

§ 4a.9

interest in the subject matter. The unit or office assigned action shall review the information within twenty working days as prescribed below.

(2) The action office shall determine whether, under the declassification provisions of the Department of Commerce National Security Information Manual, the entire document or portions thereof may be declassified. The action office shall also determine whether, if the document or portions are declassified, withholding the information is otherwise warranted under applicable statutes. Declassification of the information shall be accomplished by a designated declassification authority. Upon declassification the information shall be remarked. If the information may not be released in whole or in part, the reviewing official shall provide the reasons for denial by citing the applicable provision of section 1.3 of E.O. 12356. When the classification is a derivative decision based on classified source material of another Federal agency, the action office shall provide the information to the originator for review.

(3) The action office shall also determine if declassified information is otherwise available for public release under the Freedom of Information Act. If the information is not releasable, the reviewing official shall advise the Director, Office of Security, that the information has been declassified but that it is exempt from disclosure, citing the appropriate exemption of the Freedom of Information Act and applicable regulations.

(4) If the request for declassification is denied in whole or in part, the requester shall be notified of the right to appeal the determination within sixty days and of the procedures for such an appeal. If declassified information remains exempt from disclosure under the Freedom of Information Act, the requester shall be advised of those appellate procedures. All denials of information under the Freedom of Information Act must be approved by the Office of the Assistant General Counsel for Administration.

(c) *Fees.* If the request requires the rendering of services for which fees may be charged, the unit assigned action may calculate the anticipated

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amount of fees to be charged and ascertain the requester's willingness to pay the allowable charges as a precondition to taking further action on the request in accordance with §4.9 of Department of Commerce Freedom of Information Act rules and §4b.11 of the Department's Privacy Act rules.

(d) *Right of appeal.* (1) A requester may appeal to the Director, Office of Security, when the requested information is not declassified and released in whole. The Director shall determine, within thirty days after receipt of an appeal, whether continued classification of the requested information is required in whole or in part, notify the requester of his determination, and make available to the requester any information determined to be releasable. If continued classification is required under the provisions of this manual, the requester shall be notified of the final determination and of the reasons for denial.

(2) During the declassification review of information under appeal the Director, Office of Security, may overrule previous determinations in whole or in part when, in his judgment, continued protection in the interest of national security is no longer required. If the Director determines that the information no longer requires classification, it shall be declassified and, unless it is otherwise exempt from disclosure, released to the requester. The Director shall advise the original reviewing Commerce office or unit of his decision.

§4a.9 Requests under the Privacy Act and the Freedom of Information Act involving classified records.

(a) The Freedom of Information Act (FOIA), Title 5 U.S.C. 552(b)(1) and the Privacy Act of 1974 (PA), Title 5 U.S.C. 552a(k)(1), authorize withholding of records from public availability which are "(1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (2) are in fact properly classified pursuant to such Executive order."

(b) Under the FOIA a determination on an initial request must be made within ten working days after receipt of the request. A determination on an

appeal to an initial denial must be made within twenty working days after receipt of an FOIA appeal; or for a PA appeal, within thirty working days. Time limits are mandatory for an FOIA request, but are permissive for a PA request. Except for unusual circumstances, failure to make a determination within the stated time limits means that a requester has exhausted the administrative remedies and may bring suit immediately.

(c) Persons who request information under the provisions of these Acts, and whose requests are denied on appeal, may petition the courts to enjoin the Department of Commerce from withholding the record and, in this event, burden is on the Department of Commerce to sustain its actions.

(d) To assure that PA/FOIA requests involving classified records are subjected to a thorough classification review and that a response is made within the specified time limits, the procedures in paragraphs (e) and (f) shall apply as well as those of DAO 205-12 "Public Information," DAO 205-14 "Processing Requests Under the Freedom of Information Act," and DAO 205-15 "Implementing the Privacy Act of 1974."

(e) Initial requests involving classified records:

(1) The office determined to have primary interest shall conduct a declassification review of the information as prescribed in §4a.8(b) (2), (3), and (4).

(2) If the information is subsequently declassified, the action office shall consult with the Office of the Assistant General Counsel for Administration to determine releasability with consideration only for the legality of release within the purview of PA/FOIA.

(3) If the record warrants continued classification, the action office shall coordinate with the Office of the Assistant General Counsel for Administration and so advise the requester, and further advise the requester of the right of appeal.

(4) If the classification review cannot be completed within the prescribed time limit, due to unusual circumstances, the action office shall advise the requester. An extension of time shall be arranged in accordance

with the FOIA and implementing Commerce PA/FOIA rules.

(f) Receipt of an appeal for reconsideration of denial of a classified record under PA/FOIA: Appeals under this section shall be addressed to the General Counsel who shall refer the record(s) to the Director, Office of Security, for a declassification review. The Director may overrule previous determinations in whole or in part when, in his judgment, continued protection in the interest of national security is no longer required. If the information under review no longer requires classification, it shall be declassified. The Director shall advise the General Counsel of his decision.

§4a.10 Presidential information.

Information originated by the President, by the White House Staff, by committees, commissions, or boards appointed by the President, or by others specifically providing advice and counsel to a President or acting on behalf of a President is exempted from the provisions of mandatory review for declassification, except as consistent with applicable laws that pertain to presidential papers or records.

§4a.11 Foreign government information.

Requests for mandatory review for declassification of foreign government information shall be processed as prescribed in §4a.8(b). Consultation with the foreign source of the information through appropriate channels may be required prior to final action on the request.

§4a.12 Public availability of declassified information.

A fundamental policy of the Department of Commerce is to make information available to the public to the maximum extent permitted by law. Information which is declassified, for any reason, loses its protective status in the interest of national security. Accordingly, declassified information shall be handled in every respect on the same basis as all other unclassified information.