations, the provisions of paragraph (e) of this section apply. Components are reminded that in order to apply the commercial standards of the FOIA, the requester’s commercial benefit must clearly override any personal or non-profit interest.

(B) *The primary interest in disclosure.* Once a requester’s commercial interest has been determined, Components should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester’s commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating

news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

(4) Components are reminded that the factors and examples used in this subsection are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Components should rule in favor of the requester.

(5) In addition, the following circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

(i) A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

(ii) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. \$15.00–\$30.00).

(e) *Fee assessment.* (1) Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

(2) In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Components shall adhere to the following procedures:

(i) Analyze each request to determine the category of the requester. If the Component determination regarding the category of the requester is different than that claimed by the requester, the Component shall:

(A) Notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (i.e., 30 calendar days), the Component shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

(B) Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Component.

(ii) Requesters should submit a fee declaration appropriate for the following categories.

(A) *Commercial*. Requesters should indicate a willingness to pay all search, review and duplication costs.

(B) *Educational or noncommercial scientific institution or news media*. Requesters should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(C) *All others*. Requesters should indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

(iii) If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

(iv) In the situations described by paragraphs (e)(2)(i) and (e)(2)(ii) of this section, Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Components' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed

amount shall not be charged without the requester's agreement.

(v) No DoD Component may require advance payment of any fee; i.e., payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Component.

(vi) Where a Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(vii) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the Component may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717, and confirmed with respective Finance and Accounting Offices.

(viii) After all work is completed on a request, and the documents are ready for release, Components may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of the billing). In the case of the latter, the provisions of paragraph (e)(2)(vii) of this section, apply.

(ix) When Components act under paragraphs (e)(2)(i) through (e)(2)(vii) of this section, the administrative time limits of the FOIA will begin only after

the Component has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate).

(x) Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request. Components may also charge search and review (in the case of commercial requesters) time in records located are determined to be exempt from disclosure. In practice, if the Component estimates that search charges are likely to exceed \$25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object or reformulating the request to meet his or her needs at a lower cost.

(3) *Commercial requesters.* Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought. (See § 286.4(h)).

(i) The term “commercial use” request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category. Components must determine the use to which a requester will put the documents requested. Moreover, where a Component has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Components should seek additional clarification before assigning the request to a specific category.

(ii) When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free

pages of reproduction of documents. Moreover, commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive determining criteria, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial use. Such situations must be addressed on a case-by-case basis.

(4) *Educational institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought (see § 286.4(h)). The term “educational institution” refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the criteria of paragraph (d) of this section, have been met.

(5) *Non-commercial scientific institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought (see § 286.4(h)). The term “non-commercial scientific institution” refers to an institution that is not operated on a “commercial” basis as defined in paragraph (e)(3) of this section, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. Fees shall be waived or reduced in the public interest if the criteria of paragraph (d) of this section, have been met.

(6) Components shall provide documents to requesters in paragraphs (e)(4) and (e)(5) of this section for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in these categories, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

(7) *Representatives of the news media.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see §286.4(h)). Fees shall be waived or reduced if the criteria of paragraph (d) of this section, have been met.

(i) The term “representative of the news media” refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of “freelance” journalists they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Components may also look to the past publication record of a requester in making this determination.

(ii) To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (e)(7)(i) of this section, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(iii) “Representative of the news media” does not include private libraries, private repositories of Government records, information vendors, data brokers or similar marketers of information whether to industries and businesses, or other entities.

(8) *All other requesters.* Components shall charge requesters who do not fit into any of the categories described in paragraphs (e)(3), (e)(4), (e)(5), or (e)(7) of this section, fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought (see §286.4(h)). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for duplication. Components are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined under paragraph (d)(1) of this section. (See also paragraph (e)(3)(ii) of this section.)

(f) *Aggregating requests.* Except for requests that are for a commercial use, a Component may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document of documents, solely in order to avoid payment of fees. When a Component reasonably believes that a requester or, on

rare occasions, a group of requesters acting on concert, is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, the Agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30 day period had been made to avoid fees. For requests made over a longer period however, such a presumption becomes harder to sustain and Components should have a solid basis for determining that aggregation is warranted in such cases. Components are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Components aggregate multiple requests on unrelated subjects from one requester.

(g) *Effect of the Debt Collection Act of 1982 (5 U.S.C. 5515 note).* The Debt Collection Act of 1982 (5 U.S.C. 5515 note) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in 31 U.S.C. 3717. Components should verify the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Components may submit the debt to respective Finance and Accounting Offices for collection pursuant to 5 U.S.C. 5515 note.

(h) *Computation of fees.* The fee schedule in this subpart shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized. The appro-

priate fee category of the requester shall be applied before computing fees.

(i) *Refunds.* In the event that a Component discovers that it has overcharged a requester or a requester has overpaid, the Component shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the Component.

§ 286.29 Collection of fees and fee rates.

(a) *Collection of fees.* Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the DoD Component, or the Component has determined that the fee will be in excess of \$250 (see § 286.28(e)).

(b) *Search time—(1) Manual search.*

Type	Grade	Hourly Rate
Clerical	E1-E9/GS1-GS8	\$20.00
Professional	O1-O6/GS9-GS15	44.00
Executive	ES1-ES6/O7-O10	75.00
Contractor .....	.....	44.00

(2) *Computer search.* Fee assessments for computer search consists of two parts; individual time (hereafter referred to as human time), and machine time.

(i) *Human time.* Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms “programmer/operator” shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g. technician, administrative support, operator, programmer, database administrator, or action officer).

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(ii) *Machine time.* Machine time involves only direct costs of the Central Processing Unit (CPU), input/output devices, and memory capacity used in the actual computer configuration. Only this CPU rate shall be charged. No other machine related costs shall be charged. In situations where the capability does not exist to calculate CPU time, no machine costs can be passed on to the requester. When CPU calculations are not available, only human time costs shall be assessed to requesters. Should DoD Components lease computers, the services charged by the lessor shall not be passed to the requester under the FOIA.

(c) *Duplication.*

Type	Cost per Page (cents)
Pre-Printed material	02
Office copy	15
Microfiche	25
Computer copies (tapes, discs or printouts).	Actual cost of duplicating the tape, disc or printout (includes operator's time and cost of the medium)

(d) *Review time (in the case of commercial requesters).*

Type	Grade	Hourly Rate
Clerical	E1-E9/GS1-GS8	\$20.00
Professional	O1-O6/GS9-GS15	44.00
Executive	ES1-ES6/O7-O10	75.00
Contractor .....	.....	44.00

(e) *Audiovisual documentary materials.* Search costs are computed as for any other record. Duplication cost is 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.

(f) *Other records.* Direct search and duplication cost for any record not described in this section shall be computed in the manner described for audiovisual documentary material.

(g) *Costs for special services.* Complying with requests for special services is at the discretion of the Components. Neither the FOIA, nor its fee structure cover these kinds of services. Therefore, Components may recover the costs of special services requested by the requester after agreement has been obtained in writing from the re-

quester to pay for one or more of the following services:

(1) Certifying that records are true copies.

(2) Sending records by special methods such as express mail, etc.

[63 FR 65420, Nov. 25, 1998, as amended at 67 FR 31128, May 9, 2002]

§ 286.30 Collection of fees and fee rates for technical data.

(a) *Fees for technical data.* Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays all reasonable costs attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. DoD Components shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under §286.29 of this subpart for other types of information released under the FOIA.

(b) *Waiver.* Components shall waive the payment of costs required in paragraph (a) of this section, which are greater than the costs that would be

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required for release of this same information under §286.29 of this subpart if:

(1) The request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Components may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

(2) The release of technical data is requested in order to comply with the terms of an international agreement; or

(3) The Component determines in accordance with §286.28(d)(1), that such a waiver is in the interest of the United States.

(c) *Fee rates*—(1) *Search time*—(i) *Manual search: clerical*.

Type	Grade	Hourly rate
Clerical	E9/GS8 and below	\$13.25
(Minimum Charge).	.....	8.30

(ii) *Manual search: professional and executive* (To be established at actual hourly rate prior to search. A minimum charge will be established at ½ hourly rates).

(2) Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale in paragraph (c)(1)(i) of this section) for the computer operator and/or programmer determining how to conduct, and subsequently executing the search will be recorded as part of the computer search. See §286.29(b)(2) for further details regarding computer search.

(3) *Duplication*.

Type	Cost
Aerial photograph, maps, specifications, permits, charts, blueprints, and other technical engineering documents	\$2.50

Type	Cost
Engineering data (microfilm):	
(i) Aperture cards:	
(A) Silver duplicate negative, per card .....	.75
When key punched and verified, per card .....	.85
(B) Diazo duplicate negative, per card .....	.65
When key punched and verified, per card .....	.75
(ii) 35mm roll film, per frame .....	.50
(iii) 16mm roll film, per frame .....	.45
(iv) Paper prints (engineering drawings), each ..	1.50
(v) Paper reprints of microfilm indices, each .....	.10

(4) *Review time*—(i) *Clerical*.

Type	Grade	Hourly rate (\$)
Clerical	E9/GS8 and below	13.25
(Minimum Charge).	.....	8.30

(ii) *Professional and executive* (To be established at actual hourly rate prior to review. A minimum charge will be established at ½ hourly rates).

(d) *Other technical data records*. Charges for any additional services not specifically provided in paragraph (c) of this section, consistent with Volume 11A of DoD 7000.14-R, shall be made by Components at the following rates:

- (1) Minimum charge for office copy (up to six images) \$3.50
- (2) Each additional image10
- (3) Each typewritten page 3.50
- (4) Certification and validation with seal, each 5.20
- (5) Hand-drawn plots and sketches, each hour or fraction thereof 12.00

Subpart G—Reports

§ 286.33 Reports control.

(a) *General*. (1) The Annual Freedom of Information Act Report is mandated by the statute and reported on a fiscal year basis. Due to the magnitude of the requested statistics and the need to ensure accuracy of reporting, DoD Components shall track this data as requests are processed. This will also facilitate a quick and accurate compilation of statistics. DoD Components shall forward their report to the Directorate for Freedom of Information and Security Review no later than November 30 following the fiscal year's close. It may be submitted electronically and via hard copy accompanied by a computer diskette. In turn, DoD will produce a consolidated report for submission to the Attorney General, and

ensure that a copy of the DoD consolidated report is placed on the Internet for public access.

(2) Existing DoD standards and registered data elements are to be utilized to the greatest extent possible in accordance with the provisions of DoD Manual 8320.1-M,¹² “Data Administration Procedures.”

(3) The reporting requirement outlined in this subpart is assigned Report Control Symbol DD-DA&M(A)1365, Freedom of Information Act Report to Congress.

(b) *Annual Report.* The current edition of DD Form 2564 shall be used to submit component input. DD Form 2564 is available on the Internet at <http://www.defenseink.mil/pubs/> under Regulations and Forms. Instructions for completion follow:

(1) *Item 1: Initial request determinations.* Please note that initial Privacy Act requests which are also processed as initial FOIA requests are reported here. They will also be reported as “Privacy Act requests” on the Annual Privacy Act Report. See §286.4(m), Relationship between the FOIA and the Privacy Act (PA).

(i) *Total requests processed.* Enter the total number of initial FOIA requests responded to (completed) during the fiscal year. Since more than one action frequently is taken on a completed case, total actions (see (b)(1)(vi) of this section) the sum of Items (b)(1)(ii) through (b)(1)(v) of this section, may exceed total requests processed (See appendix E of this part for form layout.)

(ii) *Granted in full.* Enter the total number of initial FOIA requests responded to that were granted in full during the fiscal year. (This may include requests granted by your office, yet still requiring action by another office.)

(iii) *Denied in part.* Enter the total number of initial FOIA requests responded to and denied in part based on one or more of the FOIA exemptions. (Do not report “other reason responses” as a partial denial here, unless a FOIA exemption is used also.)

(iv) *Denied in full.* Enter the total number of initial FOIA requests re-

sponded to and denied in full based on one or more of the FOIA exemptions. (Do not report “other reason responses” as denials here, unless a FOIA exemption is used also.)

(v) *“Other reason” responses.* Enter the total number of initial FOIA requests in which you were unable to provide all or part of the requested information based on an “other reason” response. Paragraph (b)(2)(ii) of this section explains the nine possible “other reasons.”

(vi) *Total actions.* Enter the total number of FOIA actions taken during the fiscal year. This number will be the sum of (b)(1)(ii) through (b)(1)(v) of this section. Total actions must be equal to or greater than the number of total requests processed (paragraph (b)(1)(i) of this section).

(2) *Item 2: Initial request exemptions and other reasons—(i) Exemptions invoked on initial request determinations.* Enter the number of times an exemption was claimed for each request that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of (b)(1)(iii) and (b)(1)(iv) of this section. The (b)(7) exemption is reported by subcategories identified in paragraphs (b)(2)(i)(A) through (b)(2)(i)(F) of this section:

- (A) Interfere with enforcement;
- (B) Fair trial right;
- (C) Invasion of privacy;
- (D) Protect confidential source;
- (E) Disclose techniques; and
- (F) Endanger life or safety.

(ii) *“Other reasons” cited on initial determinations.* Identify the “other reason” response cited when responding to a FOIA request and enter the number of times each was claimed.

(A) *No records.* Enter the number of times a reasonable search of files failed to identify records responsive to subject request.

(B) *Referrals.* Enter the number of times a request was referred to another DoD Component or Federal Agency for action.

(C) *Request withdrawn.* Enter the number of times a request and/or appeal was withdrawn by a requester. (For appeals, report number in Item 4b

¹² See footnote 1 to §286.1(a).

on the report form. (See appendix E of this part.)

(D) *Fee-related reason.* Requester is unwilling to pay the fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with a fee estimate.

(E) *Records not reasonably described.* Enter the number of times a FOIA request could not be acted upon since the record had not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.

(F) *Not a proper FOIA request for some other reason.* Enter the number of times the requester has failed unreasonably to comply with procedural requirements, other than fee-related (described in paragraph (b)(2)(ii)(D) of this section), imposed by this part or a DoD Component's supplementing regulation.

(G) *Not an agency record.* Enter the number of times a requester was provided a response indicating the requested information was not a record within the meaning of the FOIA and this part.

(H) *Duplicate request.* Record number of duplicate requests closed for that reason (e.g., request for the same information by the same requester). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.

(I) *Other (specify).* Any other reason a requester does not comply with published rules, other than those reasons outlined in paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(H) of this section.

(J) *Total.* Enter the sum of paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(I) of this section in the block provided on the form. This number will be equal to or greater than the number in paragraph (b)(1)(v) of this section since more than one reason may be claimed for each "other reason" response.

(iii) *(b)(3) statutes invoked on initial determinations.* Identify the number of times you have used a specific statute to support each (b)(3) exemption. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been

upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the acts invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 2a on the report form.

(3) *Item 3: Appeal determinations.* Please note that Privacy Act appeals which are also processed as FOIA appeals are reported here. They will also be reported as "Privacy Act appeals" on the Annual Privacy Act Report. See § 286.4(m), Relationship Between the FOIA and the Privacy Act (PA).

(i) *Total appeal responses.* Enter the total number of FOIA appeals responded to (completed) during the fiscal year.

(ii) *Granted in full.* Enter the total number of FOIA appeals responded to and granted in full during the year.

(iii) *Denied in part.* Enter the total number of FOIA appeals responded to and denied in part based on one or more of the FOIA exemptions. (Do not report "other reason responses" as a partial denial here, unless a FOIA exemption is used also.)

(iv) *Denied in Full.* Enter the total number of FOIA appeals responded to and denied in full based on one or more of the FOIA exemptions. (Do not report "other reason responses" as denials here, unless a FOIA exemption is used also.)

(v) *"Other reason" responses.* Enter the total number of FOIA appeals in which you were unable to provide the requested information based on an "other reason" response (as outlined in "other reasons" in paragraph (b)(2)(ii) of this section).

(vi) *Total actions.* Enter the total number of FOIA appeal actions taken during the fiscal year. This number will be the sum of paragraphs (b)(3)(ii) through (b)(3)(v) of this section, and should be equal to or greater than the number of total appeal responses, paragraph (b)(3)(i) of this section.

(4) *Item 4: Appeal exemptions and other reasons—(i) Exemptions invoked on appeal determinations.* Enter the number of times an exemption was claimed for each appeal that was denied in full or

in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of paragraphs (b)(3)(iii) and (b)(3)(iv) of this section. Note that the (b)(7) exemption is reported by subcategories identified in paragraphs (b)(4)(i)(A) through (b)(4)(i)(F) of this section:

- (A) Interfere with enforcement;
- (B) Fair trial right;
- (C) Invasion of privacy;
- (D) Protect confidential source;
- (E) Disclose techniques; and
- (F) Endanger life or safety.

(ii) *“Other reasons” cited on appeal determinations.* Identify the “other reason” response cited when responding to a FOIA appeal and enter the number of times each was claimed. See paragraph (b)(2)(ii) of this section for description of “other reasons.” This number may be equal to or possibly greater than the number in paragraph (b)(3)(v) of this section since more than one reason may be claimed for each “other reason” response.

(iii) *(b)(3) statutes invoked on appeal determinations.* Identify the number of times a specific statute has been used to support each (b)(3) exemption identified in item 4a on the report form (appendix E of this part). List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute’s use. Ensure citation to the specific sections of the statute invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 4a on the report form.

(5) *Item 5: Number and median age of initial cases pending:* (i) Total initial cases pending:

(ii) *Beginning and ending report period:* Midnight, 2400 hours, September 30 of the Preceding Year—OR—0001 hours, October 1 is the beginning of the report period. Midnight, 2400 hours, is the close of the reporting period.

(iii) *Median age of initial requests pending:* Report the median age in days (including holidays and weekends) of initial requests pending.

(iv) *Examples of median calculation.* (A) If given five cases aged 10, 25, 35, 65, and 100 days from date of receipt as of the previous September 30th, the total requests pending is five (5). The median age (days) of open requests is the middle, not average value, in this set of numbers (10, 25, 35, 65, and 100), 35 (the middle value in the set).

(B) If given six pending cases, aged 10, 20, 30, 50, 120, and 200 days from date of receipt, as of the previous September 30th, the total requests pending is six (6). The median age (days) of open requests 40 days (the mean [average] of the two middle numbers in the set, in this case the average of middle values 30 and 50).

(v) *Accuracy of calculations.* Components must ensure the accuracy of calculations. As backup, the raw data used to perform calculations should be recorded and preserved. This will enable recalculation of median (and mean values) as necessary. Components may require subordinate elements to forward raw data, as deemed necessary and appropriate.

(vi) *Average.* If a Component believes that “average” (mean) processing time is a better measure of performance, then report “averages” (means) as well as median values (e.g., with data reflected and plainly labeled on plain bond as an attachment to the report). However, “average” (mean) values will not be included in the consolidated DoD report unless all Components report it.

(6) *Item 6: Number of initial requests received during the fiscal year.* Enter the total number of initial FOIA requests received during the reporting period (fiscal year being reported).

(7) *Item 7: Types of requests processed and median age.* Information is reported for three types of initial requests completed during the reporting period: Simple; Complex; and Expedited Processing. The following items of information are reported for these requests:

(i) *Total number of initial requests.* Enter the total number of initial requests processed [completed] during the reporting period (fiscal year) by type (Simple, Complex and Expedited Processing) in the appropriate row on the form.

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(ii) *Median age (days)*. Enter the median number of days [calendar days including holidays and weekends] required to process each type of case (Simple, Complex and Expedited Processing) during the period in the appropriate row on the form.

(iii) *Example*. Given seven initial requests, multitrack—simple completed during the fiscal year, aged 10, 25, 35, 65, 79, 90 and 400 days when completed. The total number of requests completed was seven (7). The median age (days) of completed requests is 65, the middle value in the set.

(8) *Item 8: Fees collected from the public*. Enter the total amount of fees collected from the public during the fiscal year. This includes search, review and reproduction costs only.

(9) *Item 9: FOIA program costs—(i) Number of full time staff*. Enter the number of personnel your agency had dedicated to working FOIA full time during the fiscal year. This will be expressed in work-years (manyears). For example: “5.1, 3.2, 1.0, 6.5, et al.” A sample calculation follows:

Employee	Number (months worked)	Work-years	Note
SMITH, Jane	6	0.5	Hired full time at middle of fiscal year.
PUBLIC, John Q	4	.34	Dedicated to full time FOIA processing last quarter of fiscal year.
BROWN, Tom	12	1.0	Worked FOIA full time all fiscal year.
Total	22	1.84	

(ii) *Number of part time staff*: Enter the number of personnel your agency had dedicated to working FOIA part time during the fiscal year. This will

be expressed in work-years (manyears). For example: “5.1, 3.2, 1.0, 6.5, et al.” A sample calculation follows:

Employee	Number (hours worked)	Work-years	Note
PUBLIC, John Q	200	.1	Amount of time devoted to part time FOIA processing before becoming full time FOIA processor in previous example.
WHITE, Sally	400	.2	Processed FOIA's part time while working as paralegal in General Counsel's Office.
PETERS, Ron	1,000	.5	Part time employee dedicated to FOIA processing.
Total: ¹ 1,600/2,000			

¹ Hours (hours worked in a year) equals 0.8 work-years.

(iii) *Estimated litigation cost*: Report your best estimate of litigation costs for the FY. Include all direct and indirect expenses associated with FOIA litigation in U.S. District Courts, U.S. Circuit Courts of Appeals, and the U.S. Supreme Court.

(iv) *Total program cost*: Report the total cost of FOIA program operation within your agency. Include your litigation costs in this total. While you do not have to report detailed cost information as in the past, you should be able to explain the technique by which you derived your agency's total cost figures if the need arises.

(A) Before the close of each fiscal year, the Directorate for Freedom of Information and Security Review

(DFOISR) will dispatch the latest OSD Composite Rate Chart for military personnel to DoD Components. This information may be used in computing military personnel costs.

(B) DoD Components should compute their civilian personnel costs using rates from local Office of Personnel Management (OPM) Salary Tables and shall add 16% for benefits.

(C) Data captured on DD Form 2086, Record of Freedom of Information (FOI) Processing Cost and DD Form 2086-1, Record of Freedom of Information (FOI) Processing Cost for Technical Data, shall be summarized and used in computing total costs.

(D) An overhead rate of 25% shall be added to all calculated costs for supervision, space, and administrative support.

(10) *Item 10: Authentication.* The official that approves the agency's report submission to DoD will sign and date; enter typed name and duty title; and provide both the agency's name and phone number for questions about the report.

(c) *Electronic publication.* The consolidated DoD Annual FOIA Program Report will be made available to the public in either paper or electronic format.

Subpart H—Education and Training

§ 286.36 Responsibility and purpose.

(a) *Responsibility.* The Head of each DoD Component is responsible for the establishment of educational and training programs on the provisions and requirements of this part. The educational programs should be targeted toward all members of the DoD Component, developing a general understanding and appreciation of the DoD FOIA Program; whereas, the training programs should be focused toward those personnel who are involved in the day-to-day processing of FOIA requests, and should provide a thorough understanding of the procedures outlined in this part.

(b) *Purpose.* The purpose of the educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD FOIA Program, thereby improving the interaction with members of the public and improving the public trust in the DoD.

(c) *Scope and principles.* Each Component shall design its FOIA educational and training programs to fit the particular requirements of personnel dependent upon their degree of involvement in the implementation of this part. The program should be designed to accomplish the following objectives:

(1) Familiarize personnel with the requirements of the FOIA and its implementation by this part.

(2) Instruct personnel, who act in FOIA matters, concerning the provisions of this part, advising them of the

legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.

(3) Provide for the procedural and legal guidance and instruction, as may be required, in the discharge of the responsibilities of initial denial and appellate authorities.

(4) Advise personnel of the penalties for noncompliance with the FOIA.

(d) *Implementation.* To ensure uniformity of interpretation, all major educational and training programs concerning the implementation of this part should be coordinated with the Director, Freedom of Information and Security Review.

(e) *Uniformity of legal interpretation.* In accordance with DoD Directive 5400.7, the DoD Office of the General Counsel shall ensure uniformity in the legal position and interpretation of the DoD FOIA Program.

APPENDIX A TO PART 286—COMBATANT COMMANDS—PROCESSING PROCEDURES FOR FOIA APPEALS

AP1.1. General

AP1.1.1. In accordance with DoD Directive 5400.7¹ and this part, the Combatant Commands are placed under the jurisdiction of the Office of the Secretary of Defense, instead of the administering Military Department, only for the purpose of administering the Freedom of Information Act (FOIA) Program. This policy represents an exception to the policies in DoD Directive 5100.3.²

AP1.1.2. The policy change in AP1.1.1. of this appendix authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 and DoD Instruction 5400.10³ and to forward directly to the Director, Freedom of Information and Security Review, all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

AP1.2. Responsibilities of Commands

Combatant Commanders in Chief shall:

AP1.2.1. Designate the officials authorized to deny initial FOIA requests for records.

AP1.2.2. Designate an office as the point-of-contact for FOIA matters.

¹Copy may be viewed via internet at <http://web7.whs.osd.mil/corres.htm>.

²See footnote 1 to paragraph AP1.1.1. of this appendix.

³See footnote 1 to paragraph AP1.1.1. of this appendix.

AP1.2.3. Refer FOIA cases to the Director, Freedom of Information and Security Review, for review and evaluation when the issues raised are of unusual significance, precedent setting, or otherwise require special attention or guidance.

AP1.2.4. Consult with other OSD and DoD Components that may have a significant interest in the requested record prior to a final determination. Coordination with Agencies outside of the Department of Defense, if required, is authorized.

AP1.2.5. Coordinate proposed denials of records with the appropriate Combatant Command's Office of the Staff Judge Advocate.

AP1.2.6. Answer any request for a record within 20 working days of receipt. The requesters shall be notified that his request has been granted or denied. In unusual circumstances, such notification may state that additional time, not to exceed 10 working days, is required to make a determination.

AP1.2.7. Provide to the Director, Freedom of Information and Security Review when the request for a record is denied in whole or in part, a copy of the response to the requester or the requester's representative, and any internal memoranda that provide background information or rationale for the denial.

AP1.2.8. State in the response that the decision to deny the release of the requested information, in whole or in part, may be appealed to the Director, Administration and Management and Washington Headquarters Services, Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington, DC 20301–1155.

AP1.2.9. Upon request, submit to Director, Administration and Management and Washington Headquarters Services a copy of the records that were denied. The Director, Administration and Management and Washington Headquarters Services shall make such requests when adjudicating appeals.

AP1.3. *Fees for FOIA Requests*

The fees charged for requested records shall be in accordance with subpart F of this part.

AP1.4. *Communications*

Excellent communication capabilities currently exist between the Director, Freedom of Information and Security Review and the Freedom of Information Act Offices of the Combatant Commands. This communication capability shall be used for FOIA cases that are time sensitive.

AP1.5. *Information Requirements*

AP1.5.1. The Combatant Commands shall submit to the Director, Freedom of Informa-

tion and Security Review, an annual report. The instructions for the report are outlined in subpart G of this part.

AP1.5.2. The annual reporting requirement contained in this part shall be submitted in duplicate to the Director, Freedom of Information and Security Review not later than each November 30. This reporting requirement has been assigned Report Control Symbol DD-DA&M(A) 1365 in accordance with DoD 8910.1–M.⁴

APPENDIX B TO PART 286—ADDRESSING FOIA REQUESTS

AP2.1. *General*

AP2.1.1. The Department of Defense includes the Office of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the Military Departments, the Combatant Commands, the Inspector General, the Defense Agencies, and the DoD Field Activities.

AP2.1.2. The Department of Defense does not have a central repository for DoD records. FOIA requests, therefore, should be addressed to the DoD Component that has custody of the record desired. In answering inquiries regarding FOIA requests, DoD personnel shall assist requesters in determining the correct DoD Component to address their requests. If there is uncertainty as to the ownership of the record desired, the requester shall be referred to the DoD Component that is most likely to have the record.

AP2.2. *Listing of DoD Component Addresses for FOIA Requests*

AP2.2.1. *Office of the Secretary of Defense and the Chairman of the Joint Chiefs of Staff.* Send all requests for records from the below listed offices to: Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington, DC 20301–1155.

Executive Secretariat

Under Secretary of Defense (Policy)

Assistant Secretary of Defense (International Security Affairs)

Assistant Secretary of Defense (Special Operations & Low Intensity Conflict)

Assistant Secretary of Defense (Strategy & Threat Reduction)

Deputy to the Under Secretary of Defense (Policy Support)

Director of Net Assessment

Defense Security Assistance Agency

Defense Technology Security Administration

Under Secretary of Defense (Acquisition & Technology)

Deputy Under Secretary of Defense (Logistics)

⁴See footnote 1 to paragraph AP1.1.1. of this appendix.

Office of the Secretary of Defense

Pt. 286, App. B

Deputy Under Secretary of Defense (Advanced Technology)
Deputy Under Secretary of Defense (Acquisition Reform)
Deputy Under Secretary of Defense (Environmental Security)
Deputy Under Secretary of Defense (International & Commercial Programs)
Deputy Under Secretary of Defense (Industrial Affairs & Installations)
Assistant to the Secretary of Defense (Nuclear, Chemical & Biological Defense Programs)
Director, Defense Research & Engineering
Director, Small & Disadvantaged Business Utilization
Director, Defense Procurement
Director, Test Systems Engineering & Evaluation
Director, Strategic & Tactical Systems
DoD Radiation Experiments Command Center
On-Site Inspection Agency
Under Secretary of Defense (Comptroller)
Director, Program Analysis and Evaluation
Under Secretary of Defense (Personnel & Readiness)
Assistant Secretary of Defense (Health Affairs)
Assistant Secretary of Defense (Legislative Affairs)
Assistant Secretary of Defense (Public Affairs)
Assistant Secretary of Defense (Command, Control, Communications & Intelligence)
Assistant Secretary of Defense (Reserve Affairs)
General Counsel, Department of Defense
Director, Operational Test and Evaluation
Assistant to the Secretary of Defense (Intelligence Oversight)
Director, Administration and Management
Special Assistant for Gulf War Illness
Defense Advanced Research Projects Agency
Ballistic Missile Defense Organization
Defense Systems Management College
National Defense University
Armed Forces Staff College
Department of Defense Dependents Schools
Uniformed Services University of the Health Sciences
Armed Forces Radiology Research Institute
Washington Headquarters Services

AP2.2.2. *Department of the Army.* Army records may be requested from those Army officials who are listed in 32 CFR 518. Send requests to the Department of the Army, Freedom of Information and Privacy Acts Office, TAPC-PDR-PF, 7798 Cissna Road, Suite 205, Springfield, VA 22150-3166, for records of the Headquarters, U.S. Army, or if there is uncertainty as to which Army activity may have the records.

AP2.2.3. *Department of the Navy.* Navy and Marine Corps records may be requested from any Navy or Marine Corps activity by addressing a letter to the Commanding Officer

and clearly indicating that it is a FOIA request. Send requests to Chief of Naval Operations, N09B30, 2000 Navy Pentagon, Washington, DC 20350-2000, for records of the Headquarters, Department of the Navy, and to Commandant of the Marine Corps, (ARAD), Headquarters U.S. Marine Corps, 2 Navy Annex, Washington, DC 20380-1775 for records of the U.S. Marine Corps, or if there is uncertainty as to which Navy or Marine activities may have the records.

AP2.2.4. *Department of the Air Force.* Air Force records may be requested from the commander of any Air Force installation, major command, or field operating agency (ATTN: FOIA Office). For Air Force records of Headquarters, United States Air Force, or if there is uncertainty as to which Air Force activity may have the records, send requests to Department of the Air Force, 11CS/SCSR(FOIA), 1000 Air Force Pentagon, Washington, DC 20330-1000.

AP2.2.5. *Defense Contract Audit Agency (DCAA).* DCAA records may be requested from any of its regional offices or from its Headquarters. Requesters should send FOIA requests to the Defense Contract Audit Agency, ATTN: CMR, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219, for records of its headquarters or if there is uncertainty as to which DCAA region may have the records sought.

AP2.2.6. *Defense Information Systems Agency (DISA).* DISA records may be requested from any DISA field activity or from its Headquarters. Requesters should send FOIA requests to Defense Information Systems Agency, Regulatory/General Counsel, 701 South Courthouse Road, Arlington, VA 22204-2199.

AP2.2.7. *Defense Intelligence Agency (DIA).* FOIA requests for DIA records may be addressed to Defense Intelligence Agency, ATTN: SVI-1, Washington, DC 20340-5100.

AP2.2.8. *Defense Security Service (DSS).* All FOIA requests for DSS records should be sent to the Defense Security Service, Office of FOIA and Privacy V0020, 1340 Braddock Place, Alexandria, VA 22314-1651.

AP2.2.9. *Defense Logistics Agency (DLA).* DLA records may be requested from its headquarters or from any of its field activities. Requesters should send FOIA requests to Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Ft. Belvoir, VA 22060-6221.

AP2.2.10. *National Imagery and Mapping Agency (NIMA).* FOIA requests for NIMA records may be sent to the National Imagery and Mapping Agency, General Counsels Office, GCM, mail Stop D-10, 4600 Sangamore Road, Bethesda, MD 20816-5003.

AP2.2.11. *Defense Special Weapons Agency (DSWA).* FOIA requests for DSWA records may be sent to the Defense Special Weapons Agency, Public Affairs Office, Room 113, 6801 Telegraph Road, Alexandria, VA 22310-3398.

AP2.2.12. *National Security Agency (NSA)*. FOIA requests for NSA records may be sent to the National Security Agency/Central Security Service, FOIA/PA Services, N5P5, 9800 Savage Road, Suite 6248, Fort George G. Meade, MD 20755-6248.

AP2.2.13. *Inspector General of the Department of Defense (IG, DoD)*. FOIA requests for IG, DoD records may be sent to the Inspector General of the Department of Defense, Chief FOIA/PA Office, 400 Army Navy Drive, Room 405, Arlington, VA 22202-2884.

AP2.2.14. *Defense Finance and Accounting Service (DFAS)*. DFAS records may be requested from any of its regional offices or from its Headquarters. Requesters should send FOIA requests to Defense Finance and Accounting Service, Directorate for External Services, Crystal Mall 3, Room 416, Arlington, VA 22240-5291, for records of its Headquarters, or if there is uncertainty as to which DFAS region may have the records sought.

AP2.2.15. *National Reconnaissance Office (NRO)*. FOIA requests for NRO records may be sent to the National Reconnaissance Office, Information Access and Release Center, Attn: FOIA Officer, 14675 Lee Road, Chantilly, VA 20151-1715.

AP2.3. *Other Addresses*. Although the below organizations are OSD and Chairman of the Joint Chiefs of Staff Components for the purposes of the FOIA, requests may be sent directly to the addresses indicated.

AP2.3.1. *DoD TRICARE Management Activity*. Director, TRICARE Management Activity, 16401 East Centretech Parkway, Aurora, CO 80011-9043.

AP2.3.2. *Chairman, Armed Services Board of Contract Appeals (ASBCA)*. Chairman, Armed Services Board of Contract Appeals, Skyline Six Rm 703, 5109 Leesburg Pike, Falls Church, VA 22041-3208.

AP2.3.3. *U.S. Central Command*. Commander-in-Chief, U.S. Central Command, CCJ1 AGR, MacDill Air Force Base, FL 33608-7001.

AP2.3.4. *U.S. European Command*. Commander-in-Chief, Headquarters, U.S. Euro-

pean Command/ECJ1-AA(FOIA) Unit 30400 Box 1000, APO AE 09128-4209.

AP2.3.5. *U.S. Southern Command*. Commander-in-Chief, U.S. Southern Command, SCJ1-A, 3511 NW 91st Avenue, Miami, FL 33172-1217.

AP2.3.6. *U.S. Pacific Command*. Commander-in-Chief, U.S. Pacific Command, USPACOM FOIA Coordinator (J042), Administrative Support Division, Joint Secretariat, Box 28, Camp H. M. Smith, HI 96861-5025.

AP2.3.7. *U.S. Special Operations Command*. Commander-in-Chief, U.S. Special Operations Command, Chief, Command Information Management Branch, ATTN: SOJ6-SI, 7701 Tampa Point Blvd., MacDill Air Force Base, FL 33621-5323.

AP2.3.8. *U.S. Atlantic Command*. Commander-in-Chief, U.S. Atlantic Command, Code J02P, Norfolk, VA 23511-5100.

AP2.3.9. *U.S. Space Command*. Commander-in-Chief, U.S. Space Command, Command Records Manager/FOIA/PA Officer, 150 Vandenberg Street, Suite 1105, Peterson Air Force Base, CO 80914-5400.

AP2.3.10. *U.S. Transportation Command*. Commander-in-Chief, U.S. Transportation Command, ATTN: TCJ1-1F, 508 Scott Drive, Scott Air Force Base, IL 62225-5357.

AP2.3.11. *U.S. Strategic Command*. Commander-in-Chief, U.S. Strategic Command, Attn: J0734, 901 SAC Blvd., Suite 1E5, Offutt Air Force Base, NE 68113-6073.

AP2.4. *National Guard Bureau*

FOIA requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau, ATTN: NGB-ADM, Room 2C363, 2500 Army Pentagon, Washington, DC 20310-2500.

AP2.5. *Miscellaneous*

If there is uncertainty as to which DoD Component may have the DoD record sought, the requester may address a Freedom of Information request to the Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington, DC 20301-1155.

APPENDIX C TO PART 286—DD FORM 2086, "RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST"

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST				REPORT CONTROL SYMBOL	
<i>Please read instructions on back before completing form.</i>				DA&M(A)1365	
1. REQUEST NUMBER 98-F-8888		2. TYPE OF REQUEST (X one)		3. DATE COMPLETED (YYYYMMDD) 19980701	
		<input checked="" type="checkbox"/> a. INITIAL <input type="checkbox"/> b. APPEAL			
4. CLERICAL HOURS (E-9/GS-8 and below)			TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)
a. SEARCH			1.00	X \$12.00 =	12.00
b. REVIEW/EXCISING			2.00		24.00
c. CORRESPONDENCE AND FORMS PREPARATION			1.00		12.00
d. OTHER ACTIVITY			2.00		24.00
5. PROFESSIONAL HOURS (O-1 - O-6/GS-9 - GS-15)			TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)
a. SEARCH			2.00	X \$25.00 =	50.00
b. REVIEW/EXCISING			1.00		25.00
c. COORDINATION/APPROVAL/DENIAL			1.00		25.00
d. OTHER ACTIVITY			0.00		0.00
6. EXECUTIVE HOURS (O-7 - GS-16/ES 1 and above)			TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)
a. SEARCH			0.00	X \$45.00 =	0.00
b. REVIEW/EXCISING			0.00		0.00
c. COORDINATION/APPROVAL/DENIAL			0.50		22.50
7. COMPUTER SEARCH			TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)
a. MACHINE HOURS			0.00	X 0.00 =	0.00
b. PROGRAMMER/OPERATOR TIME					
(1) Clerical			1.00		12.00
(2) Professional			1.00	25.00	25.00
8. OFFICE COPY REPRODUCTION			NUMBER (1)	RATE (2)	COST (3)
a. PAGES REPRODUCED			450	X .15 =	67.50
9. MICROFICHE REPRODUCTION			NUMBER (1)	RATE (2)	COST (3)
a. MICROFICHE REPRODUCED			0	X .25 =	0.00
10. PRINTED RECORDS			TOTAL PAGES (1)	RATE (2)	COST (3)
a. FORMS			0	X .02 =	0.00
b. PUBLICATIONS			156		3.12
c. REPORTS			45		0.90
11. COMPUTER COPY			NUMBER (1)	ACTUAL COST (2)	COST (3)
a. TAPE			0	X 0.00 =	0.00
b. PRINTOUT			0		0.00
12. AUDIOVISUAL MATERIALS			NUMBER (1)	ACTUAL COST (2)	COST (3)
a. MATERIALS REPRODUCED			0	X 0.00 =	0.00
13. FOR FOI OFFICE USE ONLY					
a. SEARCH FEES PAID		\$99.00	f. TOTAL COLLECTABLE COSTS		\$219.52
b. REVIEW FEES PAID		\$49.00	g. TOTAL PROCESSING COSTS		\$303.02
c. COPY FEES PAID		\$71.52	h. TOTAL CHARGED		\$219.52
d. TOTAL PAID		\$219.52	i. FEES WAIVED/REDUCED (X one)		Yes <input checked="" type="checkbox"/> No
e. DATE PAID (YYYYMMDD)		19980801	See Chapter 6, Fee Schedule, DoD 5400.7-R, to determine appropriate assessment of fees.		

INSTRUCTIONS FOR COMPLETING DD FORM 2086

This form is used to record costs associated with the processing of a Freedom of Information request.

<p>1. REQUEST NUMBER - First two digits will express Calendar Year followed by dash (-) and Component's request number, i.e., 97-001.</p> <p>2. TYPE OF REQUEST - Mark the appropriate block to indicate initial request or appeal of a denial.</p> <p>3. DATE COMPLETED - Enter year, month and day, i.e., 19970621.</p> <p>4. CLERICAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:</p> <p style="padding-left: 20px;">Search - Time spent in locating from the files the requested information.</p> <p style="padding-left: 20px;">Review/Excising - Time spent in reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered.</p> <p style="padding-left: 20px;">Correspondence and Forms Preparation - Time spent in preparing the necessary correspondence and forms to answer the request.</p> <p style="padding-left: 20px;">Other Activity - Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.</p> <p style="padding-left: 20px;">- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.</p> <p>5. PROFESSIONAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:</p> <p style="padding-left: 20px;">Search/Review/Excising, and Other Activity - See explanation above.</p> <p style="padding-left: 20px;">Coordination/Approval/Denial - Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.</p> <p style="padding-left: 20px;">- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.</p> <p>6. EXECUTIVE HOURS - For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:</p> <p style="padding-left: 20px;">Search/Review/Excising - See explanation above.</p> <p style="padding-left: 20px;">Coordination/Approval/Denial - See explanation above.</p> <p style="padding-left: 20px;">- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.</p> <p>7. COMPUTER SEARCH - When the amount of government-owned (not leased) computer processing machine time required to complete a search is known, and accurate cost information for operation on an hourly basis is available, enter the time used and the hourly rate. Then, calculate the total cost which is fully chargeable to the requester.</p> <p style="padding-left: 20px;">- Programmer and operator costs are calculated using the same method as in Items 4 and 5. This cost is also fully chargeable to requesters as computer search time.</p>	<p>8. OFFICE COPY REPRODUCTION - Enter the number of pages reproduced.</p> <p style="padding-left: 20px;">- Multiply by the rate per copy and enter cost figures.</p> <p>9. MICROFICHE REPRODUCTION - Enter the number of microfiche copies reproduced.</p> <p style="padding-left: 20px;">- Multiply by the rate per copy and enter cost figures.</p> <p>10. PRINTED RECORDS - Enter total pages in each category. The categories are:</p> <p style="padding-left: 20px;">Forms (Include any type of printed forms)</p> <p style="padding-left: 20px;">Publications (Include any type of bound document, such as directives, regulations, studies, etc.)</p> <p style="padding-left: 20px;">Reports (Include any type of memorandum, staff action paper, etc.)</p> <p style="padding-left: 20px;">- Multiply the total number of pages in each category by the rate per page and enter cost figures.</p> <p>11. COMPUTER COPY - Enter the total number of tapes and/or printouts.</p> <p style="padding-left: 20px;">- Multiply by the actual cost per tape or printout and enter cost figures.</p> <p>12. AUDIOVISUAL MATERIALS - Duplication cost is the actual cost of reproducing the material, including the wages of the person doing the work.</p> <p>13. FOR FOI OFFICE USE ONLY -</p> <p style="padding-left: 20px;">Search Fees Paid - Enter total search fees paid by the requester.</p> <p style="padding-left: 20px;">Review Fees Paid - Enter total review fees paid by the requester.</p> <p style="padding-left: 20px;">Copy Fees Paid - Enter the total of copy fees paid by the requester.</p> <p style="padding-left: 20px;">Total Paid - Add search fees paid and copy fees paid. Enter total in the total paid block.</p> <p style="padding-left: 20px;">Date Paid - Enter year, month, and day, i.e., 19971024, the fee payment was received.</p> <p style="padding-left: 20px;">Total Collectable Costs - Add the blocks in the cost column and enter total in the total collectable cost block. Apply the appropriate waiver for the category of requester prior to inserting the final figure. Further discussion of chargeable fees is contained in Chapter VI of DoD Regulation 5400.7-R.</p> <p style="padding-left: 20px;">Total Processing Costs - Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.</p> <p style="padding-left: 20px;">Total Charged - Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.</p> <p style="padding-left: 20px;">Fees Waived/Reduced - Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "Yes" block or the "No" block.</p>
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DD FORM 2086 (BACK), AUG 1998

APPENDIX D TO PART 286—DD FORM 2086-1, "RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST FOR TECHNICAL DATA"

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST FOR TECHNICAL DATA				REPORT CONTROL SYMBOL	
<i>Please read instructions on back before completing form.</i>				DA&M(A) 1365	
1. REQUEST NUMBER 98-F-9999	2. TYPE OF REQUEST (X one)		3. DATE COMPLETED (YYYYMMDD)		
	<input checked="" type="checkbox"/> a. INITIAL	b. APPEAL	19980701		
4. CLERICAL HOURS (E-9/GS-8 and below)					
	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)	
a. SEARCH	2.00	X	\$13.25	*	
b. REVIEW/EXCISING	1.00			=	26.50
c. CORRESPONDENCE AND FORMS PREPARATION	0.00			*	13.25
d. OTHER ACTIVITY	0.00			*	0.00
e. MINIMUM CHARGE	3.00			*	0.00
			\$ 8.30	24.90	
5. PROFESSIONAL HOURS (O-1 - O-6/GS-9 - GS/GM-15)					
	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)	
a. SEARCH	1.00	X	ACTUAL HOURLY RATE	*	
b. REVIEW/EXCISING	1.50			=	25.00
c. COORDINATION/APPROVAL/DENIAL	0.25			*	37.50
d. OTHER ACTIVITY	0.00			*	6.25
e. MINIMUM CHARGE	2.75			*	0.00
			1/2 HOURLY RATE	34.38	
6. EXECUTIVE HOURS (O-7/GM-16/ES 1 and above)					
	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)	
a. SEARCH	0.00	X	ACTUAL HOURLY RATE	*	
b. REVIEW/EXCISING	0.00			=	0.00
c. COORDINATION/APPROVAL/DENIAL	0.25			*	0.00
d. MINIMUM CHARGE	0.25			*	25.00
			1/2 HOURLY RATE	12.50	
7. COMPUTER SEARCH					
	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)	
a. MACHINE HOURS	0.00	X	0.00	*	
b. PROGRAMMER/OPERATOR TIME				=	0.00
- Clerical	1.00			*	13.25
- Professional	1.00	*	25.00		
			ACTUAL OR MINIMUM	25.00	
8. REPRODUCTION					
	NUMBER (1)		RATE (2)	COST (3)	
a. AERIAL PHOTOGRAPHS, SPECIFICATIONS, PERMITS, CHARTS, BLUEPRINTS, AND OTHER TECHNICAL DOCUMENTS	1	X	\$ 2.50	*	
b. ENGINEERING DATA (Microfilm)				=	2.50
- Aperture cards				*	0.00
-- Silver duplicate negative, per card	0			*	0.00
-- When keypunched and verified, per card	0			*	0.00
-- Diazo duplicate negative, per card	1			*	0.65
-- When keypunched and verified, per card	0			*	0.00
- 35 mm roll film, per frame	0			*	0.00
- 16 mm roll film, per frame	0			*	0.00
- Paper prints (engineering drawings), each	0			*	0.00
- Paper reprints of microfilm indices, each	0	*	0.00		
c. AUDIOVISUAL MATERIALS (insert actual cost in block (2))	25		1.24	*	
				31.00	
d. OTHER TECHNICAL DATA RECORDS					
Charges for any additional services not specifically provided above shall be made by components at the following rates:					
- Minimum charge for office copy (up to six images)	1		\$ 3.50	*	
- Each additional image	30		.10	*	
- Each typewritten page	0	X	3.50	=	
- Certification and validation with seal, each	0		*	0.00	
- Hand-drawn plots and sketches, each hour or fraction thereof	0.00		5.20	*	
			12.00	*	
* Chargeable to all requesters.					
9. FOR FOI OFFICE USE ONLY					
a. SEARCH FEES PAID	89.75	f. TOTAL COLLECTABLE		181.15	
b. REVIEW FEES PAID	50.75	g. TOTAL PROCESSING		212.40	
c. COPY FEES PAID	40.65	h. TOTAL CHARGED		181.15	
d. TOTAL PAID	181.15	i. FEES WAIVED/REDUCED (X one)		YES <input type="checkbox"/> X <input checked="" type="checkbox"/> NO <input type="checkbox"/>	
e. DATE PAID (YYYYMMDD)	19980801				

INSTRUCTIONS FOR COMPLETING DD FORM 2086-1 <i>This form is used to record costs associated with the processing of a Freedom of Information request or technical data.</i>	
<p>1. REQUEST NUMBER - First two digits will express Calendar Year followed by dash (-) and Component's request number, i.e., 87-001.</p> <p>2. TYPE OF REQUEST - Mark the appropriate block to indicate initial request or appeal of a denial.</p> <p>3. DATE COMPLETED - Enter year, month and day, i.e., 19970621.</p> <p>4. CLERICAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:</p> <p style="margin-left: 20px;">Search - Time spent in locating from the files the requested information.</p> <p style="margin-left: 20px;">Review/Excising - Time spent reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered.</p> <p style="margin-left: 20px;">Correspondence and Forms Preparation - Time spent in preparing the necessary correspondence and forms to answer the request.</p> <p style="margin-left: 20px;">Other Activity - Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.</p> <p style="margin-left: 20px;">- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Both search and review costs are chargeable to the requester.</p> <p>5. PROFESSIONAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:</p> <p style="margin-left: 20px;">Search/Review/Excising, and Other Activity - See explanation above.</p> <p style="margin-left: 20px;">Coordination/Approval/Denial - Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.</p> <p style="margin-left: 20px;">- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Both search and review costs are chargeable to the requester.</p>	<p>6. EXECUTIVE HOURS - For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:</p> <p style="margin-left: 20px;">Search/Review/Excising - See explanation above.</p> <p style="margin-left: 20px;">Coordination/Approval/Denial - See explanation above.</p> <p style="margin-left: 20px;">- Multiply the time in the total hours column in each category by the hourly rate and enter the cost figures for each category. Review costs are chargeable to the requester.</p> <p>7. COMPUTER SEARCH - When the amount of government-owned (not leased) computer processing machine time is known, and accurate cost information for operation on an hourly basis is available, enter the time used and the hourly rate. Then, calculate the total cost which is fully chargeable to the requester.</p> <p style="margin-left: 20px;">- Programmer and operator costs are calculated using the same method as in Items 4 and 5. This cost is also fully chargeable to requesters as computer search time.</p> <p>8. REPRODUCTION - Enter the number of pages or items reproduced.</p> <p style="margin-left: 20px;">- Multiply by the rate per copy and enter cost figures. The entire cost is chargeable to the requester. Reproduction cost for audiovisual material is the actual cost of reproducing the material, including the wage of the person doing the work.</p> <p>9. FOR FOI OFFICE USE ONLY -</p> <p style="margin-left: 20px;">Search Fees Paid - Enter total search fees paid by the requester.</p> <p style="margin-left: 20px;">Review Fees Paid - Enter total review fees paid by the requester.</p> <p style="margin-left: 20px;">Copy Fees Paid - Enter the total of copy fees paid by the requester.</p> <p style="margin-left: 20px;">Total Paid - Add search fees paid and copy fees paid. Enter total in the total paid block.</p> <p style="margin-left: 20px;">Date Paid - Enter year, month, and day, i.e., 19971024, the fee payment was received.</p> <p style="margin-left: 20px;">Total Collectable Costs - Add the blocks in the cost column marked with an asterisk and enter total in the total collectable cost block. Only search, reproduction and printed records are chargeable to the requester. Further discussion of collectable costs is contained in Chapter VI, Section 3, DoD Regulation 5400.7-R.</p> <p style="margin-left: 20px;">Total Processing Costs - Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.</p> <p style="margin-left: 20px;">Total Charged - Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.</p> <p style="margin-left: 20px;">Fees Waived/Reduced - Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "YES" block or an "X" in the "NO" block.</p>

DD FORM 2086-1 (BACK), JUL 1997

APPENDIX E TO PART 286—DD FORM 2564, "ANNUAL REPORT FREEDOM OF INFORMATION ACT"

ANNUAL REPORT FREEDOM OF INFORMATION ACT										REPORT CONTROL SYMBOL DD-DA&M(A)1365
1. INITIAL REQUEST DETERMINATIONS										
a. TOTAL REQUESTS		b. GRANTED IN FULL		c. DENIED IN PART		d. DENIED IN FULL		e. "OTHER REASONS"		f. TOTAL ACTIONS
30		24		3		1		6		34
2a. EXEMPTIONS INVOKED ON INITIAL REQUEST DETERMINATIONS										
(b) (1)	(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)	(b) (7)	(b) (8)	(b) (9)	(b) (10)
3	0	0	2	1	0	0	0	0	0	0
(b) (7)(A)	(b) (7)(B)	(b) (7)(C)	(b) (7)(D)	(b) (7)(E)	(b) (7)(F)	(b) (7)(G)	(b) (7)(H)	(b) (7)(I)	(b) (7)(J)	(b) (7)(K)
0	0	0	1	1	1	0	0	0	0	0
2b. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS										
1	2	3	4	5	6	7	8	9	TOTAL	
1	4	1	1	0	0	0	0	0	0	7
2c. STATUTES CITED ON INITIAL REQUEST (b)(3) EXEMPTIONS										
(1)(b)(3) STATUTE CLAIMED		NUMBER OF INSTANCES		COURT UPHELD? (Yes or No)		CONCISE DESCRIPTION OF MATERIAL WITHHELD				
10 USC §130 10 USC §424		1 1		Y N		Unclassified technical data regarding design of reentry vehicles (RV) Organizational data for protected organizations				
						S A M P L E				
3. APPEAL DETERMINATIONS										
a. TOTAL REQUESTS		b. GRANTED IN FULL		c. DENIED IN PART		d. DENIED IN FULL		e. "OTHER REASONS"		f. TOTAL ACTIONS
4		0		3		1		0		4

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4a. EXEMPTIONS INVOKED ON APPEAL DETERMINATIONS									
(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)				
	4	0	1	0	0				
(b) (7)(A)	(b) (7)(B)	(b) (7)(C)	(b) (7)(D)	(b) (7)(E)	(b) (7)(F)	(b) (8)	(b) (9)		
0	0	0	0	0	0	0	0	0	
4b. "OTHER REASONS" CITED ON APPEAL DETERMINATIONS									
1	2	3	4	5	6	7	8	9	TOTAL
0	0	0	0	0	0	0	0	0	0
4c. STATUTES CITED ON APPEAL (b)(3) EXEMPTIONS									
(1) (b)(3) STATUTE CLAIMED			NUMBER OF INSTANCES	COURT UPHELD? (Yes or No)	CONCISE DESCRIPTION OF MATERIAL WITHHELD				
10 USC §424			1	N	Organizational data for a protected organization.				
5. NUMBER AND MEDIAN AGE OF INITIAL CASES PENDING									
a. TOTAL INITIAL REQUESTS PENDING (open)				(1) AS OF BEGINNING REPORT PERIOD	(2) AS OF END REPORT PERIOD				
				15	12				
b. MEDIAN AGE (in days) OF OPEN INITIAL REQUESTS									
				62	60				
6. TOTAL NUMBER OF INITIAL REQUESTS RECEIVED DURING THE FISCAL YEAR									
7. TYPES OF INITIAL REQUESTS PROCESSED AND MEDIAN AGE									
a. SIMPLE					TOTAL NUMBER OF CASES	MEDIAN AGE (Days)			
					28	57			
b. COMPLEX					1	348			
c. EXPEDITED PROCESSING					1	13			
8. TOTAL AMOUNT COLLECTED FROM THE PUBLIC									
9. PROGRAM COST									
a. NUMBER OF FULL TIME STAFF	1				10. AUTHENTICATION				
b. NUMBER OF PART TIME STAFF	1.6				a. SIGNATURE (Approving Official)				
c. ESTIMATED LITIGATION COST	\$ 2,495				b. TYPED NAME (Last, First, Middle Initial) A. G. CAMPBELL, Colonel, U. S. Army				
d. TOTAL PROGRAM COST	\$ 121,345				c. DUTY TITLE Asst Chief of Staff, J-1				
					d. AGENCY NAME United States Antarctic Command (USARCCOM)				
					e. TELEPHONE NUMBER (Include Area Code) 77-100-555-1212, DSN 314-999				

S A M P L E

APPENDIX F TO PART 286—DOD FREEDOM OF INFORMATION ACT PROGRAM COMPONENTS

Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff/Combatant Com-

mands, Defense Agencies, and the DoD Field Activities
 Department of the Army
 Department of the Navy
 Department of the Air Force
 Defense Information Systems Agency
 Defense Contract Audit Agency

Office of the Secretary of Defense

§ 286h.3

Defense Intelligence Agency
Defense Security Service
Defense Logistics Agency
National Imagery and Mapping Agency
Defense Special Weapons Agency
National Security Agency
Office of the Inspector General, Department
of Defense
Defense Finance and Accounting Service
National Reconnaissance Office

PART 286h—RELEASE OF ACQUISITION-RELATED INFORMATION

Sec.

- 286h.1 Purpose.
- 286h.2 Applicability and scope.
- 286h.3 Policy.
- 286h.4 Responsibilities.

AUTHORITY: Pub. L. 101-189.

SOURCE: 55 FR 28614, July 12, 1990, unless otherwise noted.

§ 286h.1 Purpose.

This part sets forth Department of Defense (DoD) policy for the release of acquisition-related information.

§ 286h.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman, Joint Chiefs of Staff and Joint Staff (CJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

(b) This part is issued pursuant to section 822 of Public Law 101-189, which requires the Department of Defense to prescribe a single uniform regulation for dissemination of, and access to, acquisition information.

§ 286h.3 Policy.

(a) *General.* It is the Department of Defense's policy to make the maximum amount of acquisition-related information available to the public, and to respond promptly to specific requests from the public for such information, except for the information identified in paragraph (b) of this section, for which release is restricted.

(b) *Information for which release is restricted.* The information identified below may be released only as set forth herein.

(1) *Release subject to statutory restrictions.* This information may be released

only in accordance with the applicable statutory requirements. Once the statutory requirements have been satisfied, the information may be released unless it falls within one of the categories described in the following paragraphs, in which case the policies governing release of information within those categories shall be followed.

(2) *Classified information.* (i) Any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or under the control of the United States Government, and which, for national security purposes, must be protected against unauthorized disclosure and is so designated or marked with the appropriate classification.

(ii) Release, access, and dissemination of classified information shall be made through existing security channels in accordance with DoD 5220.22-R;¹ DoD 5220.22-M;² and DoD 5200.1-R,³ which are implementing publications for safeguarding classified information release, access, and dissemination to United States and foreign concerns.

(3) *Contractor bid or proposal information.* (i) This is information prepared by or on behalf of an offeror and submitted to the Government as a part of or in support of the offeror's bid or proposal to enter into a contract with the Government, the disclosure of which would place the offeror at a competitive disadvantage or jeopardize the integrity or the successful completion of the procurement. Contractor bid or proposal information includes cost or pricing data, profit data, overhead and direct labor rates, and manufacturing processes and techniques. Contractor bid or proposal information does not include information that is available to the public.

(ii)(A) *Sealed bids.* (1) Prior to bid opening, no release or disclosure of contractor bid information shall be made to anyone other than those who are involved in the evaluation of the

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

²Copies may be obtained, at cost, from the Government Printing Office, ATTN: Superintendent of Documents, Washington, DC 20402.

³See footnote 1 to § 286h.3(b)(2)(ii).

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bids or to other individuals authorized by the Head of the DoD Component, or his or her designee.

(2) After contract award, contractor bid information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by Federal Acquisition Regulation (FAR) 52.215–12 or release is not otherwise restricted by law.

(3) *Negotiated procurements.* Prior to contract award, no release or disclosure of contractor proposal information shall be made to anyone other than those who are involved in the evaluation of the proposals or the source selection or to other individuals authorized by the Head of the DoD Component, or his or her designee. DoD Components shall adopt procedures in accordance with FAR 15.413 to protect against release or disclosure of contractor proposal information. After contract award, contractor proposal information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by FAR 15.509 or FAR 52.215–12 or release is not otherwise restricted by law.

(4) *Source selection information.* (i) This is information prepared or developed for use by the Government in connection with the selection of a bid or proposal for the award of a contract. Only the following information, including copies or extracts thereof, is source selection information:

(A) Bid prices submitted in response to a Government solicitation for sealed bids or lists of such bid prices (applicable prior to bid opening only);

(B) Proposed costs or prices submitted in response to a Government solicitation prior to award of the contract, a list of proposed costs or prices;

(C) Source selection plans;

(D) Technical evaluation plans;

(E) Technical evaluations of competing proposals;

(F) Cost or price evaluations of competing proposals;

(G) Competitive range determinations;

(H) Rankings of competitors;

(I) The reports and evaluations of source selection boards, advisory councils, or the source selection authority (SSA); and

(J) Any other information which:

(1) If disclosed, would give an offeror a competitive advantage or jeopardize the integrity or successful completion of the procurement; and

(2) Is marked with the legend “Source Selection Information.”

(ii) *Release of or access to source selection information (SSI)—(A) Access to SSI.* The SSA (including the contracting officer when the contracting officer is the SSA) shall restrict access to source selection information to only those Government employees directly involved in the source selection process or to those individuals who have been authorized by the Head of the DoD Component, or his or her designee, to have access to such information. If the contracting officer or the SSA have not been appointed, the Head of the DoD Component, or his or her designee, shall assure access to such information is properly restricted. Employees supervising or managing employees directly involved in the source selection process are not themselves by virtue of their positions directly involved in the source selection process.

(B) *Release of SSI—(1) Prior to contract award.* Source selection information shall not be released prior to contract award unless the Head of the DoD Component, or his or her designee, determines that release is in the public interest and would not jeopardize the integrity or successful completion of the procurement. The information to be released shall only be released by the contracting officer. The contracting officer shall make release in a manner that does not provide any potential offeror with a competitive advantage.

(2) *After contract award.* The need to protect source selection information generally ends with contract award. The contracting officer may release, or authorize the release of, any source selection information related to that contract award except: Source selection information specifically developed or prepared for use with more than one

solicitation when there is a continuing need to protect that information; unless otherwise permitted by law, source selection information containing contractor data or extracts thereof which are protected by law; information which would reveal the relative merits or technical standing of the competitors or the evaluation scoring; and any pre-decisional or other information not subject to release under the Freedom of Information Act. Debriefings to unsuccessful offerors shall be conducted in accordance with FAR 15.1003 and Defense Federal Acquisition Regulation Supplement (DFARS) 215.1003(a).

(5) *Planning, programming, and budgetary information.* (i) Planning, Programming, and Budgeting System (PPBS) documents and supporting data bases are not to be disclosed outside the Department of Defense (DoD) and other governmental agencies directly involved in the defense planning and resource allocation process (e.g., the Office of Management and Budget). PPBS papers and associated data set forth the details of proposed programs and plans. Access to this material by those not directly involved in the PPBS process undermines the confidentiality necessary for the Secretary and Deputy Secretary to obtain candid advice on the content of the defense program. Also, access to PPBS information by private firms seeking contracts with the Department may pose ethical, even criminal, problems for those involved and reduce effective competition in the contract awards process.

(ii)(A) Requests for exceptions to this limitation may be granted on a case-by-case basis to meet compelling needs, after coordination with the Office of General Counsel, by the Head of the OSD office responsible for the PPBS phase to which the document or data base pertains; the Under Secretary of Defense (Policy) for the planning phase; the Assistant Secretary of Defense (Program Analysis and Evaluation) for programming; and the Comptroller, DoD for budgeting. A list of the current major documents and data bases for each PPBS phase is in paragraph (B)(5)(11)(C) of this section; all other PPBS materials are also controlled under this policy.

(B) Disclosure of PPBS information to Congress and the General Accounting Office (GAO) is covered by statute and other procedures.

(C) Major PPBS Documents and Data Bases by Phase.

Planning Phase

(1) Defense Planning Guidance.

Programming Phase

(2) Fiscal Guidance (when separate from Defense Planning Guidance);

(3) Program Objective Memoranda (POM);

(4) POM Defense Program (formerly FYDP) documents (POM Defense Program, Procurement Annex, RDT&E Annex);

(5) Program Review Proposals;

(6) Issue Papers (aka, Major Issue Papers, Tier II Issue Papers, Cover Briefs);

(7) Proposed Military Department Program Reductions (or Program Offsets);

(8) Tentative Issue Decision Memoranda;

(9) Program Decision Memoranda;

Budgeting Phase

(10) Defense Program (formerly FYDP) documents for September and President's Budget Estimate submissions including Defense Program Procurement, RDT&E and Construction Annexes;

(11) Classified P-1, R-1 and C-1;

(12) Program Budget Decisions/Defense Management Review Decisions;

(13) Reports Generated by the Automated Budget Review System (BRS);

(14) DD Form 1414 Base for Programming;

(15) DD Form 1416 Report of Programs;

(16) Contract Award Reports;

(17) Congressional Data Sheets.

(iii) Contractor requests for information contained in the National Military Strategy Document (including annexes) and the Chairman's Program Assessment Document (including annexes and comments) shall be forwarded to the CJCS who shall determine on a case-by-case basis what information, if any, is releasable to the contractor.

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(6) *Documents that disclose the Government's negotiating position.* Documents that would disclose the government's negotiating position (such as pre-negotiation business clearances and positions and government cost estimates) or would adversely impact the government negotiating strategy shall not be released.

(7) *Drafts and working papers.* Drafts and working papers that would otherwise be releasable under paragraph 286h.3(a) shall not be released where their release would inhibit the development of agency positions, jeopardize the free exchange of information that is part of the deliberative process, or compromise the decision-making process.

(c) *Freedom of Information Act.* Where a request for information, the release of which is restricted under paragraph 286h.3(b) is made under the Freedom of Information Act, the request shall be forwarded to the appropriate official for disposition in accordance with DoD 5400.7-R.⁴ Requests for contractor bid or proposal information pursuant to the Freedom of Information Act shall be subject to subparagraph 5-207 a. of DoD 5400.7-R, which requires notice to a non-United States Government source of a record.

§ 286h.4 Responsibilities.

(a) The Under Secretary of Defense (Acquisition) shall be responsible for establishing uniform policies and procedures for the release of acquisition-related information.

(b) The Under Secretary of Defense (Policy), Assistant Secretary of Defense (Program Analysis and Evaluation) and Comptroller, DoD are responsible for adjudicating requests for access to Planning, Programming and Budgeting information pertaining to their respective phases of the PPB system.

(c) The Head of each DoD Component shall assure that procedures for the release of acquisition-related information are consistent with the policy contained in this Directive and shall not impose any additional restrictions on release of such information. These procedures shall specifically identify the

⁴See footnote 1 to § 286h.3(b)(2)(ii).

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individuals authorized to release and transmit acquisition-related information.

PART 287—DEFENSE INFORMATION SYSTEMS AGENCY FREEDOM OF INFORMATION ACT PROGRAM

Sec.

- 287.1 Purpose.
- 287.2 Applicability.
- 287.3 Authority.
- 287.4 Duties of the FOIA Officer.
- 287.5 Responsibilities.
- 287.6 Duties of the DITCO and the DTIC FOIA Officers.
- 287.7 Fees.
- 287.8 Appeal rights.
- 287.9 Reports.
- 287.10 Questions.
- 287.11 "For Official Use Only" Records.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 64 FR 67166, Dec. 1, 1999, unless otherwise noted.

§ 287.1 Purpose.

This part assigns responsibilities for the Freedom of Information Act (FOIA) Program for DISA.

§ 287.2 Applicability.

This part applies to DISA and the Office of the Manager, National Communications System (OMNCS).

§ 287.3 Authority.

This part is published in accordance with (IAW) the authority contained in 32 CFR part 286. It supplements 32 CFR part 286 to accommodate specific requirements of the DISA FOIA Program. However, 32 CFR part 286 takes precedence and shall be used for all issues not covered by this part.

§ 287.4 Duties of the FOIA officer.

The DISA FOIA Officer, located at DISA Headquarters, 701 S. Courthouse Road, Arlington, Virginia, is vested with the authority, within DISA, to release documentation for all requests of Agency records received by DISA directorates and field activities. The DISA FOIA Officer will:

- (a) Make the materials described in 32 CFR 286.7 available for public inspection and reproduction. (A current index of this material will be maintained in accordance with 32 CFR 286.8).

(b) Establish education and training programs for all DISA employees who contribute to the DISA FOIA Program.

(c) Respond to all requests for records from private persons IAW 32 CFR part 286 whether the requests are received directly by DISA Headquarters or by DISA field activities. Coordinate proposed releases with the General Counsel in any case in which the release is, or may be, controversial. Coordinate all proposed denials with the General Counsel.

(d) Be the DISA principal point of contact for coordination with the Directorate for Freedom of Information and Security Review (DFOISR) Washington Headquarters Services, reference FOIA issues.

(e) Ensure the cooperation of DISA with DFOISR in fulfilling the responsibilities of monitoring the FOIA Program.

(f) Coordinate cases of significance with DFOISR, after coordination with the General Counsel and with the approval of the Chief of Staff, when the issues raised are unusual, precedent setting, or otherwise require special attention or guidance.

(g) Advise DFOISR prior to the denial of a request or prior to an appeal when two or more DoD components are affected by the request for a particular record or when circumstances suggest a potential public controversy.

(h) Ensure completion of the annual reporting requirement contained in 32 CFR part 286.

§ 287.5 Responsibilities

(a) *Deputy Directors, Headquarters, DISA; Commanders and Chiefs of DISA Field Activities; and the Deputy Manager, NCS.* These individuals will furnish the FOIA Officer, when requested, with DISA documentary material, which qualifies as a record IAW 32 CFR part 286, for the purpose of responding to FOIA requests.

(b) *Chief of Staff.* The Chief of Staff will, on behalf of the Director, DISA, respond to the corrective or disciplinary action recommended by the Merit Systems Protection Board for arbitrary or capricious withholding of records requested, pursuant to the Freedom of Information Act, by military members or civilian employees of

DISA. (This will be coordinated with the General Counsel.)

(c) *General Counsel.* The General Counsel or, in his or her absence, the Deputy General Counsel, is vested with the authority to deny, in whole or in part, a FOIA request received by DISA. The General Counsel will:

(1) Make the decision to deny a record in whole or in part; to deny a fee category claim; to deny a request for waiver or reduction in fees; to deny a request to review an initial fee estimate; to deny a request for expedited processing; or to confirm that no records were located during the initial search IAW 5 U.S.C. 552, as supplemented by the guidance provided in 32 CFR part 286

(2) Inform the person denied the basis for the denial of the request and of his or her right to appeal the decision to the Director, DISA, via written correspondence.

(3) Review any appeal the public may consider adverse in nature and ensure that the basis for the determination by the Director, DISA, be in writing, state the reasons for the denial, and inform the requester of his or her right to a judicial review in the appropriate U.S. District Court.

(4) Arrange for the publication of this part in the FEDERAL REGISTER.

(d) *Chief, Legal Counsel, Defense Information Technology Contracting Organization (DITCO).* The Chief Legal Counsel, DITCO, or, in his or her absence, the Deputy Legal Counsel, DITCO, is vested with same authority and responsibilities, for DITCO, as stated in paragraph (c) of this section.

(e) *Administrator, Defense Technical Information Center (DTIC).* The Administrator, DTIC, is vested with the same authority and responsibilities, for DTIC, as stated in paragraph (c) of this section.

§ 287.6 Duties of the DITCO and the DTIC FOIA officers.

(a) *DITCO FOIA Officer.* The DITCO FOIA Officer, located at 2300 East Drive, Scott AFB, IL 62225, is vested with the authority, within DITCO, to release documentation for all requests of records received by DITCO and its field activities, as stated in § 287.4 (a), (b), and (c) and assist the DISA FOIA

§ 287.7

officer in carrying out the duties stated in § 287.4 (d) and (h).

(b) *DTIC FOIA Officer.* The DTIC FOIA Officer, located at 8725 John J. Kingman Road, Suite 0944, Ft. Belvoir, VA 22060, is vested with the authority, within DTIC, to release documentation for all requests of records within DTIC, as stated in § 287.4 (a), (b), and (c) and assist the DISA FOIA officer in carrying out the duties stated in § 287.4 (d) and (h).

§ 287.7 Fees.

Fees charged to the requester are contained in 32 CFR part 286.

§ 287.8 Appeal rights.

All appeals should be addressed to the Director, DISA, and be postmarked no later than 60 days after the date of the initial denial letter.

§ 287.9 Reports.

An annual report will be furnished to the FOIA Officer by the field activities by 15 October IAW 32 CFR part 286.

§ 287.10 Questions.

Questions on both the substance and procedures of the FOIA and the DISA implementation thereof should be addressed to the FOIA Officer by the most expeditious means possible, including telephone calls, faxes, and electronic mail. FOIA requests should be addressed as follows: Defense Information Systems Agency, 701 S. Courthouse Road, Arlington, VA 22204-2199, Attn: RGC. Calls should be made to (703) 607-6515. Faxed requests should be addressed to the FOIA Officer at (703) 607-4344. Electronic mail requests should be addressed to bergerr@ncr.disa.mil.

§ 287.11 “For Official Use Only” Records.

The designation “For Official Use Only” will be applied to documents and other material only as authorized by 32 CFR part 286 and DoD 5200.1-R.¹

¹Copies may be obtained via Internet at <http://web7.whs.osd.mil/corres.htm>.

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PART 290—DEFENSE CONTRACT AUDIT AGENCY (DCAA) FREEDOM OF INFORMATION ACT PROGRAM

Sec.	
290.1	Purpose.
290.2	Cancellation.
290.3	Applicability and scope.
290.4	Policy.
290.5	Definitions.
290.6	Responsibilities.
290.7	Procedures.
290.8	Fees.

APPENDIX A TO PART 290—DCAA’S ORGANIZATION AND MISSION

APPENDIX B TO PART 290—DCAA’S FOIA POINTS OF CONTACT

APPENDIX C TO PART 290—FOR OFFICIAL USE ONLY

APPENDIX D TO PART 290—AUDIT WORKING PAPERS

AUTHORITY: 5 U.S.C. 552.

SOURCE: 56 FR 49685, Oct. 1, 1991, unless otherwise noted.

§ 290.1 Purpose.

This part assigns responsibilities and establishes policies and procedures for a uniform DCAA Freedom of Information Act (FOIA) program pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. 552, as implemented by DoD Directive 5400.7¹ and DoD 5400.7-R.²

§ 290.2 Cancellation.

DCAA Regulation 5410.8, DCAA Freedom of Information Act (FOIA) Program, dated 17 May 1989; DCAAR 5200.1, Control and Protection of “For Official Use Only” Information, dated 12 November 1985; and DCAA HQ Instruction 5200.9, Physical Security of “For Official Use Only” Information within Headquarters, DCAA, dated 20 November 1974, are superseded.

§ 290.3 Applicability and scope.

This rule applies to all DCAA organizational elements, and is to govern written responses by DCAA officials for requests from members of the public for permission to examine, or to be provided with copies of DCAA records.

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

²See footnote 1 to § 290.1.

Office of the Secretary of Defense

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This rule also addresses Agency policies and procedures for handling "For Official Use Only" information, including Field Detachment sensitive information.

§ 290.4 Policy.

Agency policy and procedures are those cited in DoD 5400.7-R. In addition, DCAA will:

(a) Promote public trust by making the maximum amount of information available to the public, upon request, pertaining to the operation and activities of the Agency.

(b) Allow a requester to obtain records from the Agency that are available through other public information services without invoking the FOIA.

(c) Make available, under the procedures established by DCAAP 5410.14,³ those records that are requested by a member of the general public who cites the FOIA.

(d) Answer promptly all other requests for information and records under established procedures and practices.

[56 FR 49685, Oct. 1, 1991, as amended at 60 FR 35699, July 11, 1995; 64 FR 1130, Jan. 8, 1999]

§ 290.5 Definitions.

The terms used in this rule with the exception of the following are defined in DCAAP 5410.14.

(a) *Initial denial authorities (IDAs)*. The regional directors, and the Chief, Administrative Management Division, have been delegated the authority by the Director, DCAA, to make initial determinations as to the releasability of DCAA records to the public, including Defense contractors. This authority may not be redelegated.

(b) *Appellate authority*. The Assistant Director, Resources, or his designee.

(c) *Electronic data*. Electronic data are those records and information which are created, stored, and retrievable by electronic means. This does not include computer software, which is the tool by which to create, store, or retrieve electronic data.

³Copies may be obtained from the Defense Contract Audit Agency, Attn: CMO, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

(d) *FOIA request*. A written request for DCAA records, made by any person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes the FOIA, DoD 5400.7-R, DCAAR 5410.8,⁴ or regional instruction on the FOIA.

(e) *Administrative appeal*. A request by a member of the general public, made under the FOIA, asking the appellate authority to reverse an IDA decision to withhold all or part of a requested record or to deny a request for waiver or reduction of fees.

[56 FR 49685, Oct. 1, 1991, as amended at 64 FR 1130, Jan. 8, 1999]

§ 290.6 Responsibilities.

(a) *Headquarters*. (1) The Assistant Director, Resources is responsible for:

(i) The overall Agency-wide administration of the DCAA FOIA Program through the Chief, Administrative Management Division, Information and Privacy Advisor, to ensure compliance with the policies and procedures that govern the program.

(ii) Acting as the designee for the Director, DCAA, serving as the sole appellate authority for appeals to decisions of respective IDAs.

(iii) Advising the Assistant Secretary of Defense (Public Affairs) (ASD(PA)) of cases of public interest, particularly those on appeal, when the issues raised are unusual or precedent setting, matters of disagreement among DoD components, are of concern to agencies outside the Department of Defense, or may otherwise require special attention or guidance.

(iv) Advising the ASD(PA) and the Executive Officer, DCAA, concurrent with the denial of a request or an appeal, when circumstances suggest a news media interest.

(v) Conferring with the General Counsel; the Assistant Director, Operations; and the Assistant Director, Policy and Plans, on the desirability of reconsidering a final decision to deny a

⁴See footnote 3 to § 290.4(c).

record, if that decision becomes a matter of special concern because it involves either an issue of public concern or DoD-wide consequences.

(vi) Accomplishing program overview, in cooperation with the General Counsel, to ensure coordinated guidance to components, and to provide the means of assessing the overall conduct of the Agency's FOIA Program.

(vii) Responding to corrective action recommended by the Special Counsel of the Merit Systems Protection Board for arbitrary or capricious withholding of records by designated employees of the Agency.

(2) The Chief, Administrative Management Division (CM) is responsible for:

(i) Establishing, issuing, and updating policies for the DCAA FOIA Program; monitoring compliance with this rule; and providing policy guidance for the FOIA program.

(ii) Resolving conflicts that may arise regarding implementation of DCAA FOIA policy.

(iii) Designating an Agency FOIA Advisor, as a single point of contact, to coordinate on matters concerning Freedom of Information Act policy.

(3) The DCAA Information and Privacy Advisor, under the supervision and guidance of the Chief, Administrative Management Division is responsible for:

(i) Managing the DCAA FOIA Program in accordance with this rule, DCAAP 5410.14, applicable DCAA policies as well as DoD and Federal regulations.

(ii) Providing guidelines for managing, administering, and implementing the DCAA FOIA program. This would include issuing the DCAA FOIA rule, developing and conducting training for those individuals who implement the FOIA, and publishing in the FEDERAL REGISTER any instructions necessary for the administration of the FOIA program. This also includes serving as the informational point of contact for regional FOIA coordinators.

(iii) Maintaining and publishing DCAA Pamphlet 5410.14, "DCAA Freedom of Information Act Processing Guide".

(iv) Preparing the Annual Freedom of Information Report to Congress as required by DoD 5400.7-R.

(v) Establishing and maintaining a control system for assigning FOIA case numbers to FOIA requests received by Headquarters and regional offices.

(vi) Maintaining a record of FOIA requests received by Headquarters. This record is to contain the requester's identification, the date of the request, type of information requested, and type of information furnished. This record will be maintained and disposed of in accordance with DCAA records maintenance and disposition regulations and schedules.

(vii) Making available for public inspection and copying in an appropriate facility or facilities, in accordance with rules published in the FEDERAL REGISTER the records specified in paragraph (a)(2) of 5 U.S.C. 552, unless such records are published and copies are offered for sale. Maintain and make available for public inspection and copying current indices of these records.

(4) Heads of Principal Staff Elements are responsible for:

(i) Reviewing all regulations or other policy and guidance issuances for which they are the proponent to ensure consistency with the provisions of this rule.

(ii) Ensuring that the provisions of DCAAP 5410.14 and this rule are followed in processing requests for records.

(iii) Forwarding to the DCAA Information and Privacy Advisor, any FOIA requests received directly from a member of the public so that the request may be administratively controlled and processed.

(iv) Ensuring the prompt review of all FOIA requests, and when required, coordinating those requests with other organizational elements.

(v) Providing recommendations regarding the releasability of DCAA records to members of the public, along with the responsive documents.

(vi) Providing the appropriate documentation, along with a written justification for any denial, in whole or in part, of a request for records. Those portions to be excised should be bracketed in red pencil, and the specific exemption

or exemptions cited which provide the basis for denying the requested records.

(vii) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

(5) The General Counsel is responsible for:

(i) Ensuring uniformity is maintained in the legal position, and the interpretation of the Freedom of Information Act, DoD 5400.7-R, and this rule.

(ii) Consulting with General Counsel, DoD on final denials that are inconsistent with decisions of other DoD components, involving issues not previously resolved, or raise new or significant legal issues of potential significance to other Government agencies.

(iii) Providing advice and assistance to the Assistant Director, Resources; Regional Directors; and the Regional FOIA Coordinators, through the DCAA Information and Privacy Advisor, as required, in the discharge of their responsibilities.

(iv) Coordinating Freedom of Information Act litigation with the Department of Justice.

(v) Coordinating on Headquarters denials of initial requests and administrative appeals.

(vi) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

(6) The Executive Officer shall serve as the coordinator for the release of information to the news media.

(b) Each Regional Director is responsible for the overall management of the Freedom of Information Act program within his respective region. Under his direction, the Regional Resources Manager is responsible for the management and staff supervision of the program and for designating a regional FOIA Coordinator.

(1) Regional Directors are responsible for:

(i) Implementing and administering the Freedom of Information Act program throughout the region.

(ii) Making the initial determination pertaining to the releasability of DCAA records to members of the public. This authority cannot be delegated.

(iii) Delegating signature authority for FOIA correspondence which is considered only to be routine in nature, e.g., referrals and the release of information.

(iv) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

(2) FOIA Coordinators are responsible for:

(i) Issuing regional instructions that are consistent with the policies and procedures defined in DCAAP 5410.14 and this rule.

(ii) Conducting training on the FOIA program to the FAOs.

(iii) Submitting a DCAA Form 5410-4, "Freedom of Information Case Summary", to the DCAA Information and Privacy Advisor at the completion of each FOIA case to facilitate the preparation of the annual FOIA report to Congress. All case summaries must be submitted no later than October 10th for cases completed during the previous fiscal year.

(iv) Establishing and maintaining a control system to ensure proper accountability and processing of FOIA requests.

(v) Contacting the DCAA Information and Privacy Act Advisor for a FOIA case number upon receipt of a FOIA request.

(c) Managers, Field Audit Offices (FAOs) are responsible for:

(1) Overall management and administration of the FOIA program within organizations under their cognizance.

(2) Ensuring that the regional FOIA Coordinator promptly receives all incoming FOIA requests. Use of facsimile transmission is appropriate for all requests received directly by the FAO.

(3) Ensuring that documents are marked FOUO at the time of their creation if information contained within is considered exempt from disclosure.

[56 FR 49685, Oct. 1, 1991, as amended at 64 FR 1130, Jan. 8, 1999]

§ 290.7 Procedures.

(a) Procedures for processing material in accordance with the FOIA are outlined in DCAAP 5410.14. General provisions are outlined in the following paragraphs.

(b) *Requests for audit reports.* Audit reports prepared by DCAA are the property of and are prepared for the use of DoD contracting officers. As a result, their release should be at the sole discretion of the DoD contracting activity. Requesters seeking audit reports should send their requests directly to the DoD contracting activity to avoid administrative delay. Typically, requests for copies of DCAA audit reports may be identified by requesting those that relate to a specific contract number (e.g. DLA600-89-P0222). DoD contract numbers may be easily matched to the cognizant DoD contracting activity by referring to 48 CFR, “DoD FAR Supplement” Appendix G.

NOTE: Although DCAA can make a release determination on audit reports produced for non-DoD agencies, administrative procedure routinely dictates coordination with that agency prior to responding to the request. Requesters seeking expeditious processing should forward their requests directly to the cognizant contracting officer for processing.

(c) *Requests for audit working papers.* Audit working papers, as described in appendix D, may be sought occasionally in conjunction with an audit report or as an independent demand. Normally, the release of such records is entirely dependent on the releasability of the related audit report. (Note: The procedures for determining the releasability of audit reports is provided in general in the aforementioned paragraph and in more detail in DCAAP 5410.14). Since the content of audit working paper files can be quite diverse and often voluminous, FOIA Coordinators should work closely with the requester to ensure that the records produced are narrowly defined and entirely responsive to the requester’s needs.

(d) *Public inspection and copying.* Section (a)(2) of the Freedom of Information Act requires agencies to make available for public inspection and copying, final opinions made in the adjudication of cases, statements of policy not yet published in the FEDERAL REGISTER, and administrative manuals and instructions. This requirement is satisfied by the publication of DCAAI 5025.2,⁵ “DCAA Index of Publications”

and DCAAI 5025.13,⁶ “Index of DCAA Memorandums for Regional Directors”.

(e) *Requests for the examination or copies of records.* (1) Members of the public may make written requests for copies of DCAA records or for permission to examine such records during normal business hours. Such requests must be in writing and either explicitly or implicitly invoke the Freedom of Information Act, or this rule. These requests should be submitted directly to the appropriate DCAA organizational element listed in appendix B of this rule. If the appropriate DCAA organizational element is either unknown or cannot be ascertained, and the record is likely to be in the possession of DCAA, the request may be submitted to Defense Contract Audit Agency, Attn: CM, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

(2) When submitting requests, requesters should:

(i) Identify each record sought with sufficient detail to facilitate the location and easy access to the record requested. Information as to where the record originated, subject, date, number, or any other identifying particulars should be provided whenever possible. DCAA organizational elements receiving requests which do not reasonably describe the record requested will advise the requester accordingly. Generally, a record is not reasonably described unless the requester provides information permitting an organized, nonrandom search of DCAA files and/or information systems. In providing descriptions based on events, the requester must provide information which permits DCAA organizational elements to, at least, infer the specific record sought.

(ii) Identify all other Federal agencies subject to the provisions of the FOIA to which the request has been sent. This will reduce both processing and coordination time between agencies and redundant referrals.

(iii) Provide a statement of their willingness to pay assessable charges. The statement must include a specific monetary amount if the assessable fees are likely to exceed the fee waiver

⁵ See footnote 3 to § 290.4(c).

⁶ See footnote 3 to § 290.4(c).

threshold of \$15.00 or a specific justification for any waiver or reduction of fees sought based on public interest in release or disclosure. DCAA organizational elements will notify requesters of deficiencies in fee declarations, and provide them the opportunity to amend initial declarations. Determinations on the adequacy of requester fee declarations are not subject to appeal unless: The DCAA organizational element has denied a specific request for the assessment of fees under one of the established requester categories; or has denied a request for the waiver or reduction of fees in the public interest.

(3) When a DCAA organizational element has no records responsive to a request, the requester will be notified promptly that should he or she determine such request to be adverse in nature, he or she may exercise their appeal rights. In cases where the request has been misdirected and the DCAA organizational element is aware of the appropriate FOIA respondent, they shall refer the request to the appropriate DCAA organizational element or other Federal agency through FOIA channels, and notify the requester of the referral. The 20 working day period allowed for responding to requests will not begin until the DCAA organizational element having the responsive records receives a request complying with procedural requirements of this rule, including statements on the payment of fees.

(4) The provisions of the FOIA are intended for parties with private interests. Officials seeking documents or information on behalf of foreign governments, other Federal agencies, and state or local agencies should be encouraged to employ official channels. The release of records to individuals under the FOIA is a public release of information. DCAA organizational elements will consider FOIA requests from such officials as made in a private, rather than official capacity, and will make disclosure and fee determinations accordingly.

(f) *Referrals.* (1) Records originating in or based on information obtained from other Federal agencies subject to the FOIA may be referred to that agency. In processing FOIA requests for such records, DCAA elements, after co-

ordinating with the originating agency, may refer the request, along with a copy of the responsive records in its possession, to that agency for direct response. The requester is to be notified of the referral. However, if for investigative or intelligence purposes, the outside agency desires anonymity, FOIA Coordinators may only respond directly to the requester after coordination with the agency.

(2) Referral of audit reports. Audit reports prepared by DCAA are the property of and are prepared for the use of the DoD contracting officers. Their release is at the discretion of the DoD contracting activity. Therefore any FOIA request for audit reports prepared for DoD components should be referred to the cognizant DoD contracting activity and the requester notified of the referral. To avoid the delay associated with the referral process, requesters should be advised to send requests for audit reports directly to the cognizant DoD contracting activity. Requests for audit reports prepared for non-DoD agencies should be treated as requests for DCAA records.

(3) Referral of work papers. When a requester seeks workpapers, the cognizant contracting officer must furnish a notice of disposition to the appropriate activity pertaining to the releasability of the audit report. The notice of disposition will then be used to determine releasability of the workpapers. Details concerning the appropriate processing procedures may be found in DCAAP 5410.14.

(4) All other requests should be directed to the appropriate Regional Director, if known. When the location of the record is not known, the request should be directed to the DCAA Information and Privacy Advisor.

(5) Time limits. DCAA organizational elements are to respond promptly to requesters complying with the procedural requirements outlined in this rule. When a significant number of requests are being processed, e.g. 10 or more, the requests shall be completed in order of receipt. However, this does not preclude completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. Action may be expedited on a request regardless of its ranking

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within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of the FOIA Coordinator.

(i) Upon receipt of a properly submitted FOIA request, DCAA organizational elements should contact the DCAA Information and Privacy Advisor for a FOIA case number. IDAs should:

(A) Locate and assemble responsive records.

(B) Determine releasability under the provisions of this rule.

(C) Determine the appropriate fees to be charged and

(D) Advise the requester accordingly. Initial determinations on either the release or denial of records, and notice to requesters, must be provided within 20 working days following receipt of the request by the cognizant DCAA organizational element.

(ii) In certain cases, IDAs may need to exercise an extension to the normal 20 working day period cited above. IDAs are to notify the requester, within the initial 20 working day period, of the extension, the circumstances necessitating it, and the anticipated date of a determination. Approved extensions are not to exceed 10 working days, and all extensions should be indicated on DCAA Form 5410-4, section 6. Circumstances where such extensions may be approved include:

(A) The record(s) sought are geographically located at places other than the DC+AA organizational element processing the request.

(B) The request requires the collection and review of a substantial number of records.

(C) The disclosure determination requires consultation with another DCAA organizational element or other Federal agency with a substantial interest.

(iii) As an alternative to the previously mentioned, DCAA organizational elements may seek informal agreements with requesters for extensions in unusual circumstances when time limits become an issue in the response to the request.

(iv) Misdirected requests should be referred within 20 working days to the proper Federal agency or DCAA organi-

zational element through FOIA channels, and the requester notified of the referral. The 20 working day period allowed for responding to requests will not begin until the DCAA organizational element having the responsive records receives the request.

(6) Initial disclosure determinations.

(i) Initial determinations to make records available may only be made by those IDAs designated in this rule.

NOTE: Requests for audit reports should be directed to the cognizant contracting officer for release determination. (See § 290.7(b)).

When a decision is made to release records in response to a FOIA request, DCAA organizational elements will promptly make the records available to the requester. When the request is for the examination of releasable records, DCAA organizational elements will advise the requester when and where he/she may appear. Examinations will be held during normal business hours. If a record is not provided in response to a FOIA request, the IDA will advise the requester, in writing, of the rationale for not providing the record.

(ii) IDAs should consult the Executive Officer, prior to releasing records on matters considered newsworthy or when releasing records to media representatives. Copies of all media requests should be submitted to the Executive Officer.

(iii) The following reasons, other than the statutory exemptions cited in the FOIA, are provided for not releasing a record in response to a FOIA request.

(A) The request is transferred to another DoD component, or to another Federal agency.

(B) The Agency determines through knowledge of its files and reasonable search efforts that it neither controls nor otherwise possesses the requested record.

(C) A record has not been described with sufficient particularity to enable the Agency to locate it by conducting a reasonable search.

(D) The requester has failed unreasonably to comply with procedural requirements, including payment of fees, imposed by this rule.

(E) The request is withdrawn by the requester.

(F) The information requested is not a record within the meaning of the FOIA and this rule.

(7) Denials. (i) A record in the possession and control of DCAA may be withheld *only* when the record falls within one or more of the nine categories of records exempt from mandatory disclosure under the FOIA, and the use of discretionary authority to release the record is determined to be unwarranted. (Note: Since audit reports are prepared for the use of DoD contracting officers, their release is at the discretion of the DoD contracting activity. To facilitate an expeditious response, requesters should send their requests directly to the DoD contracting activity. (See §290.7(b)). The specific exemptions are detailed in DCAAP 5410.14.

(ii) Although exempt portions of records may be denied, nonexempt portions must be released to the requester when it can reasonably be assumed that the excised information could not be reconstructed. When a record is denied in whole, based on distortion or reconstruction potential, the IDA will prepare a response advising the requester of the determination, and the response will specifically state that it is not possible to reasonably segregate meaningful portions for release.

(iii) When a request for a record is denied in whole or in part, the IDA will inform the requester in writing of the specific exemption(s) on which the denial is based and explain the determination in sufficient detail to permit the requester to make a decision concerning appeal. The determination will also inform the requester of his/her appeal rights. All appeals should be made within 60 calendar days from the date of the initial denial, contain the reasons for the requester's disagreement with the determination, and be addressed to the Assistant Director, Resources, Defense Contract Audit Agency, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

(iv) Records or portions of records which have been previously released become part of the public domain, and cannot be denied thereafter.

(8) Administrative Appeals of Denials. (i) If the IDA declines to provide a record because he/she considers it exempt, that decision may be appealed by the requester, in writing, to the Assistant Director, Resources, DCAA.

NOTE: Normally, IDAs would not issue denials for requests for audit reports. The denial authority for such records generally rests with the cognizant DoD contracting activity. (See §290.7(b)). The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a request for waiver or reduction of fees. A "no record" finding may be appealed which allows the requester to challenge the adequacy of the Agency's search. Records which are denied should be retained during the time permitted for appeal.

(ii) IDAs shall advise the requester that an appeal should be filed so that it reaches the designated appellate authority no later than 60 calendar days after the date of the initial denial letter. At the conclusion of this period, except for good cause shown as to why the appeal was not timely, the case may be considered closed; however, such closure does not preclude the requester from filing litigation for denial of his appeal. If the requester has been provided a series of determinations for a single request, the time for appeal will begin on the date of the last determination of the series. Records which are denied shall be retained for a period of six years to meet the statute of limitations of claims requirement.

(iii) Final determinations normally shall be made within 20 working days of receipt of an appropriately submitted appeal.

(9) Delay in responding to an appeal. (i) When additional time is required to respond to the appeal, the final determination may be delayed for the number of working days (not to exceed 10 days) that were not utilized as additional time for responding to the initial request. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances previously described, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive

response. DCAA shall continue to process the case expeditiously, whether or not the requester seeks a court order for release of the records, but a copy of any response provided subsequent to filing a complaint shall be forwarded to the Department of Justice through the DCAA General Counsel.

(ii) When the Assistant Director, Resources, DCAA, makes a determination to release all or a portion of the records on appeal, the records shall be made available promptly to the requester after compliance with procedural requirements. The final denial of a request will be made in writing, explain the exemption(s) invoked, advise that the material being denied does not contain meaningful portions that are reasonably segregable, and also advise the requester of the right of judicial review.

(10) Judicial action. A requester will be deemed to have exhausted his administrative remedies after he has been denied the requested record by the Assistant Director, Resources, or when the Agency fails to respond to his request within the time limits prescribed by the FOIA and this rule. The requester may then seek an order from a U.S. District Court in the district in which he resides or has his principal place of business; the district in which the record is situated; or in the U.S. District Court for the District of Columbia, enjoining the Agency from withholding the record and ordering its production.

[56 FR 49685, Oct. 1, 1991, as amended at 56 FR 56932, Nov. 7, 1991; 57 FR 15254, Apr. 27, 1992; 60 FR 35699, July 11, 1995; 64 FR 1131, Jan. 8, 1999]

§ 290.8 Fees.

(a) Fees shall be determined in accordance with the DoD fee schedule, which is detailed in DCAAP 5410.14. Fees reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. Fees are subject to limitations on the nature of assessable fees based on the category of the requester; statutory and automatic waivers based on the category determination and cost of routine collection; and either the

waiver or reduction of fees when disclosure serves the public interest.

(b) Fees will not be charged when direct costs for a FOIA request are \$15.00 or less, the automatic fee waiver threshold, regardless of category.

(c) *Fee assessment.* In order to be as responsive as possible to FOIA requests, DCAA organizational elements should adhere to the following when assessing fees:

(1) Evaluate each request to determine the requester category and adequacy of the fee declaration. An adequate fee declaration requires a willingness by the requester to pay fees in an amount equal to, or greater than, the assessable charges for the request.

(2) Provide requesters an opportunity to amend inadequate fee declarations and provide estimates of prospective charges when required. When a requester fails to provide an adequate fee declaration within 30 days after notification of a deficiency, the request for information will be considered withdrawn.

(3) A requester's claims for assessment of fees under a specific category will be carefully considered. The IDA may require a requester to substantiate a claim for assessment under a claimed category. In the absence of requester claims, the IDA will determine the category into which a requester falls, basing its determination on all available information.

(4) When a DCAA organizational element disagrees with a requester claim for fee assessment under a specific category, the IDA will provide the requester with written determination indicating the following:

(i) The requester should furnish additional justification to warrant the category claimed.

(ii) A search for responsive records will not be initiated until agreement has been attained relative to the category of the requester.

(iii) If further category information has not been received within a reasonable period of time, the component will render a final category determination; and

(iv) The determination may be appealed to the Assistant Director, Resources, within 60 calendar days of the date of the determination.

(d) When a DCAA organizational element estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, they shall notify the requester of the likely cost and obtain satisfactory assurance of full payment. This fee declaration generally applies when the requester has a history of prompt payments, however, an advance payment may be required of an amount up to the full estimated charges in the case of requesters with no history of payment.

(e) Where a requester has previously failed to pay a fee charged within 30 calendar days from the date of billing, DCAA organizational elements may require the requester to pay the full amount due, plus any applicable interest or demonstrate satisfaction of the debt, and to make an advance payment of the full amount of estimated fees, before processing begins on a new or pending request.

(f) After all work is completed on a request, and the documents are ready for release, DCAA organizational elements may request payment before forwarding the documents if there is no payment history on the requester, or if the requester has previously failed to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of billing). Documents may not be held for release pending payment from requesters with a history of prompt payment.

(g) The administrative time limits for responding to a request will begin only after the DCAA organizational element has received an adequate declaration from the requester stating a willingness to pay fees, and satisfaction that all outstanding debts have been paid.

(h) DCAA organizational elements can bill requesters for services provided in responding to a request. Payment of fees may be made by personal check, bank draft drawn on a U.S. bank, or by U.S. Postal money order. All payments of this type are to be made payable to the U.S. Treasurer.

(i) *Aggregating requests.* Occasionally, a requester may file multiple requests at the same time, each seeking portions of a document or documents, solely to avoid payments of fees. When

a DCAA organizational element reasonably believes that a requester is attempting to do so, the DCAA organizational element may aggregate such requests and charge accordingly. One element to be considered would be the time period in which the requests have occurred. In no case may DCAA organizational elements aggregate multiple requests on unrelated subjects from one requester.

(j) *Fee waivers.* (1) The determination to waive fees is at the discretion of IDAs designated in this rule. When direct costs for a FOIA request total the automatic fee waiver threshold, or is less, fees shall be waived automatically for all requesters, regardless of category.

(2) Documents will be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters, when the IDA determines that a waiver or reduction of fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations of DCAA, and is not primarily in the commercial interest of the requester. DCAA organizational elements should refer to DCAAP 5410.14 for factors to consider in applying fee waivers due to public interest. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the question of whether to charge or waive the fee cannot be clearly resolved, DCAA organizational elements should rule in favor of the requester.

APPENDIX A TO PART 290—DCAA'S ORGANIZATION AND MISSION

(a) Purpose. This section implements 5 U.S.C. 552 by describing the central and field organizations of DCAA.

(b) Origin and Authority. DCAA was established by the Secretary of Defense under Department of Defense (DoD) Directive 5105.36¹ (32 CFR part 357) and began operating on July 1, 1965. Its Director reports to the Comptroller of the Department of Defense.

(c) Objective. Assist in achieving the objective of prudent contracting by providing DoD officials responsible for procurement and

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

contract administration with financial information and advice on proposed or existing contracts and contractors, as appropriate.

(d) Mission. (1) DCAA performs all necessary contract audits for the Department of Defense, and provides accounting and financial advisory service regarding contracts to all DoD components responsible for procurement and contract administration. These services are provided in connection with negotiation, administration, and settlement of contracts and subcontracts. It also furnishes advisory contract audit service to a number of other government agencies under agreements between the Department of Defense and such agencies.

(2) DCAA audits contractors' and subcontractors' accounts, records, documents, and other evidence; systems of internal control, accounting, costing, estimating, and general business practices and procedures to give advice and recommendations to procurement and contract administration personnel on: acceptability of costs incurred under cost, redetermination, incentive, and similar type contracts; acceptability of estimates of costs to be incurred as represented by contractors incident to the award, negotiation, and modification of contracts; and adequacy of contractors' accounting and financial management systems and estimating procedures. DCAA also performs post-award audits of contracts for compliance with the provisions of Public Law 87-653 (Truth in Negotiations), and reviews contractor compliance with the Cost Accounting Standards.

(3) DCAA assists responsible procurement or contract administration activities in their surveys of the purchasing-procurement systems of major contractors; and cooperates with other DoD components on reviews, audits, analyses, or inquiries involving contractors' financial positions or financial and accounting policies, procedures, or practices. DCAA also maintains liaison auditors at major procuring and contract administration offices and provides assistance in the development of procurement policies and regulations.

(e) Composition. (1) DCAA consists of five major organizational elements: A Headquarters and five regions. The five regional offices manage over 400 field audit offices (FAOs) and suboffices located throughout the United States and overseas. An FAO is identified as either a branch office or a resident office. Suboffices are established by regional directors as extensions of FAOs when required to furnish contract audit service more economically. A suboffice is dependent on its parent FAO for release of audit reports and other administrative support.

(2) The Headquarters located at Fort Belvoir, Virginia consists of:

(i) The Director who exercises worldwide direction and control of DCAA.

(ii) The Deputy Director who serves as principal assistant to the Director and acts for the Director in his absence.

(iii) The Assistant Director, Operations, authorized to act for the Director and Deputy Director in their absence, is responsible for staff functions related to audit management, and technical audit programs, supervises the Defense Contract Audit Institute and the Technical Services Center in Memphis, Tennessee and the procurement/contract administration liaison offices.

(iv) The Assistant Director, Policy and Plans, is responsible for audit policy and procedures and related liaison functions.

(v) The Assistant Director, Resources, is responsible for the programs and procedures related to the management and administration of resources required to support the audit mission.

(vi) The General Counsel provides legal and legislative advice to the Director and all members of the Agency staff.

(vii) The Executive Officer performs a variety of special projects and assignments for the Director and Deputy Director.

(viii) The Special Assistant for Quality reviews the Agency's compliance with established audit quality control standards, policies, and procedures and other internal control requirements.

(3) Regional offices are located in Smyrna, GA; Lowell, MA; Irving, TX; La Mirada, CA; and Philadelphia, PA. Regional directors direct and administer the DCAA audit mission, and manage personnel and other resources assigned to the regions; manage the contract audit program; and direct the operation of FAOs within their region. Principal elements of regional offices are the Regional Director, Deputy Regional Director, Regional Audit Managers, Regional Special Programs Manager, and Regional Resources Manager.

(4) A resident office is established at a contractor's location when the amount of audit workload justifies the assignment of a permanent staff of auditors and support staff. A resident office may also perform procurement or contract administration liaison functions.

(5) A branch office is established at a strategically situated location within the region, responsible for performing all contract audit service within the assigned geographical area, exclusive of contract audit service performed by a resident or liaison office within the area. A branch office may also perform procurement or contract administration liaison functions.

(6) If requested, a DCAA liaison office is established at a DoD procurement or contract administration office when required on a full-time basis to provide effective communication and coordination among procurement, contract administration, and contract

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audit elements. Liaison offices assist in effective utilization of contract audit services.

[56 FR 49685, Oct. 1, 1991, as amended at 60 FR 35699, July 11, 1995; 64 FR 1131, Jan. 8, 1999]

APPENDIX B TO PART 290—DCAA's FOIA POINTS OF CONTACT

(Regional Offices Listed Alphabetically by State and City)

CALIFORNIA

DCAA WESTERN REGIONAL OFFICE, Attn: RCI-4 (FOIA Coordinator), 16700 Valley View Avenue, Suite 300, La Mirada, CA 90638-5830, (714) 228-7083

Geographical Area of Responsibility: Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Pacific Ocean and Asian Islands.

Asia except the Middle East.

Australia.

GEORGIA

DCAA EASTERN REGIONAL OFFICE, Attn: RCI-1 (FOIA Coordinator), 2400 Lake Park Drive, Suite 300, Smyrna, GA 30080-7644, (770) 319-4510

Geographical Area of Responsibility: Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, North Carolina, Ohio, Tennessee, Virginia, West Virginia, Central America, South America, Bermuda, Puerto Rico and nearby Islands, and Mexico.

MASSACHUSETTS

DCAA NORTHEASTERN REGIONAL OFFICE, Attn: RCI-2 (FOIA Coordinator), 59 Composite Way, Suite 300, Lowell, MA 01851-5150, (978) 551-9722

Geographical Area of Responsibility: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, Michigan (excluding the Upper Peninsula), all New York Counties except Steuben, Schuyler, Chemung, Tompkins, Tioga, Broome, Chenango, Otsego, Delaware, and Sullivan.

Africa and Adjacent Islands.

Europe and Adjacent Islands.

Middle East and Adjacent Islands.

Greenland.

Iceland.

PENNSYLVANIA

DCAA MID-ATLANTIC REGIONAL OFFICE, Attn: RCI-6 (FOIA Coordinator), 615 Chestnut Street, suite 1000, Philadelphia, PA 19106-4498, (215) 597-5403

Geographical Area of Responsibility: Delaware, District of Columbia, Maryland, and New Jersey.

New York Counties of Steuben, Schuyler, Chemung, Tompkins, Tioga, Broome, Chenango, Otsego, Delaware, and Sullivan.

The IBM Suboffice located at Tarrytown, New York.

Pennsylvania Counties East of and including Tioga, Lycoming, Union, Mifflin, Juniata, and Franklin.

Virginia Counties East and North of and including Stafford, Culpeper, Rappahannock, Page, Shenandoah, and Frederick.

TEXAS

DCAA CENTRAL REGIONAL OFFICE, Attn: RCI-3 (FOIA Coordinator), 106 Decker Court, suite 300, Irving, TX 75062-2795, (214) 650-4893

Geographical Area of Responsibility: Arizona, Arkansas, Colorado, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Wisconsin, Wyoming and Louisiana Parishes North of and including Vernon, Rapides, and Avoyelles.

VIRGINIA

DCAA HEADQUARTERS, Attn: CM (Information and Privacy Advisor), 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219, (703) 767-1000

(a) Miscellaneous.

(1) The following publications may be obtained from the Defense Contract Audit Agency, ATTN: CMO, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219, (703) 767-1066. Many of these items, among others, may be obtained from the DCAA Web site. Since these materials are publicly available, requesters need not invoke the Freedom of Information Act to obtain copies of the publications selected.

(i) DCAAI 5025.2, Index of Numbered Publications, lists Agency publications.

(ii) DCAAP 1421.3, Catalog of Training Courses, lists training courses available from the Defense Contract Audit Institute, Specific training courses are also available.

(2) Although the following publication is publicly available, the memorandums listed may or may not be subject to withholding under the Freedom of Information Act. Those memorandums marked with an "(R)", denoting releasable (e.g. 94-PFD-063R), are available from the above address. However, Memorandums for Regional Directors (MRDs) marked "(NR)", meaning not releasable, cannot be obtained from this source. Requests for (NR) MRDs should be sought under the auspices of the Freedom of Information Act from the Defense Contract Audit Agency, ATTN: CM, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

(i) DCAAI 5025.13, Index of DCAA Memorandums for Regional Directors (MRDs), lists numbered memorandums pertaining to Agency policy, procedure, and informational topics.

(3) Requesters should plainly display the words "Freedom of Information Act Request" on the lower left hand corner of the envelope to ensure prompt handling.

(b) [Reserved]

[56 FR 49685, Oct. 1, 1991, as amended at 57 FR 30904, July 13, 1992; 58 FR 63084, Nov. 30, 1993; 60 FR 18006, Apr. 10, 1995; 60 FR 35699, July 11, 1995; 61 FR 4885, Feb. 9, 1996; 61 FR 5510, Feb. 13, 1996; 64 FR 1131, Jan. 8, 1999]

APPENDIX C TO PART 290—FOR OFFICIAL USE ONLY

(a) General. Information that 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 the reasons cited in FOIA Exemptions 2 through 9 shall be considered as being for official use only. No other material shall be considered or marked "For Official Use Only" (FOUO). FOUO is not authorized as an anemic form of classification to protect national security interests.

(b) Prior FOUO Application. The prior application of 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 shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release. (1) Historical Papers. Records such as notes, working papers, and drafts retained as historical evidence of Agency actions enjoy no special status apart from the exemptions under the FOIA.

(2) Time to Mark Records. The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

(3) Distribution Statement. Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24¹ shall bear that statement and may be marked FOUO, as appropriate.

(c) Markings. (1) Location of Markings. (i) An unclassified document containing FOUO information shall be marked "For Official Use Only" at the bottom on the outside of the front cover (if any), on each page con-

taining FOUO information, and on the outside of the back cover (if any).

(ii) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(iii) Within a classified document, an individual page that contains FOUO information but no classified information shall be marked "For Official Use Only" at the bottom of the page.

(iv) Other records, such as, photographs, films, tapes, or slides, shall be marked "For Official Use only" or "FOUO" in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

(v) FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information
EXEMPT FROM MANDATORY DISCLOSURE

Under the FOIA, Exemptions apply.

(2) Instructions for marking DCAA audit reports are contained in Chapter 10 of the Contract Audit Manual (CAM)².

(3) DCAA Label 4, FOUO Cover Sheet. This form may be used to further identify FOUO information.

(d) Dissemination and Transmission. (1) Release and Transmission Procedures. Until FOUO status is terminated, the release and transmission instructions that follow apply:

(i) FOUO information may be disseminated within the Agency and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

(ii) Agency and DoD holders of FOUO information are authorized to convey such information to officials in other departments and agencies of the executive and judicial branches to fulfill a government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked "For Official Use Only", and the recipient shall be advised that the information has been exempted from public disclosure,

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

²Copies may be obtained from the Defense Contract Audit Agency, Attn: CMO, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

pursuant to the FOIA, and that special handling instructions do or do not apply.

(iii) Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4³ Release to the GAO is governed by DoD Directive 7650.1⁴ Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

(iv) Records or documents containing FOUO information will be transported between offices in such a manner as to preclude disclosure of the contents. First-class mail and ordinary parcel post may be used for transmission of FOUO information. The double envelope system required for classified material may be used when it is considered desirable to exclude examination by mail handling personnel. In such cases, the inner envelope should be addressed to the intended recipient by title or name and contain a statement that the envelope is to be opened by the addressee only.

(v) FOUO material prepared on personal computers or other data processing equipment should be password protected at origination.

(vi) Requests for Field Detachment sensitive information must be coordinated with the Director, Field Detachment, through Headquarters, DCAA.

(2) Transporting FOUO Information. Records containing FOUO information shall be transported in a manner that precludes disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations may be sent by fourth-class mail.

(3) Electrically Transmitted Messages. Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted in accordance with communications security procedures in Allied Communication Publication 121 (U.S. Supp 1) for FOUO information.

(e) Safeguarding FOUO Information. (1) During Duty Hours. During normal working

hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to nongovernmental personnel.

(2) During Nonduty Hours. At the close of business, FOUO records shall be stored so as to preclude unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or Government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of Public Law 86-36 shall meet the safeguards outlined for that group of records.

(3) Field audit offices located in contractor owned facilities will ensure that material marked FOUO is stored in a locked receptacle to which the contractor does not have access during nonduty hours.

(f) Termination, Disposal and Unauthorized Disclosures. (1) Termination. The originator or other competent authority, e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

(2) Disposal. (i) Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

(ii) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. chapter 33, as implemented by DCAAM 5015.1⁵, "Files Maintenance and Disposition Manual".

(3) Unauthorized Disclosure. The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be

³See footnote 1 to paragraph (b)(3).

⁴See footnote 1 to paragraph (b)(3).

⁵See footnote 2 to paragraph (c)(2).

taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may also result in civil and criminal sanctions against responsible persons. The DCAA organizational element or DoD component that originated the FOUO information shall be informed of its unauthorized disclosure.

(g) Protection of Field Detachment Sensitive Information. (1) Definition. All communication, which qualifies for withholding under Exemptions (2) through (9), between regular DCAA organizational elements and Field Detachment offices is sensitive information and, as a minimum, shall be marked: FOR OFFICIAL USE ONLY (FOUO).

(2) Markings. (i) Communications, which qualify for withholding under Exemptions (2) through (9) initiated by a Field Detachment office, will bear the following marking:

FOR OFFICIAL USE ONLY

Access limited to addressee and his/her designated representative(s) with a need-to-know.

This document may not be reproduced or further disseminated without the approval of the Director, Field Detachment, DCAA.

(ii) All correspondence specifically exempt under Exemptions (2) through (9), including assist audit requests, generated by a regular (non-FD) DCAA office, which is addressed to the Field Detachment, either Headquarters or a field audit office, will be marked FOR OFFICIAL USE ONLY and will be limited within the FAO to one protected office copy.

(3) Storage. (i) All Field Detachment sensitive information in the possession of a regular DCAA office will be stored in a classified container, if available. If a classified container is not available, the sensitive information shall be stored in a locked container controlled by the FAO manager.

(ii) Permanent files currently maintained by regular DCAA offices, which are available to all FAO personnel, should not contain any detailed information on Field Detachment audit interest. That information shall be protected as sensitive information and stored in accordance with paragraph (g)(3)(i) of this appendix.

(4) Dissemination. (i) Access to Field Detachment sensitive information by other DCAA audit and administrative personnel within the office shall be on a strict need-to-know basis as determined by the FAO manager.

(ii) Requests by non-DCAA personnel for access to Field Detachment sensitive information must be coordinated with the Direc-

tor, Field Detachment, through Headquarters, DCAA.

[56 FR 49685, Oct. 1, 1991, as amended at 60 FR 18006, Apr. 10, 1995; 60 FR 35699, July 11, 1995]

APPENDIX D TO PART 290—AUDIT
WORKING PAPERS

(a) *Definition*

(1) Audit working papers contain information from accounting and statistical records, personal observations, the results of interviews and inquiries, and other available sources. Audit working papers may also include contract briefs, copies of correspondence, excerpts from corporate minutes, organization charts, copies of written policies and procedures, and other substantiating documentation. The extent and arrangement of working paper files will depend to a large measure on the nature of the audit assignment.

(2) Working papers are generally classified in two categories: the permanent file and the current file.

(i) Permanent file.

(A) The permanent file on each contractor is a central repository of information gathered during the course of an audit which has continuing value and use to subsequent audits expected to be performed at the same contractor. Permanent files are useful in preparing the audit program and in determining the appropriate scope of subsequent audits. They also provide ready means for auditors to become familiar with the contractor's operations and any existing audit problems or contractor system weaknesses. While summary information on the contractor's organization, financial structure and policies may sometimes be included in permanent files for smaller contractors, such information on large contractors with continuing audit activity is generally maintained in the field audit office at the central reference library.

(B) Items which would logically be included in the permanent file as having continuing value in future audit assignments include:

- (1) Internal control questionnaire.
- (2) Internal control review update control log.
- (3) Vulnerability assessment.
- (4) MAARs control log.
- (5) Disclosure statement and revisions in accordance with CAS rules and regulations, and
- (6) CAS compliance control schedules and a noncompliance summary schedule.

(ii) Current File. The current file usually consists of working papers which have limited use on future assignments. DCAA Forms

7640-19 a, b, and c are the Agencywide Working Paper Indexes and provide a concise summary of items generally found in audit working papers.

(b) *Explanation.*

(1) The preparation of working papers assists the auditor in accomplishing the objectives of an audit assignment. Working papers serve as the basis for the conclusions in the audit report; provide a record of the work done for use as substantiating data in negotiations, appeals, and litigation; provide guidance for subsequent examinations; and serve as a basis for the review and evaluation of the work performed.

(2) Audit working papers are generally prepared at the time audit work is performed and are maintained on a current basis. Working papers normally reflect the progress of the audit and are designed to ensure continuity of the audit effort.

(3) Working papers should be relevant to the audit assignment and not include extraneous pages. Superseded working papers should be clearly marked as such and retained as part of the working paper package.

(4) The nature of audit working papers requires that proper control and adequate safeguards be maintained at all times. Working papers frequently reflect information considered confidential by the contractor and are marked "For Official Use Only" or are classified for government security purposes.

[56 FR 56932, Nov. 7, 1991]

PART 291—DEFENSE NUCLEAR AGENCY (DNA) FREEDOM OF INFORMATION ACT PROGRAM

Sec.

- 291.1 Purpose.
- 291.2 Applicability.
- 291.3 Definitions.
- 291.4 Policy.
- 291.5 Responsibilities.
- 291.6 Procedures.
- 291.7 Administrative instruction.
- 291.8 Exemptions.
- 291.9 For official use only (FOUO).

APPENDIX A TO PART 291—FREEDOM OF INFORMATION ACT REQUEST (DNA FORM 524)

AUTHORITY: 5 U.S.C. 552.

SOURCE: 56 FR 9842, Mar. 8, 1991, unless otherwise noted.

§ 291.1 Purpose.

This part establishes policies and procedures for the DNA FOIA program.

§ 291.2 Applicability.

This part applies to Headquarters, Defense Nuclear Agency (HQ, DNA), Field Command, Defense Nuclear Agen-

cy (FCDNA), and the Armed Forces Radiobiology Research Institute (AFRRI).

§ 291.3 Definitions.

(a) *FOIA Request.* A written request for DNA records made by any person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes the FOIA (5 U.S.C. 552), 32 CFR part 285, 286, or this part.

(b) *Agency record.* (1) 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 an agency of the United States Government under Federal law in connection with the transaction of public business and in DNA's possession and control at the time the FOIA request is made.

(2) The following are not included within the definition of the word *record*:

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

(ii) 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 DNA organization. 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)(3) of this section.

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

(iv) 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

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distributed to other agency employees for their official use.

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

(3) 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:

(i) When the data is 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.

(ii) Where the software itself reveals information about organizations, policies, functions, decisions, or procedures of a DNA office, such as computer models used to forecast budget outlays, calculate retirement system costs, or optimization models on travel costs.

(iii) Refer to § 291.8(b) exemptions 2, 4 and 5 for guidance on release determinations of computer software.

(4) If unaltered publications and processed documents, such as regulations, manuals, maps, charts, and related geophysical materials are available to the public through an established distribution system with or without charge, the provisions of 5 U.S.C. 552(a)(3) normally do not apply and they need not be processed under the FOIA. Normally, documents disclosed to the public by publication in the FEDERAL REGISTER also require no processing under the FOIA. In such cases, PAO will direct the requester to the appropriate source, to obtain the record.

(d) *Initial denial authority (IDA)*. The Deputy Director (DDIR), DNA, has the authority to withhold records requested under the FOIA for one or more of the nine categories (set forth § 291.8) of records exempt from mandatory disclosure.

(e) *Appellate authority*. The Director, DNA.

(f) *Administrative appeal*. A request by a member of the general public, made under the FOIA, asking the appellate authority of a DoD Component (Direc-

tor, DNA) to reverse an IDA decision to withhold all or part of a requested record or to deny a request for a waiver or reduction of fees.

(g) *Public interest*. Public interest is official information that sheds light on an agency's performance of its statutory duties because it falls within the statutory purpose of the FOIA in informing citizens about what their government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files that reveals little or nothing about an agency's or official's own conduct.

(h) *Electronic data*. Electronic data are those records and information which are created, stored, and retrievable by electronic means. This does not include computer software, which is the tool by which to create, store, or retrieve electronic data. Refer to paragraphs (b) (2) and (3) of this section for a discussion of computer software.

§ 291.4 Policy.

(a) *Compliance with the FOIA*. DNA personnel are expected to comply with the FOIA and this part in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DNA FOIA Program and to create conditions that will promote public trust. It is DNA policy to fully and completely respond to public requests for information concerning its operations and activities, consistent with national security objectives.

(b) *Openness with the public*. 32 CFR part 286 states that all DoD employees shall conduct DoD activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records that are not specifically exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

(c) *Avoidance of procedural obstacles*. DNA offices shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DNA records promptly. PAO shall provide assistance to requesters to help them

understand and comply with procedures established by this Instruction, the 32 CFR part 286 and any supplemental regulations published by DoD.

(d) *Prompt action on requests.* When a member of the public complies with the procedures established for obtaining DNA records, the request shall receive prompt attention; a reply shall be dispatched within 10 working days, unless a delay is authorized. When PAO has a significant number of requests, e.g., 10 or more, the requests shall be processed in order of receipt.

However, this does not preclude PAO from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. In addition, PAO 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 the PAO.

(e) *Use of exemptions.* It is DoD/DNA policy to make records publicly available, unless they qualify for exemption under one or more of the nine exemptions. Components may elect to make a discretionary release; however, a discretionary release is generally not appropriate for records exempt under exemptions 1, 3, 4, 6 and 7(C). Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.

(f) *Public domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available through the reading room channel to facilitate public access. Exempt records released pursuant to this part or other statutory or regulatory authority, however, may be considered to be in the public domain when their release constitutes a waiver of the FOIA exemption. When the release does not constitute such a waiver, such as when disclosure is made to a properly constituted advisory committee or to a Congressional committee, the released records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the

same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* (1) A record must exist and be in the possession of and in control of the DNA at the time of the search to be considered subject to this part and the FOIA. Mere possession of a record does not presume agency control, and such records, or identifiable portions thereof, would be referred to the originating agency for direct response to the requester. There is no obligation to create or compile a record to satisfy a FOIA request. However, a DNA employee may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record.

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, offices should apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach.

(h) *Description of requested 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 will enable the Government to locate the record with a reasonable amount of effort. The Act does not authorize "fishing expeditions." When DNA receives a request that does not "reasonably describe" the requested record, PAO shall notify the requester of the defect. The defect should be highlighted in a specificity

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letter, asking the requester to provide the type of information outlined in paragraph (h)(2) of this section. DNA is not obligated to act on the request until the requester responds to the specificity letter. When practical, PAO shall 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, nonrandom search based on DNA’s filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(4) The following guidelines deal with requests for personal records. Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records retrievable by personal identifiers need be searched. Search for such records may be conducted under Privacy Act procedures. No record may be denied that is releaseable under the FOIA.

(5) The above guidelines notwithstanding, the decision of an office concerning reasonableness of description must be based on knowledge of its files. If the description enables office personnel to locate the record with reasonable effort, the description is adequate.

(i) *Reasons for not releasing a record.*

(1) The request is transferred to an-

other DoD component, or to another Federal agency.

(2) The request is withdrawn by the requester.

(3) The information requested is not a record within the meaning of the FOIA and 32 CFR part 286.

(4) A record has not been described with sufficient particularity to enable DNA to locate it by conducting a reasonable search.

(5) The requester has failed reasonably to comply with procedural requirements, including payment of fees, imposed by 32 CFR part 286 or this part.

(6) The DNA determines, through knowledge of its files and reasonable search efforts, that it neither controls nor otherwise possesses the requested record.

(7) The record is subject to one or more of the nine exemptions set forth in § 291.8, and a significant and legitimate government purpose is served by withholding.

§ 291.5 Responsibilities.

(a) The Director, DNA, as appellate authority, is responsible for reviewing and making the final decision on FOIA appeals.

(b) The DDIR, as IDA, is responsible for reviewing all initial denials to FOIA requests and has sole responsibility for withholding that information.

(c) The DNA FOIA Officer, who is also the Public Affairs Officer, manages and implements the DNA FOIA program. In this regard, the Public Affairs Officer serves as the FOIA point-of-contact and liaison between DNA and the Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), Directorate for Freedom of Information and Security Review (DFOI/SR). The Public Affairs Officer is responsible for:

(1) Advising OASD(PA), DFOI/SR, of any DNA denial of a request for records or appeals that may affect another DoD component.

(2) Ensuring publication of this part in the FEDERAL REGISTER.

(3) Ensuring that the Command Services Directorate publishes in the FEDERAL REGISTER a notice of where, how

and by what authority DNA performs its functions.

(4) Ensuring that the Command Services Directorate, publishes an index of DNA instructions in the FEDERAL REGISTER.

(5) Coordinating all FOIA actions, except routine, interim replies indicating initial receipt of a FOIA request through the appropriate DNA offices and the DNA General Counsel (GC).

(6) Forwarding all fees collected under the FOIA to the HQ, DNA, Finance and Accounting Officer for further processing.

(7) Coordinating action on FOIA requests that involve other government organizations (e.g., when DNA is not the original classifier for a classified document) with those organizations.

(8) Ensuring FOIA briefings are presented annually for DNA personnel.

(9) Submitting an annual report to OASD(PA), DFOI/SR, in accordance with the requirements of DoD Directive 5400.11.¹

(d) The Commander, FCDNA, is responsible for determining, based on current directives and instruction, what information in FCDNA custody may be released to FOIA requesters. (This responsibility may be delegated.) The Commander, FCDNA, is responsible for designating a representative to process FOIA requests. The Commander has the authority to release documents in response to the FOIA. When FCDNA releases information under the FOIA, it will forward a copy of the request, the response and the appropriate cost sheet to HQ, DNA, ATTN: PAO (FOIA). FCDNA will not deny requests for information under the FOIA; instead, it will forward to HQ, DNA, PAO a recommendation and justification for denying the FOIA request.

(e) The Director, AFRRI, is responsible for designating a representative to process FOIA requests and to forward them to HQ, DNA, (PAO) for coordination and preparation of a final response.

(f) The DNA GC shall coordinate on all DNA FOIA response except routine

interim letters which acknowledge receipt of the FOIA request. That office shall also ensure uniformity in the legal position and interpretation by DNA of the FOIA, and coordinate with the DoD GC, as necessary.

(g) The HQ, DNA, Finance and Accounting Officer will ensure that fees collected under the FOIA are forwarded to the Finance and Accounting Office, U.S. Army, to be submitted to the Treasury of the United States.

(h) HQ, DNA, Assistant Director for Intelligence and Security, Classification Management Division (ISCM), will conduct security reviews of classified documents requested under the FOIA. ISCM will determine whether the document.

(1) Contains information that meets requirements for withholding under Exemption 1 Executive Order 12356.

(2) Has information that meets requirements for withholding under Exemption 3, to include Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

(3) Has information that may be declassified or sanitized. ISCM is also responsible for sanitizing DNA classified information from documents requested under the FOIA (refer to §291.6(b)(5)). In addition, ISCM is responsible for advising the Assistant Director for Technical Information (CSTI) to notify the appropriate authorities when information has been reclassified as a result of a DNA FOIA review.

(i) HQ, DNA, CSLE will, upon request, ensure that photocopies are made of 50-page or larger documents being processed under the FOIA. (Copies are required only when documents are not available from other sources.)

(j) CSTI, Technical Library Division (TITL), will, upon notification from PAO that a document has been cleared for public release under the FOIA, retain the marked up document in its files, annotate the FOIA case number in the computerized data base and ensure that the document is made available to the public through the National Technical Information Service (NTIS).

(k) Commander, FCDNA; Director, AFRRI; and directors and chiefs of staff elements at HQ, DNA, will ensure that personnel are familiar with the procedures and contents of this part

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

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prior to acting on FOIA requests. They will also make sure that FOIA actions forwarded to their offices for processing are closely monitored to ensure accountability and that their input to PAO is provided in a timely manner and in accordance with this part. (Refer to § 291.7(b)(2)). If the office(s) cannot meet the FOIA suspense, they must request an extension. In addition, they will ensure that, upon request by PAO, appropriate technical personnel sanitize information such as unclassified technical data, that is determined to be exempt from disclosure under the FOIA. (Refer to § 291.7(b)(5)).

§ 291.6 Procedures.

(a) If HQ, DNA personnel receive a FOIA request that has not been logged and processed through PAO, they will immediately handcarry the request to PAO. TDNM and AFRRI personnel will forward all FOIA requests to HQ, DNA, Attn: PAO. FCDNA will adhere to paragraph 6d and FCDNA Supplement to DNA Instruction 5400.7C.²

(b) When a FOIA request is received by PAO, HQ, DNA, the following procedures apply:

(1) The request will be date stamped, reviewed to determine if it meets the requirements of 5 U.S.C. 552, logged in, assigned an action number, suspended, and attached to a FOIA cover sheet with instructions for forwarding to the appropriate office. A copy of DD Form 2086 or DD Form 2086-1 will also be attached to the FOIA request.

(2) A copy of the request will be handcarried by PAO to the designated HQ, DNA, action office(s) or forwarded to AFRRI or FCDNA, as appropriate. The office or component providing input for the FOIA request must keep track of the request and meet the PAO suspense. The HQ, DNA input, or negative response, if there are no records available, will be handcarried to PAO. AFRRI will send the recommended response in daily distribution. FCDNA will telefax the proposed response in addition to mailing the original. All FOIA actions must include a completed

DD Form 2086 or 2086-1. Each office acting on FOIA requests will indicate on the form the search, review/excise and coordination time spent processing the FOIA action, and provide the number of pages copied.

(3) The DNA PAO will prepare the response to the requester and coordinate it with the offices that provided input, the GC, and if appropriate, ISCM, the IDA, the Director, DNA, OASD(PA), and outside agencies, if involved. The PAO will maintain files of all FOIA actions per DNA Instruction 5015.4B.

(4) If a request is received by a DNA office which does not have records responsive but office personnel believe another office would have the records requested, they must contact the other office to confirm the existence of the documents, forward the FOIA action to that office and notify PAO.

(5) *FOIAs involving classified information.* When ISCM or contractor security reviewers receive a classified document from PAO for processing under the FOIA, they will conduct a security review to determine if the document may be sanitized or declassified. Most DNA documents requested under the FOIA are queued on a first-come, first-served basis and shall be reviewed in that order. When security reviewers determine that part or all of the information in a classified document may be sanitized or declassified, they will ensure that the appropriate copies are ordered from the Defense Technical Information Center (DTIC). The DTIC copy will be marked up during review. Cases not placed in queue will be suspended by PAO. They may include documents with less than 10 pages or documents under suspense from other organizations which require a DNA review. All DNA documents reviewed will be marked with a special pen that does not permit photocopying of the classified portions. Security review must include a detailed response providing the appropriate exemption(s) and justification for withholding.

When the Field Command Security Division (FCSS) receives a classified document for processing under the FOIA, they will conduct a security review to determine if the document may be sanitized or declassified. When FCSS

²Copies can be obtained from Defense Nuclear Agency PAO or SSAB, Defense Nuclear Agency, 6801 Telegraph Road, Alexandria, VA 22310-3398.

determines that part or all of the information in a classified document may be sanitized or declassified, FCSS will make a copy which will be marked up during review. Upon completion of its review, FCSS will provide the marked up document and a sanitized version of the document to PAO. FCSS review must include a detailed response providing the appropriate exemption(s) and justification for withholding. When ISCM/FCSS completes its review, ISCM/FCSS will forward the master copy to the appropriate technical office(s) for review. That office will determine whether the remaining unclassified information is releaseable and provide its response to ISCM/FCSS. If the office recommends that part or all of the information be withheld, then it must forward a detailed response providing the appropriate exemption(s) and justification for withholding. The technical office will return documents with results of their review to ISCM. ISCM will forward the results of both reviews to PAO for further processing. If either ISCM/FCSS or the DNA office reviewing the action recommends additional review by another agency, they will provide the full name and address of that agency with a technical point-of-contact, if known. PAO will forward the action to that organization for further review. When PAO receives that organization's review determination, it will forward the results to ISCM/FCSS. After all reviews are completed, ISCM/FCSS will sanitize the document and handcarry (FCSS will forward) the sanitized as well as the marked up copy to PAO for final processing.

(6) *FOIAs involving unclassified information.* The appropriate technical office(s) will review unclassified documents for release under the FOIA. If the office(s) determines that part or all of the document should be withheld, it must provide PAO a written recommendation with the appropriate exemption(s) (§ 291.8) and detailed reasons for withholding the information. Upon PAO request, the technical office(s) will sanitize the unclassified information that is being withheld. Sanitization will be done on a photocopy of the document or on a document that has been obtained from DTIC.

§ 291.7 Administrative instruction.

(a) FOIA requesters shall clearly mark their requests as such, both on the envelope and in the body of the letter. Identification of the record desired is the responsibility of the FOIA requester. The requester must provide a description of the desired record that enables DNA to locate it with a reasonable amount of effort. The Act does not authorize "fishing expeditions." FOIA requests should be sent to the following address: Public Affairs Officer, Defense Nuclear Agency, Attention: FOIA, 6801 Telegraph Road, Alexandria, VA 22310-3398. Requester failure to comply with this section shall not be sole grounds of denial for requested information.

(b) FOIA appeals must be clearly marked as such, both on the envelope and in the body of the letter. Persons appealing DNA denial letters should include a copy of the denial letter, the case number, a statement of the relief sought and the grounds upon which it is brought. Appeals should be sent to the following address: Director, Defense Nuclear Agency, 6801 Telegraph Road, Alexandria, VA 22310-3398.

(c) The time limitations for responding to legitimate FOIA requests are:

(1) Determinations to release, deny or transfer a record shall be made and the decision reported to the requester within 10 working days after the request is received in PAO.

(2) If additional time is needed to respond to a request, the requester will be notified within the 10-day period. When PAO has a significant number of requests, e.g., 10 or more, the requests shall be processed in order of receipt. However, this does not preclude PAO from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. PAO 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 the Public Affairs Officer.

(3) If a request for a record is denied and the requester appeals the decision of the IDA, the requester should file the appeal so that it reaches DNA no later than 60 calendar days after the

date of the initial denial letter. At the conclusion of this period, the case may be considered closed; however, such closure does not preclude the requester from filing litigation. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the requester receives the last such notification. A final determination on the appeal normally shall be made within 20 working days after receipt. If additional time is needed due to unusual circumstances, the final decision may be delayed for the number of working days (not to exceed 10), that were not utilized as additional time for responding to the initial request. If an appeal is denied, the Director, DNA, will notify the requester of the right to judicial review of the decision. Appeal procedures also apply to the disapproval of a request for waiver or reduction of fees.

(d) If DNA denies the requested document in whole or in part, the response must include detailed rationale for withholding information and the specific exemption that applies so the requester can make a decision concerning appeal. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. Denial letters must also include the name and title of the IDA, and cite the name and address of the Director, DNA, as the appellate authority.

(e) All final responses will address the status of fees collectible under the FOIA. Fees of \$15 or less will be waived, regardless of category of requester.

(f) A formal reading room for the public, as defined in 32 CFR part 286, does not exist at DNA (HQ, FCDNA or AFRRI) because of security requirements. However, the PAO will arrange for a suitable location and escort, if required, for members of the public to review DNA documents released under the FOIA. In addition, most reports released under the FOIA are sent to the National Technical Information Service (NTIS).

§ 291.8 Exemptions.

(a) *General.* Records that meet the exemption criteria listed in paragraph (b) below may be withheld from public disclosure and will not be published in the FEDERAL REGISTER, made available in a library, reading room, or provided in response to a FOIA request.

(b) *FOIA exemptions.* The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law. A discretionary release (see also § 291.4(e)) to one requester may preclude the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest.

(1) *Number 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.³ Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1-R, section 2-204f., apply. In addition, this exemption shall be invoked when the following situations are apparent:

(i) The fact of the existence or non-existence of a record would itself reveal classified information. In this situation, DNA shall neither confirm nor 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.

(ii) Information that concerns one or more of the classification categories established by executive order and DoD

³See footnote 1 to § 291.5(c)(9).

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.

(2) *Number 2.* Those related solely to the internal personnel rules and practices of DNA. This exemption has two profiles, high b2 and low b2.

(i) Records qualifying under high b2 are those containing or constituting statutes, 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 DNA. Examples include:

(A) Those operating rules, guidelines and manuals for DNA investigators, inspectors, auditors, or examiners that must remain privileged in order for the DNA office to fulfill a legal requirement.

(B) Personnel and other administration matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(C) Computer software meeting the standards of paragraph 291.3(b)(2)(iii), the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be clearly examined to ensure a circumvention possibility exists.

(ii) Records qualifying under the low b2 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. Examples include: Rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

(3) *Number 3.* Those containing 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. Examples of statutes are:

(i) National Security Agency Information Exemption, Public Law 86-36, section 6.

(ii) Patent Secrecy, 35 U.S.C. 181-188. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(iii) Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

(iv) Communication Intelligence, 18 U.S.C. 798.

(v) Authority to Withhold from Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25.⁴

(vi) Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 U.S.C. 1102.

(vii) Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128.

(viii) Protection of Intelligence Sources and Methods, 50 U.S.C. 403 (d)(3).

(4) *Number 4.* Those containing trade secrets or commercial or financial information that DNA 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 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 government interest. Examples include:

(i) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such

⁴See footnote 1 to § 291.5(c)(9).

as trade secrets, inventions, discoveries, or other proprietary data. See 32 CFR part 286h, "Release of Acquisition-Related Information."

(ii) Statistical data and commercial or financial information concerning contract performance, income, profits, losses and expenditures, if offered and received in confidence from a contractor or potential contractor.

(iii) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(iv) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

(v) Scientific and manufacturing processes or developments concerning technical or scientific data or other information, submitted with an application for a research grant, or with a report, while research is in progress.

(vi) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with title 10, U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4. Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 and DoD Directive 5230.25 (refer to paragraph (b)(3)(v)).

(vii) Computer software meeting the conditions of section 4 (b)(3), which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

(5) *Number 5.* Except as provided in paragraphs (b)(5)(i) through (v) of this section, internal advice, recommenda-

tions, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decisionmaking process of any agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)) or within or among DoD/DNA offices. Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(1) Examples include:

(A) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions or suggestions.

(B) Advice, suggestions, or evaluations prepared on behalf of the DNA by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(C) Those nonfactual portions of evaluations by DNA personnel of contractors and their products.

(D) Information of a speculative, tentative, or evaluative nature or such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(E) Trade secret or other confidential research, development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(F) Records that are exchanged among agency personnel as part of the preparation for anticipated administrative proceedings by DNA, or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(G) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of DNA when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(H) Computer software meeting the standards of paragraph 291.3(b)(2)(iii), which is deliberative in nature, the disclosure of which would inhibit or chill the decision-making process. In this situation, the use of software must be closely examined to ensure its deliberative nature.

(I) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process.

(ii) If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the "discovery process" in the course of litigation with DNA, i.e., the process by which litigants obtain information from each other that is relevant to the issues in trial or hearing, then it should not be withheld from the general public even though "discovery" has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant, balanced against the interests of the agency in maintaining its confidentiality, then the record or document need not be made available under this part. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the "discovery process".

(iii) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through "discovery," and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(iv) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or ad-

vice that would compromise the decision-making process.

(v) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(6) *Number 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.

(i) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(A) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(B) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(ii) Home addresses are normally not releasable without the consent of the individuals concerned. In addition, lists of DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(A) Privacy interest. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended

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funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(B) Published telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(iii) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

(iv) Individuals' personnel, medical, or similar file may be withheld from them or their designated legal representative only to the extent consistent with DoD Directive 5400.11.

(v) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record. When withholding personal information from the subject of the record, legal counsel should first be consulted.

(7) *Number 7.* Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes.

(i) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

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

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

(C) 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.

(1) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DNA shall neither confirm nor deny the existence or nonexistence of the record being requested.

(2) 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 records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

(3) Refusal to confirm or deny should not be used when the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or the person whose personal privacy is in jeopardy is deceased, and DNA is aware of that fact.

(D) Could reasonably be expected to disclose the identity of a confidential source including a source within DNA, a state, local or foreign agency or authority, or any private institution which furnishes the information on a confidential basis.

(E) Could disclose confidential 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.

(F) 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.

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

(ii) Examples include:

(A) Statements of witnesses and other material developed during the

course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

(B) The identity of firms or individuals being investigated for alleged irregularities involving contracting with DNA when no indictment has been obtained nor any civil action filed against them by the United States.

(C) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within DNA, or a lawful national security intelligence investigation conducted by an authorized agency or office within DNA. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(iii) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500 is not diminished.

(iv) When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by DoD Directive 5400.11.

(v) *Exclusions.* Excluded from the previous exemptions are the following two situations applicable to the Department of Defense.

(A) Whenever a request is made which involves access to records or information compiled for law enforcement purposes and the investigation or proceedings involves a possible violation or criminal law where there is reason to believe that the subject of the investigation or proceedings is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings. Components may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

(B) Whenever informant records maintained by a criminal law enforcement organization within a DoD component under the informant's name or personal identifier are requested by a third party using the informant's name

or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to exemption 7, the response to the requester will state that no records were found.

(8) *Number 8.* Those contained in or related to 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) *Number 9.* Those containing geological and geophysical information and data (including maps) concerning wells.

§ 291.9 For official use only (FOUO).

Information that 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 the reasons cited in FOIA exemptions 2 through 9 shall be considered as being for official use only. No other material shall be considered or marked "For Official Use Only" (FOUO) and FOUO is not authorized as an anemic form of classification to protect national security interests. See DNA Instruction 5230.2A⁵ for additional information regarding FOUO policy.

(a) *Prior FOUO application.* The prior application of 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 shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release.

(b) *Historical papers.* Records, such as notes, working papers, and drafts retained as historical evidence of DNA actions enjoy no special status apart from the exemptions under the FOIA.

(c) *Time to mark records.* The marking of records at the time of their creation provides notice of FOUO content and

⁵ See footnote 2, to § 291.6(a)

facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, 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.

(d) *Distribution statement.* Information in a technical document that requires a distribution statement pursuant to DNA Instruction 5230.24A shall bear that statement and may be marked FOUO, as appropriate.

(e) *Termination.* The originator or other competent authority, e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

(f) *Disposal.* (1) Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

(2) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. chapter 33, as implemented by DNA instructions concerning records disposal.

(g) *Unauthorized disclosure.* The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DNA information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those respon-

sible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act, may also result in civil and criminal sanctions against responsible persons. The DNA office that originated the FOUO information shall be informed of its unauthorized disclosure.

APPENDIX A TO PART 291—FREEDOM OF INFORMATION ACT REQUEST (DNA FORM 524)

Suspense Item—Freedom of Information Act Request

Date _____
Information Required in PAO NLT _____
FOIA Case No. _____
To: _____
Special Instructions: _____

Please conduct a search within your organization to determine if there is information/documents responsive to the attached FOIA request.

If you recommend withholding information from the documents requested, please refer to the FOIA exemptions listed on the reverse.

If this request is for a technical proposal, please provide the name and address for the contact person at the company which was awarded the contract and the name and office symbol to the TM.

Record time spent on this request and the number of pages copied on the enclosed DD Form 2086.

If you believe other DNA offices should be involved in processing this request, please advise PAO ASAP.

If you have any questions call PAO, 57095 or 57306. Do not place this FOIA action in distribution.

Enclosures:
DNA Form 524 (28 June 90) Previous Editions Obsolete.

EXPLANATION OF EXEMPTIONS

FREEDOM OF INFORMATION ACT (5 USC 552)

(b)(1) Applies to information which is currently and properly classified pursuant to an Executive Order in the interest of national defense or foreign policy. (See Executive Order 12356, DoD Regulation 5200.1-R and DNA Instruction 5400-7C.)

(b)(2) Applies to information which pertains solely to the internal rules and practices of the Agency; this exemption has two

Office of the Secretary of Defense

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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 of 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.

292.1 Purpose.

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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

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

²See footnote 1 to § 292.3(a)(3).

³See footnote 1 to § 292.3(a)(3).

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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

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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 50-2⁵ regarding classification apply. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or non-existence 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.

⁴ See footnote 1 to § 292.3(a)(3).

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

(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

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:

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(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	O1-06/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 page15
Microfiche, per page25

Aerial Photography Reproduction

Per Print	\$2.50
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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

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 implements 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 charac-

teristics 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 memoranda 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 declassification 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 forwards 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

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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.

SOURCE: 56 FR 49694, Oct. 1, 1991, unless otherwise noted.

§ 295.1 Purpose.

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

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records from the Inspector General (IG) under the Freedom on Information Act (FOIA). It implements title 5, United States Code (U.S.C.) section 552, as amended by the Freedom of Information Reform Act of 1986, 32 CFR part 285 and 32 CFR part 286.

§ 295.2 Applicability.

The provisions of this part are applicable to all components of the Office of the Inspector General (OIG) and govern the procedures by which FOIA requests for information will be processed and records may be released under the FOIA.

§ 295.3 Definition of OIG records.

(a) The products of data compilation, such as books, papers, maps, and 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 in connection with the transaction of public business and in the OIG'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, 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 the OIG. 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 § 295.4(c).

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

(4) Personal records of an individual not subject to agency creation or retention requirements, created and

maintained primarily for the convenience of an OIG employee, and not distributed to any other OIG employee for their official use, or otherwise disseminated for official use.

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

(c) 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:

(1) When the data is embedded within the software and can not be extracted without the software. In this situation, both the data and the software must be reviewed for release or denial under the FOIA.

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

(3) See appendix B to this part for further information on release determinations of computer software.

(d) If unaltered publications and processed documents, such as regulations, manuals, maps, charts, and related geophysical materials are available to the public through an established distribution system with or without charge, the provisions of 5 U.S.C. 552(a)(3) normally do not apply and they need not be processed under the FOIA. Normally, documents disclosed to the public by publication in the FEDERAL REGISTER also require no processing under the FOIA. In such cases, the OIG will direct the requester to the appropriate source to obtain the record.

§ 295.4 Other definitions.

(a) *FOIA Request.* A written request for OIG records, made by any person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes

the FOIA, 32 CFR part 285 and 32 CFR part 286, or this part.

(b) *Initial Denial Authority (IDA)*. The official who has been granted authority to withhold records requested under the FOIA, for one or more of the nine categories of records exempt from mandatory disclosure, by the head of the OIG Component designated by the IG to administer the IG FOIA Program.

(c) *Appellate Authority*. The IG or his or her designee having jurisdiction for this purpose over the record.

(d) *Administrative Appeal*. A request by a member of the general public, made under the FOIA, asking the appellate authority of the OIG to reverse an IDA decision to withhold all or part of a requested record or an IDA decision to deny a request for waiver or reduction of fees.

(e) *Public Interest*. Public interest is official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA of informing citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files that reveals little or nothing about an agency's or official's own conduct.

§ 295.5 Policy.

(a) *General*. (1) It is the policy of the OIG to promote public trust by conducting its activities in an open manner, and by providing the public with the maximum amount of accurate and timely information concerning those activities, consistent with the need for security and adherence to other requirements of law and regulation.

(2) Records not specifically exempt from disclosure under the FOIA or prohibited by statutory or other regulatory requirements will, upon request, be made readily accessible to the public.

(3) Records that are specifically exempt from disclosure under the FOIA or prohibited by statutory or other regulatory requirements will be withheld from the public only upon the determination of the initial Denial Authorities identified in § 295.6 of this part, or the designated Appellate Authority.

(b) *News Media Requests*. (1) Requests from news media representatives for records that would not be withheld if requested under the FOIA or prohibited from release under other statutory or regulatory authority, will be released promptly by the OIG element originating the record.

(2) Requests from news media representatives for records that are exempt from release under the FOIA, or prohibited from release under other statutory or regulatory authority will be provided to the Freedom of Information Act and Privacy Act (FOIA/PA) Division, Office of the Assistant Inspector General for Investigations, along with the requested records, for review and a release determination and the news media representatives will be so advised.

(3) Extracts of the nonexempt portions of such records may be prepared in response to a specific request from a news media representative but shall be coordinated for release with the FOIA/PA Division. Extracts shall be prepared in accordance with the sample at appendix to § 295.5.

(c) *Control System*. (1) A request for OIG records that invokes the FOIA shall enter a formal control system designed to ensure compliance with the FOIA. A release determination must be made and the requester informed within the time limits specified in this part.

(2) Any request for OIG records that either explicitly or implicitly cites the FOIA will be processed under the provisions set forth in this part, unless otherwise required by § 295.5(m) of this part. All such requests shall be forwarded to the FOIA/PA Division.

(d) *Promptness of Response*. (1) A request from a member of the public for OIG records will be responded to within 10 working days of the date of its receipt in the FOIA/PA Division, unless a delay is authorized.

(2) Receipt of the request will be acknowledged and the requester will be promptly advised of any additional information needed to assure compliance with procedures established in this part. In the event there are a significant number of requests, e.g., 10 or more, the requests will be processed in order of date of receipt. This does not

preclude the OIG from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. The OIG 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 will be determined at the discretion of the OIG.

(3) These provisions also apply to a request received on referral from another DoD Component or government agency and time limits will begin on the date of receipt in the OIG FOIA/PA Division.

(e) *Use of Exemptions.* It is OIG policy to make records publicly available unless they qualify for exemption under one or more of the nine exemptions. The OIG may elect to make a discretionary release, however, a discretionary release is generally not appropriate for records exempt under exemptions (b)(1), (b)(3), (b)(4), (b)(6) and (b)(7)(C). Exemptions (b)(4), (b)(6) and (b)(7)(C) can not be claimed when the requester is the submitter of the information. The categories of records which are exempt from release are identified in appendix B of this part.

(f) *For Official Use Only (FOUO).* The use of FOUO markings will be accomplished in accordance with the provisions of appendix A of this part, and exemptions (b)(2) through (b)(9) as set forth in appendix B of this part. Additional guidance will be provided to OIG elements, as needed, by the FOIA/PA Division.

(g) *Public Domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in the OIG Reading Room located in the FOIA/PA Division. Exempt records released pursuant to this part or other statutory or regulatory authority, however, may be considered to be in the public domain only when their release constitutes a waiver of the FOIA exemption. When the release does not constitute such a waiver, such as when disclosure is made to a properly constituted advisory committee or to a Congressional Committee, or to an individual to whom the record pertains, the released records do not lose their exempt sta-

tus. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks to use the records in a private or personal capacity.

(h) *Creation of Records.* (1) A record must exist and be in the possession or control of the OIG at the time of the request to be considered subject to release under this part and the FOIA. Mere possession of a record does not presume OIG control and such records, or identifiable portions thereof, will be referred to the originating agency for a release determination and/or direct response to the requester. There is no obligation to create nor compile a record to satisfy a FOIA request; however, the OIG may compile a new record when doing so would result in a more useful response to the requester, or be less burdensome to the OIG than providing the existing records, and the requester does not object. The cost of creating or compiling such a record will not be charged to the requester unless the fee is equal to, or less than, the fee that would be charged for providing the existing record. Any fee assessments will be made in accordance with chapter IV of DoD 5400.7-R (32 CFR part 286).

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, the OIG will apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request will be processed. However, the request will not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not be a normal business as usual approach.

(i) *Describing Records Sought.* (1) It is the responsibility of the member of the public requesting records to adequately identify the records. A member of the public must describe the records sought with sufficient information to permit the OIG to locate the records with a reasonable amount of effort,

since the FOIA does not authorize “fishing expeditions.” 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.

(2) When the OIG receives a request that does not “reasonably describe” the requested record with sufficient Category I information to permit the conduct of an organized nonrandom search, or sufficient Category II information to permit inference of the Category I elements needed to conduct such a search, the requester will be notified in writing of the defect and of the need for more specific identification of the records sought. The specificity letter will provide guidance in identifying the records sought and in reformulating the request to reduce the burden on the OIG in complying with the FOIA. The OIG is not obligated to act on requests until an adequate description is provided by the requester.

(3) When the OIG receives a request in which only personal identifiers, e.g., name and Social Security Account Number, are provided in connection with the request for records concerning the requester, only records retrievable by personal identifiers will be searched. The search for such records may be conducted under Privacy Act procedures. No record will be denied that is releasable under the FOIA.

(j) *Referrals.* (1) The OIG has the responsibility of protecting the identity of individuals who make protected disclosures of wrongdoing on the part of others, under the “Whistleblower Protection Acts”. When a FOIA requester has identified himself/herself as the “Whistleblower” in the matter for which records are being sought, in accordance with §295.7(b)(3) of this part, or the FOIA/PA Division can reasonably determine that the FOIA requester is the “Whistleblower”, the individual’s identity will continue to be

protected in all of the following circumstances involving referrals, except to the extent that such protection will impede the release of responsive records to the requester. In such event, the requester will be advised of the impedance and offered the option of allowing himself/herself to be identified solely for the purpose of obtaining maximum release of records responsive to the FOIA request. If the requester chooses to continue anonymity, the request will be processed only to the extent that will allow continued protection of the individual’s identity.

(2) The OIG will refer a FOIA request to another DoD Component or to a Government agency outside the DoD when the OIG has no records responsive to the request, but believes the other DoD Component or outside agency may have, and the other DoD Component or outside agency has confirmed that it holds the record. When the other DoD Component or outside agency agrees to the referral, the requester will be advised of the referral and that the OIG has no responsive records, with the following exceptions:

(i) If it is determined by the other DoD Component or outside agency that the existence or nonexistence of the record itself is classified, the OIG will inform the requester only that the OIG has no responsive record and no referral will take place.

(ii) If the record falls under one or more of the “Exclusions” under the FOIA (see appendix B of this part), as determined by the other DoD Component or outside agency, the OIG will advise the requester only that the OIG has no responsive record and no referral will take place.

(3) The OIG will refer a record, or portions of a record that holds but that was originated by another DoD Component or outside agency, or for a record that contains substantial information that originated with another DoD Component or outside agency, to that Component or agency (unless the agency is not subject to the FOIA) for a release determination and/or direct response to the requester. In any such case, direct coordination will be effected and concurrence obtained from the other Component or agency prior to the referral. A copy of the record will be provided to

the Component or agency with the referral, and the requester will be notified of the referral, consistent with any security requirements or "Exclusion" provisions of the FOIA. The OIG will not, in any case, release or deny such records without prior consultation with the other DoD Component or outside agency. If the requester is the "Whistleblower", the record or portion of the record will be provided to the DoD Component or agency, with a request for a release determination and return of the record to the OIG for response to the requester.

(4) The OIG will refer a FOIA request for a classified record that it holds, but did not originate, to the originating DoD Component or outside agency (unless the agency is not subject to the FOIA). If the record originated with the OIG but the classification is derivative, i.e., contains classified information that originated elsewhere and was incorporated in the OIG record, the record will be referred to the originating authority with a recommendation for release; or, after consultation with the originating authority, with a request for a declassification review and/or release determination and return of the record. If the requester is the "Whistleblower", the record will be provided to the originating authority with a request for a release determination and return of the record to the OIG for response to the requester.

(5) The OIG may also refer a request for a record that was originated by the OIG for the use of another DoD Component or outside agency, to that Component or agency with a recommendation for release, after any necessary coordination. The requester will be notified of such action consistent with any security requirements or "Exclusion" provisions of the FOIA.

(6) A FOIA request for investigative, intelligence, or any other type of record on loan from another DoD Component or outside agency to the OIG for a specific purpose will be referred to the DoD Component or outside agency that provided the records, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside Component or agency desires anonymity as determined through

coordination, the OIG will respond directly to the requester.

(7) A FOIA request for a record, or portions of a record, held by the OIG, that originated with a non-U.S. government agency that is not subject to the FOIA, will be responded to by the OIG.

(8) Notwithstanding anything to the contrary in this section, all requesters seeking National Security Council (NSC) or White House documents will be advised that they should write directly to the NSC or White House for such documents. Should the requester insist upon an OIG search for these records, the OIG will conduct an appropriate search pursuant to the FOIA. OIG/DoD documents in which the NSC or White House has a concurrent reviewing interest will be forwarded by the FOIA/PA Division to the Director, Freedom of Information and Security Review (DFOISR), Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), which shall effect coordination with the NSC or White House, and return the documents to the originating agency after NSC review and determination. The FOIA/PA Division will forward any documents found in OIG files that are responsive to the FOIA request to DFOISR, OASD(PA) for their coordination with the NSC or White House, and return to the OIG with a release determination for final processing of the request.

(9) On occasion, the OIG receives FOIA requests for General Accounting Office (GAO) documents containing OIG information. Even though the GAO is outside of the Executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing DoD information received directly from the public, or on referral from the GAO, will be processed under the provisions of the FOIA.

(k) *Authentication of Records.* Records provided under this part will be authenticated, upon written request, to fulfill an official Government or other legal function. This service is in addition to that required under the FOIA and is not included in the FOIA fee schedule; therefore, a fee of \$5.20 may be charged for each such authentication.

(l) *Records Management.* FOIA records shall be maintained and disposed of in

accordance with Inspector General Defense Manual (IGDM) 5015.2,¹ "Records Management Program".

(m) *Relationship Between the FOIA and the Privacy Act (PA)*. Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts:

(1) Where requesters seek records about themselves which are contained in a PA system of records and cite or imply the PA, the OIG will process their requests under the provisions of the PA.

(2) Where requesters seek records about themselves which are not contained in a PA system of records and cite or imply the PA, the requests will be processed under the provisions of the FOIA, since they have no access under the PA.

(3) Where requesters seek records about themselves that are contained in a PA system of records and cite or imply the FOIA or both Acts, the requests will be processed under the time limits of the FOIA and the exemptions and fees of the PA. This is appropriate since greater access will generally be received under the PA.

(4) Where requesters seek agency records (as opposed to personal records) and cite or imply the PA and FOIA, or where requesters cite or imply only the FOIA, the requests will be processed under the FOIA.

(5) Requesters will be advised in the final responses to their requests why a particular Act was used in processing their requests.

(n) *Index and "(a)(2)" Materials*. (1) No order, opinion, statement of policy, interpretation, staff manual or instruction (except as indicated below) issued after July 4, 1967, which is not indexed and either made available or published, may be relied upon, used, or cited as a precedent against any member of the

public unless that individual has actual and timely notice of the contents of such materials. Such actual and timely notice may not be after-the-fact; i.e., after the individual has suffered some adverse effect. Materials identified as "(a)(2)" are:

(i) Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

(ii) Statements of policy and interpretations that have been adopted by the agency and are not published in the FEDERAL REGISTER.

(iii) Administrative staff manuals and instructions, or portions thereof, that establish OIG policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the OIG. Examples of manuals and instructions not normally made available are:

(A) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

(B) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

(2) Thus, materials considered to meet the preceding definition of the FOIA "(a)(2)" requirements will be made available for public inspection and copying upon written request to the address indicated in § 295.7(b)(1) of this part, unless such materials have been published and are offered for sale or subscription. Upon receipt of the request, arrangements will be made at a time convenient to both the requester and the OIG, for the review and copying. If the publishing activity is out of stock of the published, for sale material and does not intend to reprint, then the preceding procedure will apply to the published material as well.

(3) When appropriate, the cost of copying any "(a)(2)" materials will be

¹Copies may be obtained, if needed, from the Information and Operations Support Directorate, Publications Management Branch, room 420, 400 Army Navy Drive, Arlington, VA 22202-2884.

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imposed upon the individual requesting the copy in accordance with chapter VI of DoD 5400.7–R (32 CFR part 286).

(4) The OIG will prepare an index of “(a)(2)” materials, or supplement thereto, arranged topically or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Separate case name and numbering arrangements may be added for OIG convenience.

(5) The IG has determined that it is not practical nor feasible to prepare an index of the “(a)(2)” materials on a quarterly basis, nor to publish the annual “IG Publications Index” in the FEDERAL REGISTER because of the volume. This index is available to the public at no cost upon written request to: Acquisition and Resources Administration Directorate, Publications Management Branch, room 413, 400 Army Navy Drive, Arlington, Virginia 22202–2884. It may be necessary to deny all or portions of some documents listed in the index that fall within one or more exemptions of the FOIA.

(o) *Fees and Fee Waivers.* (1) Fees will be assessed under the FOIA as set forth in chapter VI of DoD 5400.7–R (32 CFR part 286).

(2) Requesters must indicate their willingness to pay fees in their initial FOIA request. If a waiver of fees is requested, a statement regarding their willingness to pay fees in the event a waiver or reduction of fees is denied is still required. Any requests not containing a statement regarding a willingness to pay assessed fees will not be processed and the requester will be so advised.

(3) Fees will not be required to be paid in advance of processing the request for release of the records requested except:

(i) When the requester is known to be in default of payment of fees incurred in connection with a previous request.

(ii) When the total amount of estimated fees assessable to the requester exceeds \$250.00 and waiver is not appropriate, a “good faith” deposit of half of the amount of the estimated fees may be required before completing the processing of the request, or providing the requested records, in the case of a requester with no history of payment.

Where the requester has a history of prompt payment, the OIG will notify the requester of the likely cost and obtain satisfactory assurance of full payment.

(4) When the OIG has completed all work on a request and the documents are ready for release, advance payment may be requested before forwarding the documents if there is no payment history on the requester. Where there is a history of prompt payment by the requester, the OIG will not hold documents ready for release pending payment.

(5) Fee waivers will be granted on a case-by-case basis when the OIG determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the OIG and the Department of Defense and is not primarily in the commercial interest of the requester. In any request for waiver of fees, the requester must provide sufficient information to enable the IDA to make a proper determination of whether or not the fees should be waived.

(6) In cases where the requester fails to provide sufficient persuasive information upon which to make a determination for waiver of the fees, the requester shall be so informed and given the opportunity to submit additional justification. Absent such justification, the requester may be required to pay fees appropriate to his/her category, if provision of the information is determined not to be in the public interest or benefit.

(7) Payments of fees must be by check or U.S. Postal money order made payable to the Treasurer of the United States. Cash payments cannot be accepted.

(p) *Appeals and Judicial Action.* (1) If the designated IDA declines to provide a requested record because the official considers it exempt from disclosure under one or more of the nine exemptions of the FOIA, that decision may be appealed by the requester to the designated Appellate Authority. The appeal should be submitted in writing by the requester within 60 calendar days after the date of the initial denial letter. In cases where incremental release

actions have been taken on an initial request, the time for the appeal will not begin until the date of the last denial of release letter.

(2) A “no record” finding may be considered to be adverse, and if so interpreted by the requester, may be appealed using the normal OIG appeal procedures. The OIG will conduct an additional search of files, based on the receipt of an appeal to a “no record” response, as a part of the appellate process.

(3) All final decisions rendered on appeals normally shall be made to the requesters in writing by the Appellate Authority, after consultation with the Office of General Counsel (OGC) representative to the OIG, and other appropriate OIG elements.

(4) Final determinations on appeals normally shall be made within 20 working days after receipt. The appeal will be deemed to have been received when it reaches the FOIA/PA Division, for administrative processing on behalf of the Appellate Authority. Misdirected appeals are to be referred expeditiously to the FOIA/PA Division.

(5) A requester will be deemed to have exhausted his/her administrative remedies after he/she has been denied the requested record or waiver/reduction of fees, by the designated Appellate Authority, or when the OIG FOIA/PA Division fails to respond to the request within the time limits prescribed by the FOIA, DoD 5400.7-R (32 CFR part 286) and this part. The requester may then seek judicial action from a U.S. District Court in the district in which the requester resides, has a principal place of business, in the district in which the record is located, or in the District of Columbia.

(6) Records that are denied on appeal shall be retained for a period of six years, in accordance with IGDM 5015.2,² “Records Management Manual,” to meet the statute of limitations of claims requirements.

APPENDIX TO § 295.5

EXTRACT

The material contained herein is an Extract of information from (Name of Original

Document), which has been determined to be in the public domain. The remaining material not provided herein may be requested under the provisions of the Freedom of Information Act.

§ 295.6 Responsibilities.

(a) The Assistant Inspector General (AIG) for Investigations is responsible for the overall implementation and administration of the FOIA program in the OIG, and for the designation of the IDAs.

(b) The Director, Investigative Support is designated as an IDA and is responsible for the overall operation of the FOIA program in the OIG.

(c) The Assistant Director, FOIA/PA Division, Investigative Support Directorate is designated as an IDA and will:

(1) Serve as the point of contact on all FOIA matters for the OIG.

(2) Coordinate and respond to all requests received from the public for records in accordance with the policy established and procedures set forth in this part, and in all applicable DoD directives, regulations and instructions.

(3) Coordinate requests received from the public for records to the extent considered necessary, with the DFOISR, OASD(PA), other DoD Components, other Federal agencies, and other OIG elements.

(4) Arrange for the collection of fees are prescribed by the policy as established in this part.

(5) Maintain the FOIA case files in accordance with IGDM Manual (IGDM) 5015.2,³ “Records Management Program”.

(6) Recommend action to be taken on all appeals of fees, appeals of fee waiver denials, and appeals of denials to access of records requested, to the Appellate Authority.

(7) Review OIG publications to assure that those which meet the FOIA “(a)(1)” and “(a)(2)” requirements for publication in the FEDERAL REGISTER are prepared in proper form and transmitted promptly for publication in the FEDERAL REGISTER.

(8) Maintain copies of material required to be made available under the “(a)(2)” provisions of the FOIA for examination and copying by the public,

²See footnote 1 to § 295.5(1).

³See footnote 1 to § 295.5(1).

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and provide the required FOIA Reading Room for use by the public in doing so.

(9) Establish a training program for OIG personnel who are involved in preparing responsive records for release to the public under the FOIA.

(10) Prepare the Annual Report on the FOIA for forwarding to DFOISR, OASD(PA) as required by 32 CFR part 286.

(d) The AIGs and the Director, IG Regional Office-Europe will:

(1) Comply with, and assure compliance by all of their subcomponents with, the policy established and the procedures set forth in this part.

(2) Appoint a Point of Contact (POC) to interact with the FOIA/PA Division on all FOIA matters, and notify the FOIA/PA Division of any changes in the appointment.

(3) Provide all records responsive to a request as directed by the FOIA/PA Division.

(4) Recommend release/denial action to be taken, indicate applicable exemptions, and provide appropriate rationales.

(e) The Freedom of Information Act Appellate Authority is designated by the Inspector General and will:

(1) Determine the action to be taken on all appeals made by the public of fees, fee waiver/reduction denials, and access denials in accordance with chapter V, section 3, of DoD 5400.7-R (32 CFR part 286).

(2) Coordinate all appellate decisions with the Office of General Counsel, Assistant General Counsel (Fiscal and Inspector General).

(f) The AIG for Administration and Information Management will:

(1) Prepare annually an index of IG publications, statements and documents pertaining to any matter issued, adopted, or promulgated and required to be made available to the public by publication or sale.

(2) Establish and implement any necessary procedures to effect disciplinary action recommended by the Special Counsel of the Merit Systems Protection Board in cases involving the arbitrary and capricious withholding of information and records requested under the FOIA as required by chapter V, section 4, of DoD 5400.7-R (32 CFR part 286).

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§ 295.7 Procedures.

(a) *General.* The provisions of the FOIA are reserved for persons with private interests as opposed to Federal governmental agencies seeking official information. The procedures for making requests, whether as a private party or governmental representative, are set forth below.

(b) *Requests From Private Parties.* (1) Members of the public may make requests in writing for copies of records, or permission to examine or copy records, directly to the FOIA/PA Division addressed to: Assistant Director, FOIA/PA Division, OAIG for Investigations, 400 Army Navy Drive, Arlington, VA 22202-2884.

(2) Requests must identify each record sought with sufficient specificity to enable the custodian to locate the record with a reasonable amount of effort. Requesters should provide such information as where the record originated and by whom, its subject matter, its approximate date or timeframe, which element of the OIG is likely to have custodianship, or any other similar information that would assist in locating the record. Requests must also contain a statement regarding willingness to pay fees.

(3) A request from an individual who made an allegation of wrongdoing to the IG, or any protected disclosure under the "Whistleblower Protection Acts," and who is seeking the results of any investigation or inquiry conducted into the allegation, should identify him/herself as the "Whistleblower" in the request. The request should indicate whether he/she wishes to continue anonymity, should be notarized to avoid the risk of losing the anonymity, and should contain a statement regarding willingness to pay fees.

(4) A request for a personal record or investigative record pertaining to the individual making the request, that is in a system of records whether non-exempt or exempted from mandatory release under the Privacy Act, must be notarized to avoid the risk of invasion of personal privacy. In any such request, the individual may designate another individual to act as his/her representative in making the request and in receiving the records on his/her behalf; however, the authorization must

be in writing, specifically name the representative and kinds of records authorized to be provided, and be notarized to avoid the risk of invasion of personal privacy.

(5) A request for a record that was obtained from a non-U.S. Government source, and that is subject to exemption (b)(4) under the FOIA, will be released to the individual or firm making the request without further exception, if:

(i) The individual or firm is clearly the submitter of the information and/or is clearly acting on behalf of the submitter in making the request.

(ii) The request contains a statement from a company official or other representative of the submitter clearly capable of certifying that the requester is acting on behalf of the submitter of the information in making the request; i.e., a Vice-President certifies on his/her company letterhead that XYZ Law Firm is acting on behalf of the company in requesting copies of documents submitted to the government by the company. A mere assertion by the requester that the requester is acting on behalf of the submitter in making the request will not be honored, if it cannot be readily verified through records available to the OIG.

(c) *Requests From Government Officials.*

(1) Requests from officials of State, or local Governments for OIG records will be considered the same as any other requester, except where the request is for a personal record in a system of records subject to the Privacy Act, in which case the provisions of DoD 5400.11-R (32 CFR part 286a) apply.

(2) Requests from members of Congress, or their staffs, not seeking records on behalf of a Congressional Committee, Subcommittee, or either House sitting as a whole, will be considered the same as any other requester. Requests from members of Congress, or their staffs, made on behalf of their constituents will also be considered the same as any other requester.

(3) Requests from officials of foreign governments shall be considered the same as any other requester. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclo-

sure channels and the requester so notified.

(d) *Misdirected Requests.* Requests misdirected to other OIG elements will be forwarded promptly to the FOIA/PA Division. The statutory period allowed for response to a request misdirected by the requester shall not begin until the request is received in the FOIA/PA Division. The OIG components and field elements receiving misdirected requests should advise the requester that the request is being forwarded to the office having the authority to act on and respond to the request.

(e) *Privileged Release to Officials.* (1) Subject to DoD 5200.1-R,⁴ "Information Security Program Regulation", applicable to classified information, DoD Directive 5400.11 (32 CFR part 286a), applicable to personal privacy or other applicable law, records exempt from release under appendix B of this part may be authenticated and released, without requiring release to other FOIA requesters, in accordance with OIG rules to U.S. Government officials requesting them on behalf of Federal governmental bodies, whether legislative, executive, administrative, or judicial, as follows:

(i) To a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4,⁵ "Provision of Information to Congress," and this part.

(ii) To the Federal courts whenever ordered by officers of the court as necessary for the proper administration of justice

(iii) To other Federal agencies both executive and administrative as determined by the IG or the IG's designee.

(2) On all such releases, the officials receiving records under the above provisions will be informed in writing that the records are exempt from public release under the FOIA and are privileged. The OIG components will also advise the receiving officials of any special handling instructions.

(f) *Processing Requests.* (1) Upon receipt in the FOIA/PA Division, a request for records will be assigned a control number, logged, and reviewed

⁴Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

⁵See footnote 4 to §295.7(e).

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for adequacy and compliance with the procedures for submitting requests outlined in § 295.7(b).

(2) If the request does not meet the adequacy of description test, contain a statement regarding fees, or contain a notarized signature/authorization or a certification of submitter representation, if applicable; the request will be acknowledged as having been received and the requester will be notified of the defect and advised of the means necessary to correct the defect and comply with the procedures. If the requester does not correct the defect within the time allowed (generally 30 calendar days) in the defect notice, the following actions will be taken:

(i) Where the request does not meet the adequacy of description test, the request will be administratively closed and the requester so advised.

(ii) Where the request meets the adequacy of description test but fails to comply with the remaining procedural requirements, and the time allowed in the defect notice for compliance by the requester has elapsed, the request will be processed to the extent possible consistent with DoD 5400.7-R (32 CFR part 286) and this part.

(3) When it is determined that a request complies with all applicable procedures, the necessary search and collection of responsive records will be initiated through the Component(s) of the OIG likely to have custodianship of the sought records.

(4) Where the appropriate OIG Component has determined that no record responsive to the request exists, the POC for the OIG Component will so advise the FOIA/PA Division within the due date assigned to the POC. The requester will be notified in writing by the IDA, within 10 working days from the date of receipt of the request, that no responsive records exist; and, of the right and means by which to appeal the no record response as an adverse determination.

(5) When it is determined that the records sought are part of an ongoing audit, inspection, or investigation, the requester will be advised of such (subject to the "Exclusions" under the FOIA identified in appendix B, of this part). The requester will be informed of the estimated timeframe for completion of

the ongoing audit, inspection, or investigation and asked if he/she wishes to withdraw the request and resubmit it upon completion of the ongoing process. If the requester chooses not to withdraw the request, the processing will be continued and an appropriate release determination will be made, consistent with the statutory provisions of the FOIA.

(6) When responsive records have been located, the POC for the OIG element having the records will forward the records to the FOIA/PA Division with a recommendation for release on SD Form 472, "Request Information Sheet," along with a completed DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost." The records will be reviewed and an initial determination to release or deny will be made.

(g) *Initial Determinations.* (1) The initial determination of whether to make a record available upon request may be made only by the IDAs designated by the IG in this part. Further, the number of IDAs designated by the IG will be limited and based on a balance of the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limitations of the FOIA.

(2) Other than statutory denials, there are six other reasons for not complying with a request for a record:

(i) The request is transferred to another DoD Component or Federal agency.

(ii) The request is withdrawn by the requester.

(iii) The information requested is not a record within the meaning of the FOIA and § 295.3(a) of this part.

(iv) A record has not been described with sufficient particularity to enable those that OIG to locate it by conducting a reasonable search.

(v) The requester has failed unreasonably to comply with the procedural requirements, including the payment of fees, imposed by 32 CFR part 286 and this part.

(vi) The OIG has determined through knowledge of its files and reasonable search efforts that it neither controls nor possesses the requested record.

(3) Initial determinations to release or deny a record normally will be made and the decision reported to the requester within 10 working days, provided that the requester has complied with the preliminary procedural requirements.

(4) When requests are denied in whole or in part, the requester will be informed in writing of the reasons for the denial, the identity of the official making the denial, the right of appeal of the decision, and the identity and address of the official to whom an appeal may be made.

(5) The explanation of the substantive basis for a denial will include specific citation of the statutory exemption applied under provisions of the FOIA. Mere reference to a classification or to a "For Official Use Only" marking will not constitute a basis for invoking an exemption. When the initial denial is based in whole or in part on a security classification, the explanation will include a summary of the applicable criteria for the classification.

(h) *Denial Tests.* (1) To deny a requested record that is in the possession and control of the OIG, it must be determined that the record is included in one or more of the nine categories of records exempt from mandatory disclosure as provided by the FOIA and outlined in chapter III of DoD 5400.7-R (32 CFR part 286), and this part. No OIG record may be otherwise withheld from the public, whether in whole or in part, except as determined by the designated IDAs in accordance with FOIA exemptions.

(2) Although portions of some records may be denied, the remaining reasonably segregable portions will be released to the requester when it can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. When a record is denied in whole, the IDA will advise the requester of that determination.

(i) *Extension of Time.* (1) In unusual circumstances, responsive records may be located by the office having custodianship over the record, but the records can not be made immediately available to the FOIA/PA Division, or the FOIA/PA Division can not make them immediately available to the re-

quester. The unusual circumstances justifying the delay will be the result of the following:

(i) The requested record is located in whole or in part at another geographic location than that of the FOIA/PA Division.

(ii) The request requires the collection and/or evaluation of a substantial number of records.

(iii) Consultation is required with other DoD Components or agencies having substantial interest in the subject matter to determine whether the records requested are exempt from disclosure in whole or in part under provisions of the FOIA and this part or should be released as a matter of discretion.

(2) In any such event, efforts will be made to negotiate an informal extension in time with the requester by the FOIA/PA Division. If the requester chooses not to agree informally to an extension in time, a written explanation of the reasons for delay will be provided to the requester and the requester will be asked to await a substantive response by an anticipated date.

(j) *Fee Assessments.* (1) When it is determined that the fees assessable to a request undergoing final processing may exceed the limit established by the requester, or may be in excess of \$250, the processing will be discontinued and the requester notified so that he/she may advise of his/her desire to continue.

(2) If a "good faith" deposit is required, the requester will be allowed a reasonable time (generally 30 calendar days) in which to provide payment. If the requester fails to provide the "good faith" deposit within the time allowed, the request will be closed and the requester so notified.

(3) In all other cases, the requester will be notified of any fees due at the time the requested records are provided to the requester, and allowed a reasonable time (generally 30 calendar days) in which to pay the fees.

(4) If the requester fails to pay the fees in the time allowed, a notice of nonpayment will be placed in the formal control system and no further FOIA requests from the requester will

be honored until the fees have been paid.

(k) *Records on Non-U.S. Government Sources.* (1) When it is determined that the records or data contained within the records responsive to a request were obtained from a non-U.S. Government source by the OIG, and the requester is not the submitter of the non-U.S. Government record nor acting as the submitter's representative; and it is further determined the source or submitter may have a valid objection to release of the material, the submitter will be promptly notified of the request and afforded a reasonable time (generally 30 calendar days) to present any objections to the release.

(2) This procedure is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4). If, for example, the record or data was submitted by the non-U.S. Government source with the actual or presumptive knowledge of the source, and established that it would be made available to the public upon request, there is no requirement to notify the source.

(3) All objections will be evaluated. When a substantial issue has been raised, the OIG may seek additional information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making a determination.

(4) The OIG will not ordinarily exercise its discretionary authority to release information clearly meeting the exemption (b)(4) criteria. Further, the final decision to disclose information not deemed to clearly meet exemption (b)(4) criteria will be made by an official equivalent in rank or greater to the official who would make the decision to withhold that data under a FOIA appeal.

(5) When the source or submitter advises of the intent to seek a restraining order or to take court action to prevent release of the data, the requester will be notified and action will not be taken on the request until after the outcome of the court action is known. When the requester brings court action to compel disclosure, the source shall be promptly notified of this action.

(6) These procedures also apply to any non-U.S. Government record in the possession and control of the OIG from multi-national organizations, such as the North Atlantic Treaty Organization (NATO) and the North American Aerospace Defense Command (NORAD), or foreign governments. Coordination of such FOIA requests with foreign governments will be made through the Department of State by the FOIA/PA Division.

(1) *Coordination With Department of Justice.* (1) Where the custodian of an OIG element determines that records responsive to a FOIA request are pertinent to pending or potential litigation involving the United States, the FOIA/PA POC for the element shall promptly notify the FOIA/PA Division so that the necessary coordination can be effected with the Office of General Counsel (OGC) representative to the IG.

(2) The OGC representative shall effect all necessary coordination with the United States Attorney and/or Department of Justice prior to any release of such records.

(m) *Procedures for Appeals.* (1) A requester may appeal the initial decision to deny access to requested records, in writing, to the designated OIG Appellate Authority. The requester may also appeal a no record determination, any fees assessed and the denial of a request for waiver/reduction of fees. All such appeals should be made no later than 60 calendar days after the date of the initial denial letter or letter of advisement regarding fees.

(2) All appeals should provide sufficient information and justification upon which a determination may be made by the Appellate Authority as to whether to grant or deny the appeal; or, in the event of a "no record determination" sufficient information and/or justification upon which additional record searches may be based. A copy of the initial request and initial denial, and "no record" or fee advisement letter should be included.

(3) The FOIA/PA Division administers the appeals for the Appellate Authority. All appeals should be addressed to the Assistant Director, FOIA/PA Division, OAIG for investigations, 400 Army Navy Drive, Arlington, VA 22202-2884.

(4) Upon receipt in the FOIA/PA Division, the appeal will be assigned a control number, logged, and prepared for provision to the Appellate Authority for a final determination. Receipt will be acknowledged in writing within 10 working days and the requester advised of any additional time needed due to the unusual circumstances described in § 295.7(i) of this part.

(5) If additional time is required, the final decision may be delayed for the number of working days (not to exceed 10) that were not used as additional time for responding to the initial request. If no additional time is required, the requester will be advised in writing of the final decision within 20 working days.

(6) If the appeal is approved in part or in whole, or responsive records located upon additional search, the requester will be informed and promptly provided any records determined to be releasable.

(7) If “no records” can be located in response to the appeal, the requester will be informed that no records were located, of the identity of the official making the final determination, and of the right to judicial review.

(8) If the appeal of the initial denial of responsive records is denied in part or in whole, the requester will be advised of the applicable statutory exemption or exemptions invoked under the provisions of the FOIA for the denial, the identity of the official making the final determination, that meaningful portions of any denied records were not reasonably segregable, and of the right to judicial review.

(9) 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 cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with an explanation of how that review confirmed the continuing validity of the security classification.

(10) Final refusal involving issues not previously resolved or that the OIG knows to be inconsistent with rulings of other DoD components ordinarily will not be made before consultation with the Assistant General Counsel

(Fiscal and Inspector General), OGC, DoD.

(11) Tentative decisions to deny records that raise new or significant legal issues of potential significance to other agencies of the Government shall be provided to the Department of Justice, Attn: Office of Legal Policy, Office of Information and Policy, Washington, DC 20530 after coordination with the Assistant General Counsel (Fiscal and Inspector General), OGC, DoD.

§ 295.8 Annual report.

The FOIA Annual Report, assigned Report Control System DD-PA (A) 1365, will be prepared by the FOIA/PA Division for the preceding calendar year and submitted to the Assistant Secretary of Defense (PA) on or before February 1 of each year. The report will be compiled and formatted in accordance with chapter VII, DoD 5400.7-R (32 CFR part 286).

§ 295.9 Organization and mission.

(a) The organization of the OIG includes the Headquarters located in Arlington, Virginia, consisting of the Inspector General, Deputy Inspector General, the Offices of the Assistant Inspector General (AIG) for Analysis and Followup, the AIG for Audit Policy and Oversight, the AIG for Auditing with its subordinate field elements located throughout the Continental United States (CONUS), the AIG for investigations with its field elements located throughout the CONUS and Europe, the AIG for Administration and Information Management, the AIG for Departmental Inquiries, the AIG for Inspections, and the Director, IG Regional Office-Europe (IGROE) located in Wiesbaden, Germany. The IGROE has representatives assigned from the Offices of the AIG for Investigations, the AIG for Inspections, the AIG for Auditing and the AIG for Departmental Inquiries, who fulfill the missions of their respective components.

(b) The “Organization and Staff Listing” (Inspector General, Defense List (IGDL) 1400.7),⁶ provides organization

⁶ See footnote 1 to § 295.5(i).

charts for the OIG elements and mailing addresses of all OIG operating locations and will be made available to the public upon written request.

(c) As an independent and objective office in the Department of Defense (DoD) the mission of the OIG is to:

(1) Conduct, supervise, monitor, and initiate audits, inspections and investigations relating to programs and operations of the DoD.

(2) Provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency, and effectiveness in the administration of, and to prevent and detect fraud and abuse in, such programs and operations.

(3) Provide a means for keeping the Secretary of Defense and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

(4) Further information regarding the responsibilities and functions of the IG is encompassed in Public Law 95–452, the “Inspector General Act of 1978,” as amended and 32 CFR part 373.

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

I. General Provisions

A. General

Information that 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 the reasons cited in FOIA exemptions (b)(2) through (b)(9) shall be considered as being for official use only. No other material shall be considered or marked “For Official Use Only” (FOUO), and FOUO is not authorized as an anemic form of classification to protect national security interests.

B. Prior FOUO Application

The prior application of 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 shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release.

C. Historical Papers

Records such as notes, working papers, and drafts retained as historical evidence of actions enjoy no special status apart from the exemptions under the FOIA.

D. Time To Mark Records

The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

E. Distribution Statement

Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24,¹ “Distribution Statements on Technical Documents”, shall bear that statement and may be marked FOUO, as appropriate.

II. Markings

A. Location of Markings

(1) An unclassified document containing FOUO information shall be marked “For Official Use Only” at the bottom on the outside of the front cover (if any), on each page continuing FOUO information, and on the outside of the back cover (if any).

(2) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(3) Within a classified document, an individual page that contains FOUO information but no classified information shall be marked “For Official Use Only” at the bottom of the page.

(4) Other records, such as, photographs, films, tapes, or slides, shall be marked “For Official Use Only” or “FOUO” in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

(5) The FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information
EXEMPT FROM MANDATORY DISCLOSURE

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

under the FOIA. Exemptions apply

III. Dissemination and Transmission

A. Release and Transmission Procedures

Until FOUO status is terminated, the release and transmission instructions that follow apply:

(1) The FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

(2) The DoD holders of FOUO information are authorized to convey such information to officials in other departments and agencies of the executive and judicial branches to fulfill a Government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked "For Official Use Only", and the recipient shall be advised that the information has been exempted from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

(3) Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4,² "Provision of Information to Congress". Release to the GAO is governed by DoD Directive 7650.1,³ "General Accounting Office Access to Records". Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

B. Transporting FOUO Information

Records containing FOUO information shall be transported in a manner that precludes disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations may be sent by fourth-class mail.

²See footnote 1 to section I.E. of this appendix.

³See footnote 1 to section I.E. of this appendix.

C. Electrically Transmitted Messages

Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviated "FOUO" before the beginning of the text. Such messages shall be transmitted in accordance with communications security procedures in ACP-121 (United States Supplement 1) for FOUO information.

IV. Safeguarding FOUO Information

A. During Duty Hours

During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-governmental personnel.

B. During Non-Duty Hours

At the close of business, FOUO records shall be stored so as to preclude unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of Public Law 86-36, National Security Agency Act shall meet the safeguards outlined for that group of records.

V. Termination, Disposal and Unauthorized Disclosures

A. Termination

The originator or other component authority, e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

B. Disposal

(1) Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but give due consideration to the additional

expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

(2) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. chapter 33, as implemented by Inspector General Defense Manual (IGDM) 5015.2,⁴ “Records Management Program”.

C. Unauthorized Disclosure

The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may also result in civil and criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

APPENDIX B TO PART 295—EXEMPTIONS

I. General

The exemptions listed apply to categories of records that may be withheld in whole or in part from public disclosure, unless otherwise prescribed by law. A discretionary release (see also §295.5(e) of this part) to one requester may preclude the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. In applying the exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester’s interest. The examples provided of the types of records that may be exempted from release are not at all inclusive.

II. FOIA Exemptions

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-R¹ (32 CFR part 159a), “Information

⁴Copies may be obtained, if needed, from the Information and Operations Support Directorate, Publications Management Branch, room 420, 400 Army Navy Drive, Arlington, VA 22202-2884.

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

Security Program Regulation”. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1-R, section 2-204f, 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, the OIG shall neither confirm nor deny the existence or nonexistence of the record being requested. A “refusal to confirm or deny” response will 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 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 (32 CFR part 159a) 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 related solely to the internal personnel rules and practices of DoD or the OIG. This exemption has two profiles, *high (b)(2)* and *low (b)(2)*.

(1) Records qualifying under high (b)(2) are those containing or constituting statutes, 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 DoD or OIG. Examples include:

(a) Those operating rules, guidelines, and manuals, for DoD and OIG investigators, inspectors, auditors, or examiners that must remain privileged in order for the OIG to fulfill a legal requirement.

(b) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualification of candidates for employment, entrance on duty, advancement, or promotion.

(c) Computer software meeting the standards of §295.3(c) of this part, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Records qualifying under the low (b)(2) profile are those that are trivial and house-keeping 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. Examples include: rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

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. Examples of statutes are:

- (1) National Security Agency Act information exemption, Public Law 86-36, section 6.
- (2) Patent Secrecy, 35 U.S.C. 181-188. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.
- (3) Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.
- (4) Communication intelligence, 18 U.S.C. 798.
- (5) Authority to Withhold from Public Disclosure Certain Technical Data, 10 U.S.C. 130, and 32 CFR part 250.
- (6) Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 U.S.C. 1102.
- (7) Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128.
- (8) Protection of Intelligence Sources and Methods, 50 U.S.C. 403(d)(3).

D. Exemption (b)(4)

Those containing trade secrets or commercial or financial information that the OIG 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 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 Government interest. Examples include:

- (1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. See also 32 CFR part 286h, "Release of Acquisition-Related Information".

- (2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

- (3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

- (4) Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

- (5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

- (6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interest in such data in accordance with title 10, U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4 (see section C.(5) of this appendix).

- (7) Computer software meeting the conditions of §295.3(c), which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

E. Exemption (b)(5)

Except as provided in subsections (2) through (5), below, 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 (as defined in 5 U.S.C. 552(e)), DoD Components or OIG components. Also exempted are records pertaining to attorney-client privilege and the attorney work-product privilege.

(1) Examples include:

- (a) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

- (b) Advice, suggestions, or evaluations prepared on behalf of the Department of Defense by individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for the purpose of obtaining advice and recommendations.

(c) Those non-factual portions or evaluations by DoD or OIG Components personnel of contractors and their products.

(d) Information of a speculative, tentative, or evaluative nature of such matters as proposed plans to procure, lease or otherwise acquire and dispose of materials, real estate, facilities or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate Government functions.

(e) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(f) Records that are exchanged among agency personnel and within and among DoD Components or agencies as part of the preparation for anticipated administrative proceeding by an agency or litigation before any Federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(g) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(h) Computer software meeting the standards of §295.3(c), which is deliberative in nature, the disclosure of which would inhibit or chill the decision-making process. In this situation, the use of software must be closely examined to ensure its deliberative nature.

(i) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process.

(2) If any such intra or interagency record or reasonably segregable portion of such record hypothetically would be made available routinely through the "discovery process" in the course of litigation with the agency, i.e., the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing, then it should not be withheld from the general public even though discovery has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant, balanced against the interests of the agency in maintaining its confidentiality, then the record or document need not be made available under this part. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

(3) Intra or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through "discovery," and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(4) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(5) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

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 would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

(1) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(a) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(b) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(2) Home addresses are normally not releasable without the consent of the individuals concerned. In addition, the release of lists of DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(a) Privacy interest. A privacy interest may exist in personal information even though the information has been disclosed at

some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(b) Published telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(3) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

(4) Individuals' personnel, medical, or similar file may be withheld from them or their designated legal representative only to the extent consistent with DoD Directive 5400.11 (32 CFR part 286a).

(5) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record. When withholding personal information from the subject of the record, legal counsel should first be consulted.

G. Exemption (b)(7)

Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes.

(1) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

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

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

(c) 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.

(i) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, the OIG shall neither confirm nor deny the existence or nonexistence of the record being requested.

(ii) 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 records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

(iii) Refusal to confirm or deny should not be used when (1) the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or (2) the person whose personal privacy is in jeopardy is deceased, and the OIG is aware of that fact.

(d) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense, a State, local, or foreign agency or authority, or any private institution which furnishes the information on a confidential basis.

(e) 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.

(f) 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.

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

(2) Examples include:

(a) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

(b) The identity of firms or individuals being investigated for alleged irregularities involving contracting with Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States.

(c) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(3) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500) is not diminished.

(4) When the subject of an investigative record is the requester of the record, it may

be withheld only as authorized by DoD Directive 5400.11 (32 CFR part 286a).

(5) Exclusions. Excluded from the above exemptions are the following two situations as applicable to the Department of Defense and the OIG:

(a) Whenever a request is made which involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the OIG may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such situation, the response to the requesters will state that no records were found.

(b) Whenever informant records maintained by a criminal law enforcement organization within the OIG under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the OIG may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are subject to exemption (b)(7), the response to the requester will state that no records were found.

H. Exemption (b)(8)

Those contained in or related to 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.

I. Exemption (b)(9)

Those containing geological and geophysical information and data (including maps) concerning wells.

PART 296—NATIONAL RECONNAISSANCE OFFICE FREEDOM OF INFORMATION ACT PROGRAM REGULATION

Sec.

- 296.1 Purpose.
- 296.2 Definitions.
- 296.3 Indexes.
- 296.4 Procedures for request of records.
- 296.5 Appeals.
- 296.6 Reading room.

AUTHORITY: 5 U.S.C. 552, as amended.

SOURCE: 64 FR 71298, Dec. 21, 1999, unless otherwise noted.

§ 296.1 Purpose.

The purpose of this part is to provide policies and procedures for the National Reconnaissance Office (NRO) implementation of the Freedom of Information Act (5 U.S.C. 552 as amended) (FOIA), and to promote uniformity in the NRO FOIA program.

§ 296.2 Definitions.

The terms used in this part, with the exception of the following, are defined in 32 CFR part 286:

(a) *Freedom of Information Act appellate authority*. The Chief of Staff, NRO.

(b) *Initial denial authority*. The Chief, Information Access & Release Center NRO.

§ 296.3 Indexes.

(a) The NRO does not originate final orders, opinions, statements of policy, interpretations, staff manuals or instructions that affect a member of the public of the type covered by the indexing requirement of 5 U.S.C. 552(a)(2). The Director, NRO, has therefore determined, pursuant to 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(a)(2), except the index noted in paragraph (b) of this section.

(b) A general index of FOIA-processed (a)(2) records shall be made available to the public, both in hard copy and electronically by December 31, 1999.

§ 296.4 Procedures for request of records.

(a) *Requests*. Requests for access to records of the National Reconnaissance Office may be filed by mail or FAX addressed to the Chief, Information Access and Release Center, National Reconnaissance Office, 14675 Lee Road, Chantilly, VA 20151-1715, FAX Number (703) 808-5082. Requests need not be made on any special form but must be by letter or FAX or other written statement identifying the request as a Freedom of Information Act request and setting forth sufficient information reasonably describing the requested record. All requests should contain a willingness to pay assessable FOIA fees.

(b) *Date of acceptance.* The requestor shall be promptly informed by letter of the date of acceptance of the request. The search conducted pursuant to that request shall be for records in existence as of and through the acceptance date.

(c) *Determination and notification.* When the requested record has been located and identified, the Initial Denial Authority shall determine whether the record is one which, consistent with statutory requirements, executive orders and appropriate directives, may be released or may contain information that is exempt under the provisions of 5 U.S.C. 552. Normally, the Initial Denial Authority shall notify the requestor of the determination within 20 working days of the receipt of the request.

(d) *Multi-track processing.* The NRO has 3 queues in which requests may be processed when a significant number of pending requests prevents a response within 20 working days, all based on the date of receipt, first-in first-out, and the amount of work, time, and volume involved in processing the requests.

(See subparagraph C1.5.4.2. of DoD 5400.7-R¹, Sept 1998). The queues are:

(1) *Simple.* Those requests which are easily handled and processed.

(2) *Complex.* Those requests which are complicated by multiple searches, coordinations, consultations, volume etc.

(3) *Expedited.* Expedited processing shall be granted to a requestor after the requestor asks for and demonstrates a compelling need for the information (paragraph C1.5.4.3. of DoD 5400.7-R)

(e) *Extension of response time.* In unusual circumstances when additional time is needed to respond, the Initial Denial Authority shall notify the requestor in writing of the reasons therefore, and an anticipated date, not to exceed 10 additional working days, on which a determination is expected to be dispatched. The Initial Denial Authority will normally send this notification within 20 working days from receipt of the request. Should it be determined that this 10 additional working days cannot be met, the requestor shall

be notified and offered the opportunity to limit or narrow the scope of the request in order to facilitate faster processing, or to arrange an alternative time for processing the request (paragraph C1.5.2.6. of DoD 5400.7-R)

(f) *Fees*—(1) *General.* As a component of the Department of Defense, the applicable published Department rules and schedules with respect to the schedule of fees chargeable and waiver of fees will also be the policy of NRO. See 32 CFR 286.33.

(2) *Advance payments.* (i) Where a total fee to be assessed is estimated to exceed \$250, advance payment of the estimated fee will be required before processing of the request, except where assurances of full payment are received from a requestor with a history of prompt payment. Where a requestor has previously failed to pay a fee within 30 calendar days of the date of the billing, the requestor will be required to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, as well as make an advance payment of the full amount of any estimated fee before processing of a new or pending request continues.

(ii) For all other requests, advance payment, i.e., a payment made before work is commenced, will not be required. Payment for work already completed is not an advance payment. Responses will not be held pending receipt of fees from requestors with a history of prompt payment. Fees should be paid by certified check or postal money order forwarded to the Chief, Information Access and Release Center (IARC) and made payable to the Treasurer of the United States.

§ 296.5 Appeals.

Any person denied access to records, denied a fee waiver, involved in a dispute regarding fee estimates, or who considers a no record determination, or any determination to be adverse in nature, may, within 60 days after notification of such denial, file an appeal to the Freedom of Information Act Appellate Authority, National Reconnaissance Office. Such an appeal shall be in writing addressed to the Chief, Information Access and Release Center, National Reconnaissance Office, 14675 Lee

¹Copies may be obtained via internet at <http://web7.whs.osd.mil/corres/htm>.

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Road, Chantilly, VA 20151-1715, should reference the initial denial, and shall contain the basis for disagreement with the initial denial. The Freedom of Information Act Appellate Authority shall normally make a final determination on an appeal within 20 working days after receipt of the appeal.

§ 296.6 Reading room.

(a) The NRO shall provide a reading room equipped with hard copy and electronic records as required in the "Electronic Freedom of Information Act Amendments of 1996". The NRO Reading Room is located at 14675 Lee Road, Chantilly VA, 20151-1715 and is open weekdays only from 8:00 am until 4:00 p.m. Requestors must call for an appointment twenty-four (24) hours in advance so that optimum customer service can be provided. (703) 808-5029. Fees will be charged for duplication of hard copy records at \$.15 per page after the first 100 pages. Softcopy media provided to visitors is assessed as follows:

- (1) 5.25" Floppy diskette \$0.50
- (2) 3.5" Floppy diskette \$0.50
- (3) CD-R Media \$3.75
- (4) Video Tape \$4.00.

(b) The NRO FOIA Electronic Reading Room is located on the NRO Home Page: www.nro.odci.gov.

PART 298—DEFENSE INVESTIGATIVE SERVICE (DIS) FREEDOM OF INFORMATION ACT PROGRAM

Sec.

298.1 Purpose.

298.2 Organization.

298.3 Records maintained by DIS.

298.4 Procedures for release of DIS records.

298.5 Information requirements.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 60 FR 20032, Apr. 24, 1995, unless otherwise noted.

§ 298.1 Purpose.

This part states the intent of the agency regarding policy and procedures for the public to obtain information from the Defense Investigative Service (DIS) under the Freedom of Information Act (FOIA).

§ 298.2 Organization.

(a) The DIS organization includes a Headquarters located in Alexandria,

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Virginia; four Regions and one operational area with subordinate operating locations throughout the Continental United States (CONUS), Alaska, Hawaii, and Puerto Rico; the Defense Industrial Security Clearance Office (DISCO), Columbus, Ohio; the Personnel Investigations Center (PIC) and National Computer Center (NCC) in Baltimore, Maryland; Office of Industrial Security International Europe (OISI-E), located in Brussels, Belgium with a subordinate office in Mannheim, Germany; Office of Industrial Security International Far East (OISI-FE) located at Camp Zama, Japan; and the Department of Defense Security Institute, located in Richmond, Virginia.

(b) A copy of the DIS Directory showing the addresses of all offices, is available to the public upon request and may be obtained by following the procedures outlined in § 298.4. The names and duty addresses of DIS personnel serving overseas are not released.

§ 298.3 Records maintained by DIS.

It is the policy of DIS to make publicly available all information which may be released under the Freedom of Information Act (FOIA), consistent with its other responsibilities. In implementing this policy, DIS follows the procedures set forth in 32 CFR part 286. DIS maintains the following records which may be of interest to the public:

(a) The Defense Clearance and Investigations Index (DCII), which contains references to investigative records created and held by DoD Components. The records indexed are primarily those prepared by the investigative agencies of the DoD, covering criminal, fraud, counterintelligence, and personnel security information. This index also includes security clearance determinations made by the various components of the Department of Defense. Information in the DCII is not usually available to the general public, since general release would violate the privacy of individuals whose names are indexed therein.

(b) Records created as required by DoD Directive 5105.42, "Defense Investigative Service (DA&M)," (32 CFR part 361) including investigative and industrial security records.

(c) Publications referenced in "DIS Directives Listing" (DIS 00-1-L). A copy of DIS 00-1-L may be obtained upon request from the DIS Office of Information and Public Affairs (V0020), 1340 Braddock Place, Alexandria, VA 22314-1651. While this document will be provided for the convenience of possible users of the materials, such release does not constitute a determination that all or any of the publications listed affect the public or have been cleared for public release.

§ 298.4 Procedures for release of DIS records.

(a)(1) All requests will be submitted in writing to: Defense Investigative Service, Office of Information and Public Affairs (V0020), 1340 Braddock Place, Alexandria, Virginia 22314-1651.

(2) Requests directed to any agency activity (headquarters or field elements) will be forwarded to the Office of Information and Public Affairs.

(b) All requests shall contain the following information:

(1) As complete an identification as possible of the desired material including to the extent known, the title description, and date. 32 CFR part 286 does not authorize "fishing expeditions." In the event a request is not reasonably described as defined in 32 CFR part 286, the requester will be notified by DIS of the defect.

(2) The request must contain the first name, middle name or initial, surname, date and place of birth, social security number, and, if applicable, military service number of the individual concerned, with respect to material concerning investigations of an individual.

(3) A statement as to whether the requester wishes to inspect the record or obtain a copy of it.

(4) A statement that all costs for search (in the case of "other" and "commercial" requesters), duplication (in case of all categories of requesters), and review (in the case of "commercial requesters") will be borne by the requester even if no records, or no releasable records, are found, if appropriate. See 32 CFR part 286 for information on costs and fee waivers.

(5) The full address (including ZIP code) of the requester.

(c) A notarized request by an individual requesting investigative or other personnel records may be required to avoid the risk of invasion of privacy. Requesters will be notified and furnished appropriate forms if this requirement is deemed necessary. In lieu of a notarized statement, an unsworn declaration in accordance with 28 U.S.C. 1746 may be required.

(d) When a request is incomplete or fails to include all of the information required, the requester will be contacted for additional information prior to beginning release procedures.

(e) DIS shall normally respond to request within 10 working days after receipt by the Office of Information and Public Affairs, unless an extension is required and the requester is notified in writing. If a significant number of requests prevents responding in 10 working days, requests, will be processed on a first-come, first-served basis to ensure equitable treatment to all requesters.

(f) When the release of information has been approved, a statement of costs computed in accordance with the DoD Fee Schedule (32 CFR part 286), or a statement waiving the fee, will be included in the notification of approval. Records approved for release will generally be mailed immediately following the receipt of fees. Fees may be waived or reduced in accordance with 32 CFR part 286. Remittances must be in the form of a personal check, bank draft, or postal money order. Remittances are to be made payable to the Treasurer of the United States. Certified documents may be requested for an official government or legal function, and will be provided at a rate established by 32 CFR part 286 for each authentication.

(g) When requests are denied in whole or in part in accordance with 32 CFR part 286, the requester will be advised of the identity of the official making the denial, the reason for the denial, the right of appeal of the decision, and the identity of the person to whom an appeal may be addressed.

(h) Facilities for the review or reproduction of records following approval of the request or appeal are available at the Defense Investigative Service,

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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.

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AUTHORITY: 5 U.S.C. 552.

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

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§ 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/>.

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

²See 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.

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

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

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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 special-

ized 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.

(1) 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 for-

warded 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

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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 pro-

vided 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

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