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c. Means to ensure verifications of an interview by OSC investigators are appropriate, whether or not the military member or civilian employee is accompanied by counsel. Tape recorders may only be used for this purpose when—

- (1) The recorder is used in full view.
- (2) All attendees are informed.
- (3) The OSC investigator agrees to record the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the investigator should be corrected before the member or employee signs the statement. The military member or civilian employee is not required to sign any written summary that is not completely accurate. A military member or civilian employee may receive a copy of the summary as a condition of signing.

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AUTHORITY: 5 U.S.C. 551, 552, 552a, 5101–5108, 5110–5113, 5115, 5332–5334, 5341–42, 5504–5509, 7154; 10 U.S.C. 130, 1102, 2320–2321, 2328, 18 U.S.C. 798, 3500; 31 U.S.C. 3710; 35 U.S.C. 181–188; 42 U.S.C. 2162; 44 U.S.C. 33; and Executive Order 12600.

SOURCE: 56 FR 48932, Sept. 26, 1991, unless otherwise noted.

## Subpart A—General Provisions

### REFERENCES

### § 518.1 References.

(a) Title 5, United States Code, section 552.

(b) DoD Directive 5400.7, “DoD Freedom of Information Act Program,” May 13, 1988.

(c) Public Law 86–36, “National Security Information Exemption.”

(d) DoD Directive 5400.11, “Department of Defense Privacy Program,” June 9, 1982.

(e) DoD 5400.11–R, “Department of Defense Privacy Program,” August 1983, authorized by DoD Directive 5400.11, June 9, 1982.

(f) DoD Directive 5100.3, “Support of the Headquarters of Unified, Specified and Subordinate Commands,” November 1, 1988.

(g) Title 5, United States Code, section 551, “Administrative Procedures Act.”

(h) DoD 5200.1-R, "DoD Information Security Program Regulation," January 1987, authorized by DoD Directive 5200.1, June 7, 1982.

(i) Title 35, United States Code, section 181-188, "Patent Secrecy."

(j) Title 42, United States Code, section 2162, "Restricted Data and Formerly Restricted Data."

(k) Title 18, United States Code, section 98, "Communication Intelligence."

(l) Title 18, United States Code, section 3500, "The Jencks Act."

(m) DoD Directive 5230.24, "Distribution Statements on Technical Documents," March 18, 1987.

(n) DoD Directive 5400.4, "Provision of Information to Congress," January 30, 1978.

(o) DoD Directive 7650.1, "General Accounting Office Access to Records," August 26, 1982.

(p) ACP-121 (United States Supplement 1).

(q) Title 44, United States Code, chapter 33, "Disposal of Records."

(r) DoD Instruction 7230.7, "User Charges," January 29, 1985.

(s) DoD Directive 5000.11, "Data Elements and Data Codes Standardization Program," December 7, 1964.

(t) DoD Directive 7750.5, "Management and Control of Information Requirements," August 7, 1986.

(u) DoD 7220.9-M, "Department of Defense Accounting Manual," 1983, authorized by DOD Instruction 7220.9, October 22, 1981.

(v) DoD Directive 5230.25, "Withholding of Unclassified Technical Data From Public Disclosure," November 6, 1984.

(w) DoD Directive 5230.9, "Clearance of DoD Information for Public Release," April 2, 1982.

(x) DoD Directive 7650.2, "General Accounting Office Audits and Reports," July 19, 1985.

(y) Title 10, United States Code, section 2328, "Release of Technical Data under Freedom of Information Act: Recovery of Costs".

(z) Title 10, United States Code, section 130, "Authority to Withhold from Public Disclosure Certain Technical Data."

(aa) Title 10, United States Code, section 2320-2321, "Rights in Technical Data."

(bb) Title 10, United States Code, section 1102, "Confidentiality of Medical Quality Records: Qualified Immunity Participants."

(cc) DoD Federal Acquisition Regulation Supplement (DFARS), subpart 227.4, "Technical Data, Other Data, Computer Software and Copyrights," October 28, 1988.

(dd) Executive Order 12600, "Predisclosure Procedures for Confidential Commercial Information," June 23, 1987.

(ee) Title 31, United States Code, section 3717, "Interest and Penalty on Claims."

(ff) Title 5, United States Code, section 552a, as amended, "The Privacy Act of 1974."

(gg) DoD 5000.12-M, "DoD Manual for Standard Data Elements," October 1986, authorized by DoD Instruction 5000.12, July 1989.

(hh) DoD Instruction 5400.10, "OSD Implementation of DoD Freedom of Information Act Program," January 24, 1991.

(ii) Title 32, Code of Federal Regulations, part 518, The Army Freedom of Information Act Program.

(jj) Title 10, United States Code, section 128, "Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information".

(kk) Public Law 101-189, National Defense Authorization Act, November 1989, 103 Stat. 1352.

#### §518.2 References (Army).

- (a) Required publications.<sup>1</sup>
- (1) AR 1-20 (Legislative Liaison) (cited in §§ 518.44 and 518.46).
  - (2) AR 20-1 (Inspector General Activities and Procedures) (cited in §§ 518.4, 518.58 and appendix B).
  - (3) AR 25-1 (The Army Information Resource Management Program) (cited in §§ 518.3 and 518.29).
  - (4) AR 25-9 (Army Data Management and Standards Program) (cited in § 518.98).
  - (5) AR 25-400-2 (The Modern Army Recordkeeping System (MARKS))

<sup>1</sup>All publications and forms referenced in this section are available from National Technical Information Services, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161.

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(cited in §§518.30, 518.51, 518.66, and appendix B).

(6) AR 27-20 (Claims) (cited in §518.4 and 518.51).

(7) AR 36-2 (Processing Internal and External Audit Reports and Follow-up on Findings and Recommendations) (cited in §518.4).

(8) AR 40-66 (Medical Record and Quality Assurance Administration) (cited in §518.17).

(9) AR 40-400 (Patient Administration) (cited in §518.4).

(10) AR 25-11 (Record Communications) (cited in §518.46).

(11) AR 195-2 (Criminal Investigation Activities) (cited in §§519.4-519.56).

(12) AR 340-21 (The Army Privacy Program) (cited in §§518.22, 518.37 and 518.56).

(13) AR 360-5 (Public Information) (cited in §§518.4 and 518.54).

(14) AR 380-5 (Department of the Army Information Security Program) (cited in §§518.4, 518.37, 518.53 and 518.56).

(15) AR 530-1 (Operations Security (OPSEC)) (cited in §§518.53 and 518.54).

(16) AR 600-85 (Alcohol and Drug Abuse Prevention and Control Program) (cited in §518.4 and 518.54).

(b) Related publications. A related publication is merely a source of additional information. The user does not have to read it to understand this regulation.

(1) AR 5-13 (Installation Management and Organization).

(2) AR 10-series (Organization and Functions).

(3) AR 25-3 (Army Life Cycle Management of Information Systems).

(4) AR 27-10 (Military Justice).

(5) AR 27-40 (Litigation).

(6) AR 27-60 (Patents, Inventions, and Copyrights).

(7) AR 60-20 (Army and Air Force Exchange Service (AAFES) Operating Policies) (AFR 147-14).

(8) AR 70-31 (Standards for Technical Reporting).

(9) AR 190-45 (Military Police Law Enforcement Reporting).

(10) AR 380-10 (Department of the Army Policy for Disclosure of Information, Visits, and Accreditation of Foreign Nationals (U)).

(11) AR 381-45 (Investigative Records Repository (IRR)).

(12) AR 385-40 (Accident Reporting and Records).

(13) AR 640-10 (Individual Military Personnel Records).

(14) DA Pam 25-30 (Consolidated Index of Army Publications and Blank Forms).

(15) DA Pam 25-51 (The Army Privacy Program-Systems Notices and Exemption Rules).

(16) DA Pam 385-95 (Aircraft Accident Investigation and Reporting).

(17) DoD 4500.11-PH (Defense Privacy Board Advisory Opinions).

(18) Title 10, United States Code, section 128, "Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information".

(c) Prescribed forms.

(1) DA Form 4948-R (Freedom of Information Act (FOIA)/Operations Security) (OPSEC) Desktop Guide) (prescribed in §§518.50 and 518.49).

(2) DA Label 87 (For Official Use Only Cover Sheet) (prescribed in §§518.41 and 518.44).

(3) DD Form 2086 (Record of Freedom of Information (FOI) Processing Cost) (prescribed in §518.81).

(4) DD Form 2086-1 (Record of Freedom of Information (FOI) Processing Cost for Technical Data) (prescribed in §518.92a).

### PURPOSE AND APPLICABILITY

#### §518.3 Purpose.

The purpose of this Regulation is to provide policies and procedures for the Department of Defense (DoD) implementation of the Freedom of Information Act and DoD Directive 5400.7 (references (a) and (b)) and to promote uniformity in the DoD Freedom of Information Act (FOIA) Program. This Army regulation implements provisions for access and release of information from all Army information systems (automated and manual) in support of the Information Resources Management Program (AR 25-1).

#### §518.4 Applicability.

(a) This Regulation applies to the Office of the Secretary of Defense (OSD), which includes for the purpose of this Regulation the Joint Staff, Unified Commands, the Military Departments,

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the Defense Agencies, and the DoD Field Activities (hereafter referred to as “DoD Components”), and takes precedence over all Component regulations that supplement the DoD FOIA Program. A list of DoD Components is at enclosure 1 (appendix G).

(b) The National Security Agency records are subject to the provisions of this Regulation, only to the extent the records are not exempt under Public Law 86-36 (reference (c)).

(c) This part applies to—

- (1) Active Army.
- (2) Army National Guard.
- (3) U.S. Army Reserve.

(4) Organizations for which the Department of the Army (DA) is the Executive Agent.

(d) This regulation governs written FOIA requests from members of the public. It does not preclude release of personnel or other records to agencies or individuals in the Federal Government for use in official work. Section 518.52(a) gives procedures for release of personnel information to Government agencies outside DOD.

(e) Soldiers and civilian employees of the Department of the Army may, as private citizens, request DA or other agencies’ records under the FOIA. They must prepare requests at their own expense and on their own time. They may not use Government equipment, supplies, or postage to prepare personal FOIA requests. It is not necessary for soldiers or civilian employees to go through the chain of command to request information under the FOIA.

(f) Requests for DA records processed under the FOIA may be denied only in accordance with the FOIA (5 U.S.C. 552(b)), as implemented by this regulation. Guidance on the applicability of the FOIA is also found in the Federal Acquisition Regulation (FAR) and in the Federal Personnel Manual (FPM).

(g) Release of some records may also be affected by the programs that created them. They are discussed in the following regulations:

- (1) AR 20-1 (Inspector General reports).
- (2) AR 27-10 (military justice).
- (3) AR 27-20 (claims reports).
- (4) AR 27-60 (patents, inventions, and copyrights).

(5) AR 27-40 (litigation: release of information and appearance of witnesses).

(6) AR 36-2 (GAO audits).

(7) AR 40-66 and AR 40-400 (medical records).

(8) AR 70-31 (technical reports).

(9) AR 20-1, AR 385-40, and DA Pam 385-95 (aircraft accident investigations).

(10) AR 195-2 (criminal investigation activities).

(11) AR 190-45 (Military Police records and reports).

(12) AR 360-5 (Army public affairs: public information, general policies on release of information to the public).

(13) AR 380-10 (release of information on foreign nationals).

(14) AR 381-45 (U.S. Army Intelligence and Security Command investigation files).

(15) AR 385-40 (safety reports and records).

(16) AR 600-85 (alcohol and drug abuse records).

(17) AR 640-10 (military personnel records).

(18) AR 690 series, FPM Supplement 293-31; FPM chapters 293, 294, and 339 (civilian personnel records).

(19) AR 380-5 and DOD 5200.1-R (national security classified information).

(20) Federal Acquisition Regulation (FAR), DOD Federal Acquisition Regulation Supplement (DFARS), and the Army Federal Acquisition Regulation Supplement (AFARS) (procurement matters).

(21) AR 380-5, paragraph 7-101e (policies and procedures for allowing persons outside the Executive Branch to do unofficial historical research in classified Army records).

### DOD PUBLIC INFORMATION

#### §518.5 ODISC4 Authority to approve exceptions.

The ODISC4 has the authority to approve exceptions to this part which are consistent with controlling law and regulation. The ODISC4 may delegate this authority in writing to a division chief within the proponent agency who holds the rank of colonel or the civilian equivalent. The approval authority coordinate all questions regarding the scope of authority to approve exceptions with Headquarters Department of

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the Army, Office of The Judge Advocate General, ATTN: DAJA-AL, Washington, DC 20310-2200.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### § 518.6 Public information.

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 DoD record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall be withheld only when it is exempt from mandatory public disclosure under the FOIA. In the event a requested record is exempt under the FOIA, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by the release of the record. (See § 518.36 for clarification.) In order that the public may have timely information concerning DoD activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request unless the requested records are in a Privacy Act system of records; such records in a Privacy Act system of records will not be released absent a written request under the FOIA, unless otherwise releasable under the Privacy Act. 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 should continue to be honored through appropriate means even though the request does not qualify under FOIA requirements.

### § 518.7 Control system.

A request for 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 Regulation. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this Regulation, unless otherwise required by § 518.31.

### DEFINITIONS

#### § 518.8 Definitions and terms.

As used in this regulation, definitions and terms are listed in appendix F to this part.

#### § 518.9 FOIA request.

A written request for DoD 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 Directive 5400.7 (reference b), this part, or DoD Component supplementing regulations or instructions. This part is the Department of the Army's supplementing regulation.

#### § 518.10 Agency record.

(a) 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 DoD'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 a DoD Component. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of

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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 (c) of this section.

(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 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 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 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.

(2) Where the software itself reveals information about organizations, policies, functions, decisions, or procedures of a DoD Component, such as computer models used to forecast budget outlays, calculate retirement system costs, or optimization models on travel costs.

(3) See subpart C of this part for guidance on release determinations of computer software.

(d) 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 Regulation and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy an FOIA request.

(e) 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

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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. Components should direct the requester to the appropriate source to obtain the record.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### §518.11 DoD component.

An element of the Department of Defense, as defined in §518.4, authorized to receive and act independently on FOIA requests. A DoD Component has its own initial denial authority (IDA) or appellate authority, and general counsel. The Department of the Army is a DOD Component.

### §518.12 Initial denial authority (IDA).

An official who has been granted authority by the head of a DoD Component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure. The Department of the Army's Initial Denial Authorities are designated in §518.58(d).

### §518.13 Appellate authority.

The Head of the DoD Component or the Component head's designee having jurisdiction of this purpose over the record. The Department of the Army's appellate authority is the Office of General Counsel.

### §518.14 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 an IDA decision to withhold all or part of a requested record or to deny a request for waiver or reduction of fees.

### §518.15 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

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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.

### § 518.16 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. See § 518.10 (b)(2) and (c) for a discussion of computer software.

### § 518.17 Law enforcement investigation.

An investigation conducted by a command or agency for law enforcement purposes relating to crime, waste, or fraud or for national security reasons. Such investigations may include gathering evidence for criminal prosecutions and for civil or regulatory proceedings.

## POLICY

### § 518.18 Compliance with the FOIA.

DoD personnel are expected to comply with the provisions of the FOIA and this Regulation 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.

### § 518.19 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 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.

(a) Operations Security (OPSEC). DA officials who release records under the FOIA must also consider OPSEC. The Army implementing directive is AR

530-1. Section 518.53 of this publication gives the procedure for FOIA personnel and the IDA to follow when a FOIA request appears to involve OPSEC.

(b) DA Form 4948-R. This form lists references and information frequently used for FOIA requests related to OPSEC. Persons who routinely deal with the public (by telephone or letter) on such requests should keep the form on their desks as a guide. DA Form 4948-R (Freedom of Information Act (FOIA)/Operations Security (OPSEC) Desk Top Guide) will be locally reproduced on 8½ x 11-inch paper. A copy for reproduction purposes is located at the back of this regulation. The name and telephone number of the command FOIA/OPSEC adviser will be entered on the form.

### § 518.20 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 regulation and any supplemental regulations published by the DoD Components.

### § 518.21 Prompt action on requests.

When a member of the public complies with the procedures established in this part for obtaining DoD records, the request shall receive prompt attention; a reply shall be dispatched within 10 working days, unless a delay is authorized. When a Component 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 a Component from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. A DoD Component 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 compliment processing the request.

(a) The 10-day period prescribed for review of initial requests under the

## § 518.22

FOIA (5 U.S.C. 552(a)(6)) starts only when the request—

(1) Is in writing.

(2) Reasonably describes the record requested.

(3) Is received by the proper official designated to answer the request (see appendix B to this part).

(4) Meets the procedural requirements of this part (see § 518.85(b)(9)).

(b) All requests shall refer explicitly or implicitly to the Freedom of Information Act, to ensure their prompt recognition as FOIA actions.

(c) Members of the public who make FOIA requests should carefully follow the guidance in this part. They should send requests to the office that has the desired record or to a specific agency FOIA official for referral. The Army Freedom of Information and Privacy Act Division, Information Systems Command, Attn: ASQNS-OF-F, room 1146, Hoffman Building I, Alexandria, VA 22331-0301 can supply correct addresses.

(d) See Army Regulation 340-21 for Privacy Act procedures.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### § 518.22 Use of exemptions.

(a) It is the DoD policy to make records publicly available, unless they qualify for exemption under one or more of the nine exemptions. Components (IDA) 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.

(b) Parts of a requested record may be exempt from disclosure under the FOIA. The proper DA official may delete exempt information and release the remainder to the requester. The proper official also has the discretion under the FOIA to release exempt information; he or she must exercise this discretion in a reasonable manner, within regulations. The excised copies shall reflect the denied information by means of Blackened areas, which are Sufficiently Blackened as to reveal no information. The best means to ensure illegibility is to cut out the informa-

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tion from a copy of the document and reproduce the appropriate pages. If the document is classified, all classification markings shall be lined through with a single black line, which still allows the marking to be read. The document shall then be stamped “Unclassified”.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### § 518.23 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 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 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, 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.

### § 518.24 Creating a record.

(a) 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. Mere possession of a record does not presume departmental 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 an 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.

(b) 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 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.

(c) Requested records, or portions thereof, may be located at several Army offices. The official receiving the FOIA request will refer it to those other offices for a direct reply if—

(1) The information must be reviewed for release under the FOIA; and

(2) Assembling the information would interfere materially with DA operations at the site first receiving the request.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

**§ 518.25 Description of requested record.**

(a) 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 Government to locate the record with a reasonable amount of effort. The Act does not authorize “fishing expeditions.” When a DoD Component receives a request that does not “reasonably describe” the requested record, it shall notify the requester of the defect. The defect should be highlighted in a specificity letter, asking the requester to provide the type of information outlined below in § 518.61(b) of this publication. Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, Components shall offer as-

sistance 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. DA officials will reply to unclear requests by letter. The letter will—

(1) Describe the defects in the request.

(2) Explain the types of information in paragraph (b) of this section, and ask the requester for such information.

(3) Explain that no action will be taken on the request until the requester replies to the letter.

(b) 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.

(1) 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.

(2) 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.

(c) 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 the 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.

(d) 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 releasable under the FOIA.

(e) The above 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 with

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reasonable effort, the description is adequate.

### §518.26 Referrals.

(a) 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 Component confirms that it has the requested record, and this belief can be confirmed by the other DoD Component. In cases where the Component receiving the request has reason to believe that the existence or nonexistence of the record may in itself be classified, that Component will consult the DoD Component having cognizance over the record in question before referring the request. If the DoD Component that is consulted determines that the existence or nonexistence of the record is in itself classified, the requester shall be so notified by the DoD Component originally receiving the request, and no referral shall take place. Otherwise, the request shall be referred to the other DoD Component, and the requester shall be notified of any such referral. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. Within the Army, referrals will be made directly to offices that may have custody of requested records. If the office receiving the FOIA request does not know where the requested records are located, the request and an explanatory cover letter will be forwarded to The Army Freedom of Information and Privacy Act Division, Information Systems Command, Attn: ASQNS-OP-F, room 1146, Hoffman Building I, Alexandria, VA 22331-0301.

(b) Whenever a record or a portion of a record is, after prior consultation, referred to another DoD Component or to a Government agency outside of the Department of Defense for a release determination and direct response, the requester shall be informed of the referral. Referred records shall only be identified to the extent consistent with security requirements.

(c) A DoD Component shall refer an FOIA request for a classified record that it holds to another DoD Component or agency outside the Department of Defense, if the record originated in

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the other DoD Component or outside agency or if the classification is derivative. In this situation, provide the record and a release recommendation on the record with the referral action.

(d) A DoD Component may also refer a request for a record that it originated to another DoD Component or agency when the record was created for the use of the other DoD Component or agency. The DoD Component or agency for which the record was created may have an equally valid interest in withholding the record as the DoD Component that created the record. In such situations, provide the record and a release recommendation on the record with the referral action. 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. Any FOIA request shall be referred to the appropriate contracting officer and the requester shall be notified of the referral.

(e) Within the Department of Defense, a Component shall ordinarily refer an FOIA request for a record that it holds, but that was originated by another 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 of such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component.

(f) DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA and this Regulation. Those time limits shall begin to run upon receipt of the referral by the official designated to respond.

(g) Agencies outside the Department of Defense that are subject to the FOIA:

(1) A Component may refer as FOIA request for any record that originated in an agency outside the DoD or that is based on information obtained from an outside agency to the agency for direct

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response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the Component must respond to the request.

(2) 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 Component may only respond directly to the requester after coordination with the outside agency.

(3) Notwithstanding anything to the contrary in § 518.26, a Component shall notify requesters seeking National Security Council (NSC) or White House documents that they should write directly to the NSC or White House for such documents. DoD documents in which the NSC or White House has a concurrent reviewing interest shall be forwarded to the Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), Attn: Directorate For Freedom of Information and Security Review (DFOISR), which shall effect coordination with the NSC or White House, and return the documents to the originating agency after NSC review and determination. NSC or White House documents discovered in Components' files which are responsive to the FOIA request shall be forwarded to OASD(PA), Attn: DFOISR, for subsequent coordination with the NSC or White House, and returned to the Component with a release determination.

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

(i) On occasion, the Department of Defense receives FOIA requests for General Accounting Office (GAO) documents 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, will be processed under the provisions of the FOIA.

In DA, requests received for GAO documents that contain classified Army information will be handled by the Army Inspector General's Office.

### § 518.27 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.

### § 518.28 Unified and specified commands.

(a) The Unified Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3 (reference (f)); it authorizes and requires the Unified Commands to process Freedom of Information (FOI) requests in accordance with DoD Directive 5400.7 (reference (b)) and this Regulation. The Unified Commands shall forward directly to the OASD(PA), 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. For Army components of unified commands, if the requested records are joint documents, process the FOIA request through unified command channels. If the requested documents are Army-unique, process the FOIA request through Army channels.

(b) The Specified Commands remain under the jurisdiction of the administering Military Department. The Commands shall designate IDAs within their headquarters; however, the appellate authority shall reside with the Military Department.

### § 518.29 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

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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:

(a) Requesters who seek records about themselves contained in a PA system of records and who cite or imply the PA, will have their requests processed under the provisions of the PA.

(b) Requesters who seek records about themselves which are not contained in a PA system of records and who cite or imply the PA, will have their requests processed under the provisions of the FOIA, since they have no access under the PA.

(c) Requesters who seek records about themselves which are contained in a PA system of records and who cite or imply the FOIA or both Acts will have their requests processed under the time limits of the FOIA and the exemptions and fees of the PA. This is appropriate since greater access will be received under the PA.

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

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

(f) Requesters should be advised in final responses why their request was processed under a particular Act.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

## § 518.30 Records management.

FOIA records shall be maintained and disposed of in accordance with DoD Component Disposition instructions and schedules. See AR 25-400-2. AR 25-1 contains Army policy for records management requirements in the life cycle management of information. Information access and release, to include potential electronic access by the public, will be considered during information systems design.

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### Subpart B—FOIA Reading Rooms

#### REQUIREMENTS

#### § 518.31 Reading room.

Each Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the materials described below. In addition to the materials described below, Components may elect to place other documents in their reading room as a means to provide public access to such documents. DoD Components may share reading room facilities if the public is not unduly inconvenienced. 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. The Army FOIA Reading Room is operated by The Freedom of Information and Privacy Act Division, Information Systems Command. It is located in room 1146, Hoffman Building I, 2461 Eisenhower Avenue, Alexandria, VA 22331-0301. It is open from 0800 to 1530 Monday through Friday, except holidays.

#### § 518.32 Material availability.

The FOIA requires that so-called “(a)(2)” materials shall be made available in the FOIA reading room for inspection and copying, unless such materials are published and copies are offered for sale. Identifying details that, if revealed, would create a clearly unwarranted invasion of personal privacy may be deleted from “(a)(2)” materials made available for inspection and copying. In every case, justification for the deletion must be fully explained in writing. 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 documents to avoid clearly unwarranted invasions of privacy. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. So-called “(a)(2)” materials are:

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

(b) Statements of policy and interpretations that have been adopted by the agency and are not published in the FEDERAL REGISTER.

(c) 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:

(1) 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.

(2) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

### INDEXES

#### § 518.33 “(a)(2)” materials.

(a) Each DoD Component shall maintain in each facility prescribed in § 518.31, an index of materials described in § 518.4, 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 Regulation.

(b) 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.

(c) Each index of “(a)(2)” materials or supplement thereto shall be arranged topically 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.

#### § 518.34 Other materials.

(a) 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. Army “(a)(2)” materials are published in DA Pam 25-30.

(b) 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 in FOIA reading rooms for inspection and copying. Examples of “(a)(1)” materials are: descriptions of an 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

### GENERAL PROVISIONS

#### § 518.35 General.

Records that meet the exemption criteria in the exemption part of subpart C 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 an FOIA request.

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### § 518.36 Jeopardy of government interest.

An exempted record, other than those being withheld pursuant to Exemptions 1, 3 or 6, shall be made available upon the request of any individual when, in the judgment of the releasing DoD Component or higher authority, no jeopardy to government interest would be served by release. It is appropriate for DoD Components to use their discretionary authority on a case-by-case basis in the release of given records. If a DoD Component determines that a record requested under the FOIA meets the Exemption 4 withholding criteria set forth in this publication, the DoD Component shall not ordinarily exercise its discretionary power to release, absent circumstances in which a compelling public interest will be served by release of that record. Further guidance on this issue may be found in § 518.37, Number 4. and § 518.65.

#### EXEMPTIONS

### § 518.37 FOIA exemptions.

The following types of records may be withheld by the IDA in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law. A discretionary release (also see § 518.23) 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 privacy interest.

(a) *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 (reference h). 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 § 518.53(c)(4) 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, 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) Information that concerns one or more of the classification categories established by executive order and DoD 5200.1-R (reference (h)) 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) *Number 2.* Those related solely to the internal personnel rules and practices of DoD or any of its Components. This exemption has two profiles, high b2 and low b2.

(1) 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 DoD. Examples include:

(i) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or 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 qualification of candidates for employment, entrance on duty, advancement, or promotion.

(iii) Computer software meeting the standards of § 518.10(c), the release of which would allow circumvention of statute or DoD rules, regulations, orders, 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 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 these 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) Negotiation and bargaining techniques, practices, and limitations.

(c) *Number 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 Information Exemption, Pub. L. 86-36, Section 6 (reference (c)).

(2) Patent Secrecy, 35 U.S.C. 181-188 (reference (i)). 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 (reference (j)).

(4) Communication Intelligence, 18 U.S.C. 798 (reference (k)).

(5) Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25 (reference (w) and (aa)).

(6) Confidentiality of Medical Quality Records: Qualified Immunity Participants, 10 U.S.C. 1102 (reference (cc)).

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

(8) Protection of Intelligence Sources and Methods, 50 U.S.C. 403(d)(3).

(d) *Number 4.* Those containing trade secrets or commercial or financial information that a DoD Component re-

ceives 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 records that contain:

(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 Public Law 101-189, National Defense Authorization Act, November 1989, 103 Stat. 1352 (§518.1(k)).

(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), subpart 227.4 (references (aa) and (cc)). 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 (reference (v)) (see §518.37(e)).

(7) Computer software meeting the conditions of section 518.10(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) *Number 5.* Except as provided in paragraphs (e)(2) through (5) of this section, 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) (reference (a))), or within or among DoD Components. Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.

(1) Examples include:

(i) The nonfactual portions of staff papers, to include after-action reports 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 nonfactual 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 interests.

(vi) 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.

(vii) Those portions of official reports of inspection, reports of the Inspector Generals, 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.

(viii) Computer software meeting the standards of §518.10(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.

(ix) Planning, programming, and budgetary information which is involved in the defense planning and resource allocation process (see reference (kk)).

(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 interest of the agency in maintaining its confidentiality, then the record or document need not be made available under this Regulation. 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 referenced in the record containing the decision.

(f) *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.

(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 eli-

gibility 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 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.

(i) 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 Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicated the information is not freely available.

(ii) 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 (reference (d)).

(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 record, legal counsel should first be consulted.

(6) Requests for access to or release of records, before appellate review, of courts-martial or special courts-martial involving a bad conduct discharge should be addressed as in appendix B, paragraph 5. This guidance does not preclude furnishing records of a trial to an accused.

(g) *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 also applies to law enforcement investigations such as Inspector General investigations. 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:

(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.

(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.

(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; or (2) the person whose personal privacy is in jeopardy is deceased, and the agency is aware of the fact.

(iv) 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.

(v) 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.

(vi) 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.

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

(2) Examples include:

(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 identity of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense (Army) 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 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, reference (1)) 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 (reference (d)). The Army implementing directive is AR 340-21.

(5) Exclusions. Excluded from the above exemption are the following two situations applicable to the Department of Defense:

(i) Whenever a request is made which 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 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.

(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 the FOIA, the response to the requester will state that no records were found.

(h) *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 re-

sponsible for the regulation or supervision of financial institutions.

(i) *Number 9.* Those containing geological and geophysical information and data (including maps) concerning wells.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### Subpart D—For Official Use Only

#### GENERAL PROVISIONS

#### § 518.38 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), and FOUO is not authorized as an anemic form of classification to protect national security interests.

#### § 518.39 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.

#### § 518.40 Historical papers.

Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special status apart from the exemptions under the FOIA (reference (a)).

#### § 518.41 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

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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.

### § 518.42 Distribution statement.

Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24 (reference (m)), shall bear that statement and may be marked FOUO as appropriate.

### § 518.43 Location of markings.

(a) An unclassified document containing FOUO information shall be marked "For Official Use Only" in bold letters at least  $\frac{3}{16}$  of an inch high at the bottom on the outside of the front cover (if any), one each page containing FOUO information, and on the outside of the back cover (if any).

(b) 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.

(c) 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. The paragraphs containing the "For Official Use Only" information should also be marked with the initials FOUO.

(d) 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. Markings on microform will conform to the requirements of paragraphs (b) and (c) of this section. As a minimum, each frame of a microform containing FOUO information will be marked "FOR OFFICIAL USE ONLY" at the bottom center of the appropriate page or frame. Classified or protective markings placed by a software program at both top and bottom of a page or frame of a computer-generated report are acceptable. Storage media (disk packs or magnetic tapes) containing personal information subject to the Privacy Act will be labeled "FOR OF-

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FICIAL USE ONLY-Privacy Act Information."

(e) 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."

(f) Permanently bound volumes need to be marked only on the outside of the front and back covers, title page, and first and last pages. Volumes stapled by office-type hand or electric staples are not considered permanently bound.

### DISSEMINATION AND TRANSMISSION

### § 518.44 Release and transmission procedures.

Until FOUO status is terminated, the release and transmission instructions that follow apply:

(a) 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.

(b) 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.

(c) Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4 (reference (n)). Army implementing instructions are in § 518.52 and in AR 1-20. Release to the GAO is governed by DoD Directive

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7650.1 (reference (o)). 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.

### § 518.45 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. When material marked FOUO is removed from storage, attach DA Label 87 (For Official Use Only Cover Sheet).

### § 518.46 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 ACP[EN]121 (U.S. Supp 1) (reference (p)) for FOUO information. Army follows the procedures in AR 25-11.

### § 518.47 Telephone usage.

(a) FOUO information may be discussed over the telephone lines with DoD, other Government agencies, and Government support contractors for official purposes.

(b) Facsimile communications marked FOUO may be transmitted by nonsecure terminals with the FOUO markings intact between U.S. DoD, other U.S. Government agencies, and

U.S. Government support contractors for official purposes.

### SAFEGUARDING FOUO INFORMATION

#### § 518.48 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. When material marked FOUO is removed from storage, attach DA Label 87.

#### § 518.49 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 (reference (c)) shall meet the safeguards outlined for that group of records. Army personnel handling National Security Agency (NSA) records will follow NSA instructions on storing and safeguarding those records.

### TERMINATION, DISPOSAL AND UNAUTHORIZED DISCLOSURES

#### § 518.50 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

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or storage need not be retrieved solely for that purpose.

[56 FR 48932, Sept. 26, 1991; 56 FR 56010, Oct. 31, 1991]

### §518.51 Disposal.

(a) 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.

(b) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. chapter 33 (reference (q)), as implemented by DoD Component instructions concerning records disposal. Army implementing disposition instructions are in AR 5-400-2.

### §518.52 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 (reference (gg)) 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.

## Subpart E—Release and Processing Procedures

### GENERAL PROVISIONS

#### §518.53 Public information.

(a) Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other

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responsibilities, written requests for a DoD or Department of the Army record made under the FOIA may be denied only when:

(1) The record is subject to one or more of the exemptions in subpart C of this part.

(2) 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.

(3) 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 his attorney, notarization of the request may be required.

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

(c) Release of information under the FOIA can have an adverse impact on OPSEC. The Army implementing directive for OPSEC is AR 530-1. It requires that OPSEC points of contact be named for all HQDA staff agencies and for all commands down to battalion level. The FOIA official for the staff agency or command will use DA Form 4948-R to announce the OPSEC/FOIA advisor for the command. Persons named as OPSEC points of contact will be OPSEC/FOIA advisors. Command OPSEC/FOIA advisors should implement the policies and procedures in AR 530-1, consistent with this regulation and with the following considerations:

(1) Documents or parts of documents properly classified in the interest of national security must be protected. Classified documents may be released in response to a FOIA request only under AR 380-5, chapter III. AR 380-5 provides that if parts of a document are not classified and can be segregated with reasonable ease, they may be released, but parts requiring continued protection must be clearly identified.

(2) The release of unclassified documents could violate national security. When this appears possible, OPSEC-FOIA advisors should request a classification evaluation of the document by

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its proponent under AR 380-5, paragraphs 2-204, 2-600, 2-800, and 2-801. In such cases, other FOIA exemptions (para 3-200) may also apply.

(3) A combination of unclassified documents, or parts of them, could combine to supply information that might violate national security if released. When this appears possible, OPSEC/FOIA advisors should consider classifying the combined information per AR 380-5, paragraph 2-211.

(4) A document or information may not be properly or currently classified when a FOIA request for it is received. In this case, the request may not be denied on the grounds that the document or information is classified except in accordance with Executive Order 12356, §1.6(d), and AR 380-5, paragraph 2-204, and with approval of the Army General Counsel.

(d) OPSEC/FOIA advisors will—

(1) Advise persons processing FOIA requests on related OPSEC requirements.

(2) Help custodians of requested documents prepare requests for classification evaluations.

(3) Help custodians of requested documents identify the parts of documents that must remain classified under this paragraph and AR 380-5.

(e) OPSEC/FOIA advisors do not, by their actions, relieve FOIA personnel and custodians processing FOIA requests of their responsibility to protect classified or exempted information.

### § 518.54 Requests from private parties.

The provisions of the FOIA are reserved for persons with private interests as opposed to federal or foreign governments seeking official information. Requests from private persons will be made in writing, and will clearly show all other addresses within the Federal Government to whom the request was sent. This procedure will reduce processing time requirements, and ensure better inter and intra-agency coordination. Components are under no obligation to establish procedures to receive hand delivered requests. Foreign governments seeking information from DoD Components should use established official channels for obtaining information. Release of records to individuals under the FOIA is consid-

ered public release of information, except as provided for in §§518.24 and 518.32. DA officials will release the following records, upon request, to the persons specified below, even though these records are exempt from release to the general public. The 10-day limit (§518.22) applies.

(a) *Medical records.* Commanders or chiefs of medical treatment facilities will release information.

(1) On the condition of sick or injured patients to the patient's relatives.

(2) That a patient's condition has become critical to the nearest known relative or to the person the patient has named to be informed in an emergency.

(3) That a diagnosis of psychosis has been made to the nearest known relative or to the person named by the patient.

(4) On births, deaths, and cases of communicable diseases to local officials (if required by local laws).

(5) Copies of records of present or former soldiers, dependents, civilian employees, or patients in DA medical facilities will be released to the patient or to the patient's representative on written request. The attending physician can withhold records if he or she thinks that release may injure the patient's mental or physical health; in that case, copies of records will be released to the patient's next of kin or legal representative or to the doctor assuming the patient's treatment. If the patient is adjudged insane, or is dead, the copies will be released, on written request, to the patient's next of kin or legal representative.

(6) Copies of records may be given to a Federal or State hospital or penal institution if the person concerned is an inmate or patient there.

(7) Copies of records or information from them may be given to authorized representatives of certain agencies. The National Academy of Sciences, the National Research Council, and other accredited agencies are eligible to receive such information when they are engaged in cooperative studies, with the approval of The Surgeon General of the Army. However, certain information on drug and alcohol use cannot be released. AR 600-85 covers the Army's alcohol and drug abuse prevention and control program.

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(8) Copies of pertinent parts of a patient's records can be furnished to the staff judge advocate or legal officer of the command in connection with the Government's collection of a claim. If proper, the legal officer can release this information to the tortfeasor's insurer without the patient's consent.

NOTE: Information released to third parties under paragraphs (a) (5), (6), and (7) of this section must be accompanied by a statement of the conditions of release. The statement will specify that the information not be disclosed to other persons except as privileged communication between doctor and patient.

(b) *Military personnel records.* Military personnel records will be released under these conditions:

(1) DA must provide specific information about a person's military service (statement of military service) in response to a request by that person or with that person's written consent to his or her legal representative.

(2) Papers relating to applications for, designation of beneficiaries under, and allotments to pay premiums for, National Service Life Insurance or Serviceman's Group Life Insurance will be released to the applicant or to the insured. If the insured is adjudged insane (evidence of an insanity judgment must be included) or dies, the records will be released, on request, to designated beneficiaries or to the next of kin.

(3) Copies of DA documents that record the death of a soldier, a dependent, or a civilian employee will be released, on request, to that person's next of kin, life insurance carrier, and legal representative. A person acting on behalf of someone else concerned with the death (e.g., the executor of a will) may also obtain copies by submitting a written request that includes evidence of his or her representative capacity. That representative may give written consent for release to others.

(4) Papers relating to the pay and allowances or allotments of a present or former soldier will be released to the soldier or his or her authorized representative. If the soldier is deceased, these papers will be released to the next of kin or legal representatives.

(c) *Civilian personnel records.* Civilian Personnel Officers (CPOs) with custody of papers relating to the pay and allow-

ances or allotments of current or former civilian employees will release them to the employee or his or her authorized representative. If the employee is dead, these records will be released to the next of kin or legal representative. However, a CPO cannot release statements of witnesses, medical records, or other reports or documents pertaining to compensation for injuries or death of a DA civilian employee (Federal Personnel Manual, chap 294). Only officials listed in §518.58(d) (18) can release such information.

(d) *Release of information to the public concerning accused persons before determination of the case.* Such release may prejudice the accused's opportunity for a fair and impartial determination of the case. The following procedures apply:

(1) *Information that can be released.* Subject to paragraph (d)(2) of this section, the following information concerning persons accused of an offense may be released by the convening authority to public news agencies or media.

(i) The accused's name, grade or rank, unit, regular assigned duties, and other information as allowed by AR 340-21, paragraph 3-3a.

(ii) The substance or text of the offense of which the person is accused.

(iii) The identity of the apprehending or investigating agency and the length or scope of the investigation before apprehension. The factual circumstances immediately surrounding the apprehension, including the time and place of apprehension, resistance, or pursuit.

(iv) The type and place of custody, if any.

(2) *Information that will not be released.* Before evidence has been presented in open court, subjective observations or any information not incontrovertibly factual will not be released. Background information or information relating to the circumstances of an apprehension may be prejudicial to the best interests of the accused, and will not be released except under paragraph (d) of this section, unless it serves a law enforcement function. The following kinds of information will not be released:

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(i) Observations or comments on an accused's character and demeanor, including those at the time of apprehension and arrest or during pretrial custody.

(ii) Statements, admissions, confessions, or alibis attributable to an accused, or the fact of refusal or failure of the accused to make a statement.

(iii) Reference to confidential sources, investigative techniques and procedures, investigator notes, and activity files. This includes reference to fingerprint tests, polygraph examinations, blood tests, firearms identification tests, or similar laboratory tests or examinations.

(iv) Statements as to the identity, credibility, or testimony of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not that evidence or argument may be used at the trial.

(vi) Any opinion on the accused's guilt.

(vii) Any opinion on the possibility of a plea of guilty to the offense charged, or of a plea to a lesser offense.

### (3) Other considerations.

(i) Photographing or televising the accused. DA personnel should not encourage or volunteer assistance to news media in photographing or televising an accused or suspected person being held or transported in military custody. DA representatives should not make photographs of an accused or suspect available unless a law enforcement function is served. Requests from news media to take photographs during courts-martial are governed by AR 360-5.

(ii) Fugitives from justice. This paragraph does not restrict the release of information to enlist public aid in apprehending a fugitive from justice.

(iii) Exceptional cases. Permission to release information from military personnel records other than as outlined in paragraph (b) of this section to public news agencies or media may be requested from The Judge Advocate General (TJAG). Requests for information from military personnel records other than as outlined in paragraph (b) of this section above will be processed according to this regulation.

(e) *Litigation, tort claims, and contract disputes.* Release of information or records under this paragraph is subject to the time limitations prescribed in § 518.62. The requester must be advised of the reasons for nonrelease or referral.

(1) *Litigation.* (i) Each request for a record related to pending litigation involving the United States will be referred to the staff judge advocate or legal officer of the command. He or she will promptly inform the Litigation Division, Office of the Judge Advocate General (OTJAG), of the substance of the request and the content of the record requested. (Mailing address: HQDA (DAJA-LT), WASH DC 20310-2210; telephone, AUTOVON 227-3462 or commercial (202) 697-3462.)

(ii) If information is released for use in litigation involving the United States, the official responsible for investigative reports (AR 27-40, para 2-4) must be advised of the release. He or she will note the release in such investigative reports.

(iii) Information or records normally exempted from release (i.e., personnel and medical records) may be releasable to the judge or court concerned, for use in litigation to which the United States is not a party. Refer such requests to the local staff judge advocate or legal officer, who will coordinate it with the Litigation Division, OTJAG paragraph (a) of this section.

(2) *Tort claims.* (i) A claimant or a claimant's attorney may request a record that relates to a pending administrative tort claim filed against the DA. Refer such requests promptly to the claims approving or settlement authority that has monetary jurisdiction over the pending claim. These authorities will follow AR 27-20. The request may concern an incident in which the pending claim is not as large as a potential claim; in such a case, refer the request to the authority that has monetary jurisdiction over the potential claim.

(ii) A potential claimant or his or her attorney may request information under circumstances clearly indicating that it will be used to file a tort claim, though none has yet been filed. Refer such requests to the staff judge advocate or legal officer of the command.

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That authority, when subordinate, will promptly inform the Chief, U.S. Army Claims Service, of the substance of the request and the content of the record. (Mailing address: U.S. Army Claims Service, Attn: JACS-TCC, Fort George G. Meade, MD 20755-5360; telephone, AUTOVON 923-7860 or commercial (301) 677-7860.)

(iii) DA officials listed in §518.54(d) who receive requests under (a) or (b) of this section will refer them directly to the Chief, U.S. Army Claims Service. They will also advise the requesters of the referral and the basis for it.

(iv) The Chief, U.S. Army Claims Service, will process requests according to this regulation and AR 27-20, paragraph 1-10.

(3) *Contract disputes.* Each request for a record that relates to a potential contract dispute or a dispute that has not reached final decision by the contracting officer will be treated as a request for procurement records and not as litigation. However, the officials listed in §§518.50(a) and 518.54(d) will consider the effect of release on the potential dispute. Those officials may consult with the U.S. Army Legal Services Agency. (Mailing address: U.S. Army Legal Services Agency, Attn: JALS-CA, Nassif Building, 5611 Columbia Pike, Falls Church, VA 22041-5013; telephone, AUTOVON 289-2023 or commercial (703) 756-2023.) If the request is for a record that relates to a pending contract appeal to the Armed Services Board of Contract Appeals or to a final decision that is still subject to appeal (i.e., 90 days have not lapsed after receipt of the final decision by the contractor), then the request will be—

(i) Treated as involving a contract dispute; and

(ii) Referred to the U.S. Army Legal Services Agency. (For address and phone number, see paragraph (e)(3) of this section.)

(f) *Dissemination of unclassified information concerning physical protection of special nuclear material.* (1) Unauthorized dissemination of unclassified information pertaining to security measures, including security plans, procedures, and equipment for the physical protection of special nuclear material, is prohibited under 10 U.S.C. 128 and para 3[EN]200, exemption number 3.

(2) This prohibition shall be applied by the Deputy Chief of Staff for Operations and Plans as the IDA, to prohibit the dissemination of any such information only if and to the extent that it is determined that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of—

(i) Illegal production of nuclear weapons; or

(ii) Theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(3) In making such a determination, DOD personnel may consider what the likelihood of an illegal production, theft, diversion, or sabotage would be if the information proposed to be prohibited from dissemination were at no time available for dissemination.

(4) DOD personnel shall exercise the foregoing authority to prohibit the dissemination of any information described:

(i) So as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security; and

(ii) Upon a determination that the unauthorized dissemination of such information could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of—

(A) Illegal production of nuclear weapons; or

(B) Theft, diversion, or sabotage of special nuclear materials, equipment, or facilities.

(5) DOD employees shall not use this authority to withhold information from the appropriate committees of Congress.

(g) *Release of names and duty addresses.* (1) Telephone directories, organizational charts, and/or staff directories published by installations or activities in CONUS and U.S. Territories will be released when requested under FOIA. In all such directories or charts, names of personnel assigned to sensitive units, routinely deployable units, or

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units stationed in foreign territories will be redacted and denied under Exemption 6 of the FOIA. By DoD policy, the names of general officers (or civilian equivalent) or public affairs officers may be released at any time. The sanitized copy will be redacted by cutting out or masking the names and reproducing the document. The IDA is the U.S. Army Information Systems Command-Pentagon, Freedom of Information and Privacy Act Division, Attn: ASQNS-OP-F, room 1146, Hoffman Building I, Alexandria, VA 22331-0301.

(2) Public Affairs Offices may release information determined to have legitimate news value, such as notices of personnel reassignments to new units or installations within the continental United States, results of selection/promotion boards, school graduations/completions, and awards and similar personal achievements. They may release the names and duty addresses of key officials, if such release is determined to be in the interests of advancing official community relations functions.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### § 518.55 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 §§ 518.24 and 518.56). 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.

### § 518.56 Privileged release to officials.

(a) Subject to DoD 5200.1-R (reference (h)), and AR 380-5 applicable to classified information, DoD Directive 5400.11 (reference (d)), and AR 340-21 applicable to personal privacy, or other applicable law, records exempt from release

under subpart C, Exemptions, of this part may be authenticated and released, without requiring release to other FOIA requesters, in accordance with DoD Component regulations to U.S. Government officials requesting them on behalf of Federal government bodies, whether legislative, executive, administrative, or judicial, as follows:

(1) To a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4 (reference (n)). The Army implementing directive is AR 1-20. Commanders or chiefs will notify the Chief of Legislative Liaison of all releases of information to members of Congress or staffs of congressional committees. Organizations that in the normal course of business are required to provide information to Congress may be excepted. Handle requests by members of Congress (or staffs of congressional committees) for inspection of copies of official records as follows:

(i) National security classified records. Follow AR 380-5.

(ii) Civilian personnel records. Members of Congress may examine official personnel folders as permitted by 5 CFR 297.503(i).

(iii) Information related to disciplinary action. This subparagraph refers to records of trial by courts-martial; nonjudicial punishment of military personnel under the Uniform Code of Military Justice, Article 15; nonpunitive measures such as administrative reprimands and admonitions; suspensions of civilian employees; and similar documents. If the Department of the Army has not issued specific instructions on the request, the following instructions will apply. Subordinate commanders will not release any information without securing the consent of the proper installation commander. The installation commander may release the information unless the request is for a classified or "For Official Use Only" document. In that case the commander will refer the request promptly to the Chief of Legislative Liaison (see paragraph (d) of this section for action, including the recommendations of the transmitting agency and copies of the requested records with the referral.

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(iv) Military personnel records. Only HQDA can release information from these records. Custodians will refer all requests from Congress directly and promptly to the Chief of Legislative Liaison, Department of the Army, HQDA (SALL) WASH DC 20310-1600.

(v) Criminal investigation records. Only the Commanding General, U.S. Army Criminal Investigation Command (USACIDC), can release any USACIDC-originated criminal investigation file. For further information, see AR 195-2, Criminal Investigation Activities.

(vi) Other exempt records. Commanders or chiefs will refer requests for all other categories of exempt information under §518.33 directly to the Chief of Legislative Liaison per paragraph (d) of this section. They will include a copy of the material requested and, as appropriate, recommendations concerning release or denial.

(vii) All other records. The commander or chief with custody of the records will furnish all other information promptly.

(2) To the Federal courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

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

(i) Disciplinary actions and criminal investigations. Requests for access to, or information from, the records of disciplinary actions or criminal investigations will be honored if proper credentials are presented. Representatives of the Office of Personnel Management may be given information from personnel files of employees actually employed at organizations or activities. Each such request will be considered on its merits. The information released will be the minimum required in connection with the investigation being conducted.

(ii) Other types of requests. All other official requests received by DA elements from agencies of the executive branch (including other military departments) will be honored, if there are no compelling reasons to the contrary. If there are reasons to withhold the records, the requests will be submitted

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for determination of the propriety of release to the appropriate addresses shown in appendix B.

(4) To State and local officials, as determined by the head of a DoD Component or designee.

(b) DoD Components shall inform officials receiving records under the provisions of §518.56(a), that those records are exempt from public release under the FOIA and are privileged. DOD Components shall also advise officials of any special handling instructions.

### §518.57 Required coordination.

Before forwarding a FOIA request to an IDA for action, records custodians will obtain an opinion from their servicing judge advocate concerning the releasability of the requested records. A copy of that legal review, the original FOIA request, two copies of the requested information (with one copy clearly indicating which portions are recommended for withholding, which FOIA exemptions support such withholding, and which portions, if any, have already been released), a copy of the interim response acknowledging receipt and notifying the requester of the referral to the IDA, and a cover letter containing a telephone point of contact will be forwarded to the IDA with the command's recommendation to deny a request in whole or in part.

### INITIAL DETERMINATIONS

### §518.58 Initial denial authority.

(a) 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 to each request within the time limitations of the FOIA. The DA officials in paragraph (d) of this section are designated as the Army's only IDAs. Only an IDA, his or her delegate, or the Secretary of the Army can deny FOIA requests for DA records. Each IDA will act on direct and referred requests for records within his or her area of functional responsibility. (See the proper AR in the 10-series for full discussions of these areas; they are outlined in paragraph (d) of this section.) Included are records created or

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kept within the IDA's area of responsibility; records retired by, or referred to, the IDA's headquarters or office; and records of predecessor organizations. If a request involves the areas of more than one IDA, the IDA to whom the request was originally addressed will normally respond to it; however, the affected IDAs may consult on such requests and agree on responsibility for them. IDAs will complete all required coordination at initial denial level. This includes classified records retired to the National Archives and Records Administration when a mandatory declassification review is necessary.

(b) The initial determination of whether to make a record available or grant a fee waiver 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 this Regulation is applicable and should be invoked. DAs may delegate all or part of their authority to an office chief or subordinate commander. Such delegations must not slow FOIA actions. If an IDA's delegate denies a FOIA or fee waiver request, the delegate must clearly state that he or she is acting for the IDA and identify the IDA by name and position in the written response to the requester. IDAs will send the names, offices, and telephone numbers of their delegates to the Director of Information Systems for Command, Control, Communications, and Computers. IDAs will keep this information current. (The mailing address is HQDA (SAIS-PS), WASH DC 20310-0107.

(c) 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. A FOIA re-

lease or denial action, appeal, or court review may generate public or press interest. In such case, the IDA (or delegate) should consult the Chief of Public Affairs or the command or organization PAO. The IDA should inform the PAO contacted of the issue and obtain advice and recommendations on handling its public affairs aspect. Any advice or recommendations requested or obtained should be limited to this aspect. Coordination must be completed within the 10-day FOIA response limit. (The point of contact for the Army Chief of Public Affairs is HQDA (SAPA-OSR), WASH DC 20310-1500; telephone, AUTOVON 227-4122 or commercial (202) 697-4122.) If the request involves actual or potential litigation against the United States, release must be coordinated with The Judge Advocate General. (See §518.54(e).)

(d) The following officials are designated IDAs for the areas of responsibility outlined below:

(1) The Administrative Assistant to the Secretary of the Army is authorized to act for the Secretary of the Army on requests for all records maintained by the Office of the Secretary of the Army and its serviced activities, except those specified in paragraphs (d)(2) through (d)(6) of this section, as well as requests requiring the personal attention of the Secretary of the Army.

(2) The Assistant Secretary of the Army (Financial Management) is authorized to act on requests for finance and accounting records.

(3) The Assistant Secretary of the Army (Research, Development, and Acquisition) is authorized to act on requests for procurement records other than those under the purview of the Chief of Engineers and the Commander, U.S. Army Materiel Command.

(4) The Director of Information Systems for Command, Control, Communications, and Computers (DISC4) is authorized to act on requests for records pertaining to the Army Information Resources Management Program (automation, telecommunications, visual information, records management, publications and printing, and libraries).

(5) The Inspector General is authorized to act on requests for all Inspector General records under AR 20-1.

(6) The Auditor General is authorized to act on requests for records relating to audits done by the U.S. Army Audit Agency under AR 10-2. This includes requests for related records developed by the Audit agency.

(7) The Deputy Chief of Staff for Operations and Plans is authorized to act on requests for records relating to strategy formulation; force development; individual and unit training policy; strategic and tactical command and control systems; nuclear and chemical matters; use of DA forces; and military police records and reports, prisoner confinement, and correctional records.

(8) The Deputy Chief of Staff for Personnel is authorized to act on requests for case summaries, letters of instruction to boards, behavioral science records, general education records, and alcohol and drug prevention and control records. Excluded are individual treatment/test records, which are a responsibility of The Surgeon General.

(9) The Deputy Chief of Staff for Logistics is authorized to act on requests for records relating to DA logistical requirements and determinations, policy concerning materiel maintenance and use, equipment standards, and logistical readiness.

(10) The Chief of Engineers is authorized to act on requests for records involving civil works, military construction, engineer procurement, and ecology; and the records of the U.S. Army Engineer divisions, districts, laboratories, and field operating agencies.

(11) The Surgeon General is authorized to act on requests for medical research and development records, and the medical records of active duty military personnel, dependents, and persons given physical examination or treatment at DA medical facilities, to include alcohol and drug treatment/test records.

(12) The Chief of Chaplains is authorized to act on requests for records involving ecclesiastical relationships, rites performed by DA chaplains, and nonprivileged communications relating to clergy and active duty chaplains' military personnel files.

(13) The Judge Advocate General (TJAG) is authorized to act on requests for records relating to claims, courts-martial, legal services, and similar legal records. TJAG is also authorized to act on requests for records described elsewhere in this regulation, if those records relate to litigation in which the United States has an interest. In addition, TJAG is authorized to act on requests for records that are not within the functional areas of responsibility of any other IDA.

(14) The Chief, National Guard Bureau, is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and active Army National Guard military personnel, including technician personnel, unless such records clearly fall within another IDA's responsibility. This authority includes, but is not limited to, National Guard organization and training files; plans, operations, and readiness files; policy files; historical files; files relating to National Guard military support, drug interdiction, and civil disturbances; construction, civil works, and ecology records dealing with armories, facilities within the States, ranges, etc.; Equal Opportunity investigative records; aviation program records and financial records dealing with personnel, operation and maintenance, and equipment budgets.

(15) The Chief of Army Reserve is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and reserve component military personnel, and all U.S. Army Reserve (USAR) records, unless such records clearly fall within another IDA's responsibility. Records under the responsibility of the Chief of Army Reserve include records relating to USAR plans, policies, and operations; changes in the organizational status of USAR units; mobilization and demobilization policies; active duty tours; and the Individual Mobilization Augmentation program.

(16) The Commander, United States Army Materiel Command (AMC) is authorized to act on requests for the records of AMC headquarters and its

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subordinate commands, units, and activities that relate to procurement, logistics, research and development, and supply and maintenance operations.

(17) The Commander, USACIDC, is authorized to act on requests for criminal investigative records of USACIDC headquarters and its subordinate activities. This includes criminal investigation records, investigation-in-progress records, and military police reports that result in criminal investigation reports.

(18) The Commander, United States Total Army Personnel Command, is authorized to act on requests for military personnel files relating to active duty (other than those of reserve and retired personnel) military personnel matters, personnel locator, physical disability determinations, and other military personnel administration records; records relating to military casualty and memorialization activities; heraldic activities; voting; records relating to identification cards; naturalization and citizenship; commercial solicitation; Military Postal Service Agency and Army postal and unofficial mail service; civilian personnel records and other civilian personnel matters; and personnel administration records.

(19) The Commander, United States Army Community and Family Support Center, is authorized to act on requests for records relating to morale, welfare, and recreation activities; non-appropriated funds; child development centers, community life programs, and family action programs; retired activities; club management; Army emergency relief; consumer protection; retiree survival benefits; and records dealing with DA relationships with Social Security, Veterans' Affairs, United Service Organization, U.S. Soldiers' and Airmen's Home, and American Red Cross.

(20) The Commander, United States Army Intelligence and Security Command, is authorized to act on requests for intelligence investigation and security records, foreign scientific and technological information, intelligence training, mapping and geodesy information, ground surveillance records, intelligence threat assessment, and missile intelligence data relating to tactical land warfare systems.

(21) The Commander, U.S. Army Safety Center, is authorized to act on requests for Army safety records.

(22) The General Counsel, Army and Air Force Exchange Service (AAFES), is authorized to act on requests for AAFES records, under AR 60-20/AFR 147-14.

(23) The Commander, Forces Command (FORSCOM), as a specified commander, is authorized to act on requests for specified command records that are unique to FORSCOM under § 518.29.

(24) Special IDA authority for time-event related records may be designated on a case-by-case basis. These will be published in the FEDERAL REGISTER. Current information on special delegations may be obtained from the Office of the Director of Information Systems for Command, Control, Communications, and Computers, Attn: SAIS-PSP, WASH DC 20310-0107.

### § 518.59 Reasons for not releasing a record.

There are seven reasons for not complying with a request for a record:

(a) The request is transferred to another DoD Component, or to another federal agency.

(b) The DoD Component 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 DoD Component 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 part or DoD Component supplementing regulations.

(e) The request is withdrawn by the requester.

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

(g) The record is denied in accordance with procedures set forth in the FOIA and this part.

### § 518.60 Denial tests.

To deny a requested record that is in the possession and control of a DoD Component, it must be determined that

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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 subpart C of this part.

[56 FR 56010, Oct. 31, 1991]

### § 518.61 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. When a record is denied in whole, the response advising the requester of that determination will specifically state that it is not too reasonable to segregate portions of the records for release. The excised copies shall reflect the denied information by means of Blackened areas, which are Sufficiently Blackened as to reveal no information. The best means to ensure illegibility is to cut out the information from a copy of the document and reproduce the appropriate pages. If the document is classified, all classification markings shall be lined through with a single black line, which still allows the marking to be read. The document shall then be stamped "Unclassified".

[56 FR 56010, Oct. 31, 1991]

### § 518.62 Response to requester.

(a) Initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 10 working days after receipt of the request by the official designated to respond. The action command or office holding the records will date- and time-stamp each request on receipt. The 10-day limit will start from the date stamped.

(b) 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.

(c) 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 ex-

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plain 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. 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. 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. The IDA will inform the requester of his or her right to appeal, in whole or part, the denial of the FOIA or fee waiver request and that the appeal must be sent through the IDA to the Secretary of the Army (Attn: General Counsel). (See § 518.69).

(d) The response to the requester should contain information concerning the fee status of the request, consistent with the provisions of subpart F, this regulation. Generally, the information shall reflect one or more of the following conditions:

(1) All fees due have been received.

(2) Fees have been waived because they fall below the automatic fee waiver threshold.

(3) Fees have been waived or reduced from a specified amount to another specified amount because the rationale provided in support of a request for waiver was accepted.

(4) A request for waiver has been denied.

(5) Fees due in a specified amount have not been received.

(e) The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this Regulation. Merely referring to a classification or to a "For Official Use Only" marking on the requested record does not constitute a proper citation or explanation of the basis for invoking an exemption.

(f) When the time for response becomes an issue, the official responsible for replying shall acknowledge to the

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requester the date of the receipt of the request.

### § 518.63 Extension of time.

(a) In unusual circumstances, when additional time is needed to respond, the DoD Component shall acknowledge the request in writing within the 10-day period, describe the circumstances requiring the delay, and indicate the anticipated date for substantive response that may not exceed 10 additional working days. Unusual circumstances that may justify delay are:

(1) The requested record is located in whole or in part at places other than the office processing the request.

(2) The request requires the collection and evaluation of a substantial number of records.

(3) 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 this Regulation or should be released as a matter of discretion.

(b) The statutory extension of time for responding to an initial request must be approved on a case-by-case basis by the final appellate authority for the DoD Component, or in accordance with regulations of the DoD Component, or in accordance with regulations of the DoD Component that establish guidance governing the circumstances in which such extensions may be granted. The time may be extended only once during the initial consideration period. Only the responsible IDA can extend it, and the IDA must first coordinate with the Office of the Army General Counsel.

(c) In these unusual 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 notification that he or she may treat the delay as an initial denial with a right to appeal, or 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. Components

are reminded that the requester still retains the right to treat this delay as a de facto denial with full administrative remedies.

(d) As an alternative to the taking of formal extensions of time as described in § 518.63 (a), (b), and (c), the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

### § 518.64 Misdirected requests.

Misdirected requests shall be forwarded promptly to the DoD Component 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.

### § 518.65 Records of non-U.S. Government source.

(a) When a request is received for a record 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 (reference (a) Exemption (b)(4) subpart C, exemptions, § 518.37, paragraph (d) and reference (dd), this part) will 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). 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

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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 to 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.

(b) The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the Department of Defense from multi-national organizations, such as the North American Treaty Organization (NATO) and North American Aerospace Defense Command (NORAD), or foreign governments. Coordination with foreign governments under the provisions of this paragraph shall be made through Department of State.

### §518.66 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 evaluation. Records will be maintained in accordance with AR 25-400-2.

### §518.67 Special mail services.

DoD 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.

### §518.68 Receipt accounts.

The Treasurer of the United States has established two accounts for FOIA receipts. These accounts, which are described below, shall be used for depositing all FOIA receipts, except receipts for industrially-funded and non-appropriated funded activities. Components

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are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially-funded and non-appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(a) 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. Deliver collections within 30 calendar days to the servicing finance and accounting office.

(b) 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.

## APPEALS

### §518.69 General.

(a) If the official designated by the DoD Component to make initial determinations on requests for records (IDA) declines to provide a record because the official considers it exempt, 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 request for a waiver or reduction of fees, and for no record determinations when the requester considers such a response adverse in nature. Appeals of denials of Office of the Secretary of Defense and Joint Staff documents or fee waivers may be sent to the address in appendix B, paragraph 2a to this part.

(b) Appeals of adverse determinations made by Army IDAs must be made through the denying IDA to the Secretary of the Army (Attn: General Counsel). On receipt of an appeal, the IDA will—

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(1) Send the appeal to the Office of the Secretary of the Army, Office of the General Counsel, together with a copy of the documents that are the subject of the appeal, marked to show the portions withheld; the initial denial letter; and any other relevant material.

(2) Assist the General Counsel as requested during his or her consideration of the appeal.

(c) Appeals of denial of records made by the General Counsel, AAFES, shall be made to the Secretary of the Army when the Commander, AAFES, is an Army officer.

### § 518.70 Time of receipt.

An 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.

### § 518.71 Time limits.

(a) The requester shall be advised to file an appeal so that it reaches the appellate authority 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. Records which are denied shall be retained for a period of six years to meet the statute of limitations of claims requirement.

(b) Final determinations on appeals normally shall be made within 20 working days after receipt.

### § 518.72 Delay in responding to an appeal.

(a) If additional time is needed due to the unusual circumstances described in § 518.63, of this part, 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.

(b) If a determination cannot be made and the requester notified within 20 working days, the appellate author-

ity 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. Requests shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in § 518.63, 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, whether or not the requester seeks a court order for release of the records, but a copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.

### § 518.73 Response to the requester.

(a) When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, 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.

(b) Final refusal to provide a requested record or to approve a request for waiver or reduction of fees must be made in writing by the head of the DoD Component or by a designated representative. The response, at a minimum, shall include the following:

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

(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 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.

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

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(4) The response shall advise the requester that the material being denied does not contain meaningful portions that are reasonably segregable.

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

### § 518.74 Consultation.

(a) 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 Office of the General Counsel of the Department of Defense.

(b) 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.

## JUDICIAL ACTIONS

### § 518.75 General.

(a) 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.

(b) A requester may seek an order from a United States 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 Regulation.

### § 518.76 Jurisdiction.

The requester may bring suit in the United States 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.

### § 518.77 Burden of proof.

The burden of proof is on the DoD Component to justify its refusal to provide a record. The court shall evaluate

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the case de novo (anew) and may elect to examine any requested record in camera (in private) to determine whether the denial was justified.

### § 518.78 Action by the court.

(a) When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

(b) 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.

(c) 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 Systems 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.

(d) 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.

### § 518.79 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 nongovernment source or records based on information obtained from a nongovernment 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.

**§ 518.80 Litigation status sheet.**

FOIA managers at 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. The Litigation Status Sheet at appendix C provides a standard format for recording information concerning FOIA litigation and forwarding that information to the Office of the Secretary of Defense. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a Litigation Status Sheet, with items 1 through 6 completed, and a copy of the complaint to the OASD(PA), Attn: DFOISR, with an information copy to the General Counsel, Department of Defense, Attn: Office of Legal Counsel. A revised Litigation Status Sheet shall be provided at each stage of the litigation. In the Department of the Army, HQDA TJAG (DAJA-LT), WASH DC 20310-2210 is responsible for preparing this report.

**Subpart F—Fee Schedule**

## GENERAL PROVISIONS

**§ 518.81 Authorities.**

The Freedom of Information Act (5 U.S.C. 552), as amended; by the Freedom of Information Reform Act of 1986; the Paperwork Reduction Act (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et seq.); the Budget and Accounting Procedures Act (31 U.S.C. 67 et seq.); the Defense Authorization Act for FY 87, Section 954, (Pub. L. 99-661); as amended by the Defense Technical Corrections Act of 1987 (Pub. L. 100-26).

**§ 518.82 Application.**

(a) 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 Instruction 7230.7 (reference (r)) (AR 37-60), which does not supersede the collection of fees under the FOIA. Nothing in this Chapter 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.

(b) 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 an FOIA request. Direct costs include, or 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 in the Collection of Fees and Fee Rates portions 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.

(c) The term “search” includes all time spent looking 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 document 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-

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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 § 518.82(e), for the definition of review, and § 518.90(b), for information pertaining to computer searches.

(d) The term “duplication” refers to the process of making a copy of a document in response to an 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 by requesters. If it is not possible to provide copies which are clearly usable, the requester shall be notified that their copy 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.

(e) The term “review” refers to the process of examining documents located in response to an 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 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

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exemption already applied. However, records or portions of records withheld in full under an exemption which 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.

### § 518.83 Fee restrictions.

(a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

#### § 518.84 Fee waivers.

(a) Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in § 518.81 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.

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

(c) 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:

(1) 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."

(i) The subject of the request. Components should analyze whether the subject matter of the request involves issues which 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 Depart-

ment 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.

(ii) 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 determine 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 which 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 heavily redacted record, 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.

(iii) 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 indigency are insufficient without demonstrating the capacity to further disclose the information in a manner which 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.

(iv) 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 previously 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 public understanding of the issue. Components shall not make value judgments as to whether the information is important enough to be made public.

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

(i) 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 profit-making 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 §518.85 apply. Components are reminded that in order to apply the commercial standards of the FOIA, the requester’s commercial benefits must clearly override any personal or non-profit interest.

(ii) 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

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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.

(d) Components are reminded that the above factors and examples 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.

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

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

(2) 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).

### § 518.85 Fee assessment.

(a) 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.

(b) 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:

(1) 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 will:

(i) Notify the requester that he should 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 cat-

egory determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

(ii) 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.

(2) Requesters must submit a fee declaration appropriate for the below categories.

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

(ii) *Education or Noncommercial Scientific Institution or News Media*. Requesters must indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(iii) *All Others*. Requesters must 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.

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

(4) In the situation described by § 518.81(b) (1) and (2). 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 Component estimates exceed the actual 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.

(5) 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

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date of billing (the fees have been assessed in writing) by the Component.

(6) 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.

(7) 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 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 (reference (ff)), and confirmed with respective Finance and Accounting Offices.

(8) After all work is completed on a request, and the documents are ready for release, Components may request payment prior to 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 the billing). In the case of the latter, the provisions of §518.85(b)(7), apply. Components may not hold documents ready for release pending payment from requesters with a history of prompt payment.

(9) When Components act under §518.85, (a)(1) through (a)(7), of this part, the administrative time limits of the FOIA (i.e., 10 working days from receipt of initial requests, and 20 working days from receipt of appeals, plus permissible extensions of these time limits) will begin only after the Component has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate).

(10) Components may charge for time spent searching for records, even if that search fails to locate records re-

sponsive to the request. Components may also charge search and review (in the case of commercial requesters) time if records located are determined to be search charges are likely to exceed \$25,000 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 of reformulating the request to meet his or her needs at a lower cost.

(c) 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 §518.26).

(1) 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, Component 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.

(2) 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 record 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.

(d) 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 record sought (see § 518.26). The term "educational institution" refers to a pre-school, a public or private elementary or secondary school, an institution of graduate higher 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.

(e) 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 § 518.26). The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as defined in § 518.81(c) and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(f) Components shall provide documents to requesters in § 518.85 (d) and (e), 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.

(g) Representatives of the news media. Fees shall be limited to only reasonable standard charges for docu-

ment 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 § 518.26).

(1) 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. Example 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.

(2) To be eligible for inclusion in this category, a requester must meet the criteria in § 518.85(g)(1) 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).

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(3) "Representative of the news media" does not include private libraries, private repositories of Government records, or middlemen, such as information vendors or data brokers.

(h) All Other Requesters. Components shall charge requesters who do not fit into any of the above categories, 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 §518.26). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 (reference (ff)), 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 §518.84(a). (See also §518.85(c)(2).DD Form 2086 (Record of Freedom of Information (FOI) Processing Cost) will be used to annotate fees for processing FOIA information. The form is available through normal publications channels.

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56010, Oct. 31, 1991]

### §518.86 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 or 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 in 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

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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.

### §518.87 Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).

The Debt Collection Act of 1982 (Pub. L. 97-365) 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 (reference (ff)). 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 the Debt Collection Act of 1982.

### §518.88 Computation of fees.

The fee schedule in this chapter 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.

#### COLLECTION OF FEES AND FEE RATES

### §518.89 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

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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 § 518.81).

**§ 518.90 Search time.**

(a) Manual search.

Type	Grade	Hourly rate (\$)
Clerical .....	E9/GS8 and below .....	12
Professional ...	01-06/GS9-GS/GM15 .....	25
Executive .....	07/GS/GM16/ES1 and above .....	45

(b) *Computer search.* Computer search is based on direct cost of the central processing unit, input-output devices, and money 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.

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

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

Type	Grade	Hourly rate (\$)
Clerical .....	E9/GS8 and below .....	12
Professional ...	01-06/GS9-GS15 .....	25
Executive .....	07/GS16/ES1 and above .....	45

**§ 518.93 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. Army audiovisual materials are referred to as "visual information."

**§ 518.94 Other records.**

Direct search and duplication cost for any record not described above shall be computed in the manner described for audiovisual documentary material.

**§ 518.95 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 requester to pay for one or more of the following services:

- (a) Certifying that records are true copies.
- (b) Sending records by special methods such as express mail, etc.

COLLECTION OF FEES AND FEE RATES FOR TECHNICAL DATA

**§ 518.96 Fees for technical data.**

(a) 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

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known market value, charges shall be based on recovery of full costs to the Federal Government. The full cost 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 the Collection of Fees and Fee Rates portion of this subpart for other types of information released under the FOIA. DD Form 2086-1 (Record of Freedom of Information (FOI) Processing Cost for Technical Data) will be used to annotate fees for technical data. The form is available through normal publications channels.

(b) Waiver. Components shall waive the payment of costs required in §518.96(a), which are greater than the costs that would be required for release of this same information under the Collection of Fees and Fee Rates portion 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 §518.80(a), that such a waiver is in the interest of the United States.

(c) Fee Rates.

(1) Search time. (i) Manual Search.

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

Professional and Executive (To be established at actual hourly rate prior to

search. A minimum charge will be established at ½ hourly rates.)

(ii) 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 §518.96(c)(1)(i), 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.

(2) Duplication.

Type	Cost
Aerial photographs, specifications, permits, charts, blueprints, and other technical documents .....	\$2.50
Engineering data (microfilm):	
Aperture cards:	
Silver duplicate negative, per card .....	.75
When key punched and verified, per card .....	.85
Diazo duplicate negative, per card .....	.65
When key punched and verified, per card .....	.75
35mm roll film, per frame .....	.50
16mm roll film, per frame .....	.45
Paper daprnts (engineering drawings), each ....	1.50
Paper reprints of microfilm indices, each .....	.10

(3) Review time.

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

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 additional services not specifically provided in §518.96(c), consistent with DoD Instruction 7230.7 (reference (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 image ..... .10
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

## REPORTS CONTROL

## § 518.97 General.

The reporting requirement outlined in this subpart is assigned Report Control Symbol DD-PA(A) 1365. See appendix F for DD Form 2564, Annual Report Freedom of Information Act.

## ANNUAL REPORT

## § 518.98 Reporting time.

Each DoD Component shall prepare statistics and accumulate paperwork for the preceding calendar year on those times prescribed for the annual report and submit them in duplicate to the ASD(PA) on or before each February 1. Existing DoD standards and registered data elements are to be used for all data requirements to the greatest extent possible in accordance with the provisions of DoD Directive 5000.11 (reference(s)) AR 25-9. The standard data elements are contained in DoD Directive 5000.12-M (reference (99)). The Army will follow guidelines below and submit the information to the Army Freedom of Information and Privacy Act Division, Information Systems Command, Attn: ASQNS-OP-F, Room 1146, Hoffman Building I, Alexandria, VA 22331-0301 by the second week of each January.

(a) Each reporting activity will submit the information requested in § 518.99, items (a)(1), (a)(2), (a)(5), (a)(6), (b)(3), (i), (j)(1), (j)(2) and (j)(2)(i). Data will be collected throughout the year on DD Form 2086.

(b) Each IDA will submit the information requested in § 518.99, excluding items (d) through (h).

(c) The Judge Advocate General, Army, will submit the information requested in § 518.99, item (9).

(d) The Army General Counsel will submit the information requested in § 518.99, items (d) through (f).

(e) The Information Systems Command will compile the data submitted in the Department of the Army's annual Reporting of Freedom of Information Processing Costs (RCS DD-PA(A) 1365). This report will be coordinated through the DISC4 (SAIS-PDC), WASH DC 20310-0107, to the Director of Free-

dom of Information and Security Review by 31 January each year.

## § 518.99 Annual report content.

The following instructions shall be used in preparing the annual report for submission on DD Form 2564 (see appendix G to this part). DD Form 2564 may be ordered through publication channels or reproduced locally:

(a) Item 1.

(1) *Total requests.* Enter the total number of FOIA requests responded to during the calendar year.

(2) *Granted in full.* Enter the total number of FOIA requests responded to and granted in full during the calendar year. (This may include requests granted by your office, yet still requiring action by another office).

(3) *Denied in part.* Enter the total number of FOIA requests responded to and denied in part based on one or more of the nine FOIA exemptions. (Do not report denial of fee waivers).

(4) *Denied in full.* Enter the total number of FOIA requests responded to and denied in full based on one or more of the nine FOIA exceptions. (Do not report denial of fee waivers).

(5) *“Other Reason” responses.* Enter the total number of FOIA requests in which you were unable to provide all or part of the requested information based on an “Other Reason” response. Item (b)(3) of this section explains the six possible “Other Reasons”.

(6) *Total actions.* Enter the total number of FOIA actions taken during the calendar year. This number will be the sum of paragraphs (a)(2) through (a)(5) of this section.

(b) Item 2.

(1) *Exemptions invoked on initial 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 paragraphs (a)(3) and (a)(4) of this section.

(2) *b(3) Status invoked on initial determinations.* Identify the statutes cited and number of times invoked when you claim a (b)(3) exemption. The total number of instances will be equal to

the total in paragraph (b)(1) of this section. Cite the specific sections when invoking the Atomic Energy of 1954 or the National Security Act of 1947. To qualify as a b(3) exemption, the statute must contain clear wording that the information covered will not be disclosed. The following examples are not b(3) statutes:

- (i) 5 U.S.C. 552a—Privacy Act.
- (ii) 17 U.S.C. 101 et. seq.—Copyright Act.
- (iii) 18 U.S.C. 793—Gathering, Transmitting or Losing Defense Information.
- (iv) 18 U.S.C. 794—Gathering or Delivering Defense Information to Aid Foreign Governments.
- (v) 18 U.S.C. 1905—Trade Secrets Act.
- (vi) U.S.C. 1498—Patent and Copyright Cases.
- (3) “*Other Reasons*” cited on initial determinations. Identify the “*Other Reasons*” response cited when responding to a FOIA request and enter the number of times each was claimed.
  - (i) *Transferred request*. Enter the number of times a request was transferred to another DoD Component or Federal Agency for action.
  - (ii) *Lack of records*. Enter the number of times a search of files failed to identify records responsive to subject request and there was no statutory obligations to create a record.
  - (iii) *Failure of requester to reasonably describe record*. Enter the number of times a FOIA request could not be acted upon since the requester failed to reasonably describe the record(s) being sought.
  - (iv) *Other failures by requester to comply with published rules and/or directives*. Enter the number of times a requester failed to follow published rules concerning time, place, fees, and procedures.
  - (v) *Request withdrawn by requester*. Enter the number of times a requester withdrew a request and/or appeal.
  - (vi) *Not an agency record*. Enter the number of times a requester was provided a request indicating the requested information was not an agency record.
  - (vii) *Total*. Enter the sum of paragraphs (b)(3) (i) through (vi) of this section. This number will be equal to or greater than the number in paragraph (a)(5) of this section, since more than

one reason may be claimed for each “*Other Reason*” response.

(c) Item 3.

*Initial denial authorities by participation*. Enter the name, rank (if military), title, and activity of each individual who signed a partial or total denial response and give the number of instances of participation. The total number of instances will equal the sum of paragraphs (a)(3) and (a)(4) of this section. Show the individual’s full title and complete organization (do not use acronyms or abbreviations, other than U.S.) See example below.

Smith, John G. BG Director, Personnel and Administration, 6 U.S. European Command

(d) Item 4.

(1) *Total requests*. Enter the total number of FOIA appeals responded to during the calendar year.

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

(3) *Denied in part*. Enter the total number of FOIA appeals responded to and denied in part based on one or more of the nine FOIA exemptions.

(4) *Denied in full*. Enter the total number of FOIA appeals responded to and denied in full based on one or more of the nine FOIA requests.

(5) “*Other Reason*” responses. Enter the total number of FOIA appeals in which you were unable to provide the requested information based on “*Other Reason*” response. Item (b)(3) of this section explains the six possible “*Other Reasons*.”

(6) *Total actions*. Enter the total number of FOIA appeal actions taken during the calendar year. This number will be the sum of paragraphs (d)(2) and (d)(5) of this section.

(e) Item 5.

(1) *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 (d)(3) and (d)(4) of this section.

(2) *b(3) Statutes invoked on appeal determinations*. Identify the statutes cited and number of times invoked when you claimed a(b)(3) exemption. The total

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number of instances will be equal to the total in paragraph (e)(1) of this section. Cite the specific sections when invoking the Atomic Energy Act of 1954 or the National Security Act of 1947. To qualify as a b(3) exemption, the statute must contain clear wording that the information covered will not be disclosed. Examples which are not b(3) statues are listed in paragraph (b)(2) of this section.

(3) "Other Reasons" cited on appeal determinations. Identify the "Other Reasons" response cited when responding to a FOIA appeal and enter the number of times each was claimed. See paragraph (b)(3) of this section for description of "Other Reasons".

(f) Item 6.

*Appeal denial authorities by participation.* Enter the name, rank (if military), title, and activity of each individual who signed a partial or total appeal denial response and give the number of instances of participation. The total number of instances will equal the sum of paragraphs (d)(3) and (d)(4) of this section. Show the full title and complete organization (do not use acronyms or abbreviations, other than U.S.). See Item 3 of this section for example.

(g) Item 7.

*Court opinions and actions taken.* Briefly describe the results of each suit the Judge Advocate General and/or the General Counsel participated in during the calendar year. See following example:

Armed Forces Relief and Benefit Association v. Department of Defense, Department of the Army, Department of the Air Force, and Department of the Navy. C.A. 89-0689, U.S.D.C.D.C., March 15, 1989. Plaintiff filed suit for defendant's refusal to release serviceman's name and duty address. Information was held pursuant to 5 U.S.C. 552 (b)(2) and (b)(6). Plaintiff voluntarily dismissed suit June 19, 1989.

(h) Item 8.

*FOIA implementation rules and regulations.* List all changes or revisions of FOIA rules or regulations affecting the implementation of the FOIA program, followed by the FEDERAL REGISTER reference (volume number, date, and page) that announces the change of revision to the public. Append a copy of each. See following example:

DoD Regulation 5400.7-R "DoD Freedom of Information Act Program"—32 CFR 286, Vol. 54, No. 155, pg. 33190, 14 August 1989.

(i) Item 9.

*Fee collected from the public.* Enter the total amount of fees collected from the public during the calendar year. This includes search, review, and reproduction costs only.

(j) Item 10.

(1) *Availability of records.* Reports all new categories or segregable positions of records now being released upon request.

(2) *FOI Program costs.*

(i) *Personnel costs.* Items (b) and (c) of this section are used to captured manyears and salary costs of personnel primarily involved in planning, program management and/or administrative handling of FOIA requests. Determine salaries for military personnel by using the Composite Standard Pay rates (DoD 7229.9-M, Department of Defense Accounting Manual). For civilian personnel use Office of Personnel Management salary table and add 16 percent for benefits. A sample computation is shown as follows. Table G-1 shows how the cost computation is made.

TABLE G-1.—SAMPLE COMPUTATION

Grade	No. of personnel	Salary	Percentage of time	Costs
O-5 .....	1	\$88,463	10	\$8,846
O-1 .....	1	37,219	30	11,165
GS-12 .....	1	41,557	50	20,799
Total .....	.....	.....	90	40,790

**Notes:**

- To determine the manyear computation: Add the total percentages of time and divide the percentage by 100.
- Sample Computation: Manyears=140% divided by 100=1.4 manyears.

(a) *Estimated manyears.* Add the total percentages of time for personnel involved in administering the FOI program and divide by 100. In the example shown above, (10+30+50)/100=.9 manyears.

(b) *Manyear costs.* Total costs associated with salaries of individuals involved in administering FOIA program. In the example shown above, the total cost is \$40,790.

(c) *Estimated manhour costs by Category.* This section accounts for all other personnel not reported in (a) and (b) of this section who are involved in processing FOIA requests. Enter the total hourly cost for each of the five areas described below.

(1) *Search time.* This includes only those direct costs associated with the time spent

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looking for material that is responsive to a request, including line by line identification of material within a document to determine if it is responsive to the request. Searches may be done manually or by computer using existing programming.

(2) *Review and existing.* This includes all direct costs incurred during the process of examining documents located in response to a request to determine whether any portion of any document located is permitted to be withheld. It also includes excising document to prepare them for release. It does not include time spent resolving general legal or policy issues regarding the applications of exemptions.

(3) *Coordination and approval.* This includes all costs involved in coordinating the release/denial of documents requested under the FOIA.

(4) *Correspondence/form preparation.* This includes all costs involved in typing responses, filling out forms, etc., to respond to a FOIA request.

(5) *Other activities.* This includes all other processing costs not covered above, such as processing time by the mail room.

(6) *Total.* Enter the sum of (c)(1) through (c)(5) of this section.

(d) *Overhead.* This is the cost of supervision, space, and administrative support. It is computed as 25% of the sum of (b) and (c) of this section.

(e) *Total.* (1) Enter the sum of (b), (c), and (d) of this section.

(2) *Other case-related costs.* Using the fee schedule, enter the total amounts incurred in each of the areas below.

(i) *Computer search time.* This includes costs of central processing unit, input/output devices, memory, etc., of the computer system used, as well as the wage of the machine's operator/programmer.

(ii) *Office copy reproduction.* This includes the cost of reproducing normal documents with office copying equipment.

(iii) *Microfiche reproduction.* This includes the cost of reproducing normal documents with office copying equipment.

(iv) *Printed records.* This is the cost of providing reproduced copies of forms, publications, or reports.

(v) *Computer copy.* This is the actual cost of duplicating magnetic tapes, floppy diskettes, computer printouts, etc.

(vi) *Audiovisual materials.* This is the actual cost of duplicating audio or video tapes or like materials, to include the wage of the person doing the work.

(vii) *Other.* Reports all other costs which are easily identifiable, such as per diem, operation of courier vehicles, training courses, printing (indexes and forms), long distance telephone calls, special mail services, use of indicia, etc.

(viii) *Subtotal.* Enter the sum of (e)(2)(i) through (vii) of this section.

(ix) *Overhead.* This is the cost of supervision, space and administrative support. It is computed as 25% of (e)(2)(viii) of this section.

(x) *Total.* Enter the sum of (e)(2)(viii) and (ix) of this section.

(3) *Cost of routing requests processed.* This item optional. Some reporting activities may find it economical to develop an average cost factor for processing repetitive routine requests rather than tracking costs on each request as it is processed. Care should be exercised so that costs are comprehensive to include a 25% overhead, yet not duplicated elsewhere in the report. Multiply the number of routine requests processed items the cost factor to compute this amount.

(4) *Total costs.* Enter the sum of (1) through (3) of this section.

(f) *Format time limit extension.* Enter the total number of instances in which it was necessary to seek a formal 10 working day time extension for one of the reasons explained as follows:

(1) *Location.* The need to search for and collect the requested records from another activity that as separate from the office processing the request.

(2) *Volume.* the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records in a single request.

(3) *Consultation.* The need for consultation with another agency having a substantial interest in the material requested.

(4) *Court involvement.* Where court actions were taken on the basis of exhaustion of administrative procedures because the department/activity was unable to comply with the request within the applicable time limits, and in which a court allowed additional time upon a showing of exceptional circumstances, provide a copy of each court opinion and court order containing such an extension of time.

(5) *Total.* Enter the sum of paragraphs (j)(2)(i) through (j)(2)(iv) above of this section.

(ii) [Reserved]

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56011, Oct. 31, 1991]

## Subpart H—Education and Training

### RESPONSIBILITY AND PURPOSE

#### §518.100 Responsibility.

The head of each DoD Component is responsible for the establishment of educational and training programs on the provisions and requirements of this Regulation. 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 Regulation.

**§ 518.101 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 Department of Defense.

**§ 518.102 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 Regulation. The Program should be designed to accomplish the following objectives:

- (a) Familiarize personnel with the requirements of the FOIA and its implementation by this Regulation.
- (b) Instruct personnel, who act in FOIA matters, concerning the provisions of this Regulation, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.
- (c) 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.
- (d) Advise personnel of the penalties for noncompliance with the FOIA.

**§ 518.103 Implementation.**

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

**§ 518.104 Uniformity of legal interpretation.**

In accordance with DoD Directive 5400.7 (reference (b)), the General Counsel of the Department of Defense shall ensure uniformity in the legal position and interpretation of the DoD FOIA Program. This regulation provides procedures for contacting the DOD General Counsel where required.

APPENDIX A TO PART 518—UNIFIED COMMANDS—PROCESSING PROCEDURES FOR FOI APPEALS

1. *General.*

a. In accordance with DoD Directive 5400.7 (reference (b)) and this Regulation, the Unified 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 (FOI) Programs. This policy represents an exception to the policies in DoD Directive 5100.3 (reference (f)).

b. The policy change above authorizes and requires the Unified Commands to process FOI requests in accordance with DoD Directive 5400.7 (reference (b)) and DoD Instruction 5400.10 (reference (hh)) and to forward directly to the OASD(PA) all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

2. *Responsibilities of Commands.*

Unified Commanders in Chief shall:

- a. Designate the officials authorized to deny initial FOIA requests for records.
- b. Designate an office as the point-of-contact for FOIA matters.
- c. Refer FOIA cases to the ASD(PA) for review and evaluation when the issues raised are of unusual significance, precedent setting, or otherwise require special attention or guidance.
- d. 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.
- e. Coordinate proposed denials of records with the appropriate Unified Command's Office of the Staff Judge Advocate. Answer any request for a record within 10 working days of receipt. The requester 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.
- f. Provide to the ASD(PA) when the request for a record is denied in whole or in part, a copy of the response to the requester

or his representative, and any internal memoranda that provide background information or rationale for the denial.

g. 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 Assistant Secretary of Defense (Public Affairs), the Pentagon, Washington, DC 20301-1400.

h. Upon request, submit to ASD(PA) a copy of the records that were denied. ASD(PA) shall make such requests when adjudicating appeals.

#### 3. Fees for FOI Requests.

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

#### 4. Communications.

Excellent communications capabilities currently exist between the OASD(PA) and the Public Affairs Offices of the Unified Commands. This communication capability shall be used for FOIA cases that are time sensitive.

#### 5. Reporting Requirements.

a. The Unified Commands shall submit to the ASD(PA) an annual report. The instructions for the report are outlined in subpart G.

b. The annual report shall be submitted in duplicate to the ASD(PA) not later than each February 1. This reporting requirement is assigned Report Control Symbol DD-PA(A)1365.

### APPENDIX B TO PART 518—ADDRESSING FOIA REQUESTS

#### 1. General.

a. The Department of Defense includes the Office of the Secretary of Defense and the Joint Staff, the Military Departments, the Unified Commands, the Defense Agencies, and the DoD Field Activities.

b. 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.

#### 2. Listing of DoD Component Addresses for FOIA Requests.

a. Office of the Secretary of Defense and the Joint Staff. Send all requests for records from the below listed offices to: Office of the Assistant Secretary of Defense (Public Affairs), Attn: Directorate for Freedom of Information and Security Review, room 2C757, The Pentagon, Washington, DC 20301-1400.

(1) Executive Secretariat.

(2) Under Secretary of Defense (Policy).

(a) Assistant Secretary of Defense (International Security Affairs).

(b) Assistant Secretary of Defense (International Security Policy).

(c) Assistant Secretary of Defense (Special Operations/Low Intensity Conflict).

(d) Principal Deputy Under Secretary of Defense (Strategy and Resources).

(e) Deputy Under Secretary of Defense (Trade Security Policy).

(f) Deputy Under Secretary of Defense (Security Policy).

(g) Director of Net Assessment.

(h) Director Defense Security Assistance Agency.

(i) Defense Technology Security Administration.

(3) Under Secretary of Defense (Acquisition).

(a) Assistant Secretary of Defense (Production and Logistics).

(b) Assistant Secretary of Defense (Command, Control, Communications, and Intelligence).

(c) Assistant to the Secretary of Defense (Atomic Energy).

(d) Director, Defense Research and Engineering.

(e) Director, Small and Disadvantaged Business Utilization.

(4) Comptroller of the Department of Defense.

(5) Assistant Secretary of Defense (Force Management and Personnel).

(6) Assistant Secretary of Defense (Health Affairs).

(7) Assistant Secretary of Defense (Legislative Affairs).

(8) Assistant Secretary of Defense (Public Affairs).

(9) Assistant Secretary of Defense (Program Analysis and Evaluation).

(10) Assistant Secretary of Defense (Reserve Affairs).

(11) General Counsel, Department of Defense.

(12) Director, Operational Test and Evaluation.

(13) Assistant to the Secretary of Defense (Intelligence Oversight).

(14) Assistant to the Secretary of Defense (Intelligence Policy).

(15) Defense Advanced Research Projects Agency.

(16) Strategic Defense Initiative Organization.

(17) Defense Systems Management College.

(18) National Defense University.

(19) Armed Forces Staff College.

(20) Department of Defense Dependent Schools.

(21) Uniformed Services University of the Health Sciences.

b. Department of the Army. Army records may be requested from those Army officials who are listed in 32 CFR part 518 (reference (ii)), appendix B. Send requests to the Chief,

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Freedom of Information and Privacy Act Division, Information Systems Command—Pentagon, Attn: ASQNS-OP-F, room 1146, Hoffman I, 2461 Eisenhower Avenue, Alexandria, VA 22331-0301 for records of the Headquarters, U.S. Army, or if there is uncertainty as to which Army activity may have the records. Send requests to particular installations or organizations as follows:

(1) Current publications and records of DA field commands, installations, and organizations.

(a) Send the request to the commander of the command, installation, or organization, to the attention of the Freedom of Information Act Official.

(b) Consult AR 25-400-2 for more detailed listings of all record categories kept in DA offices.

(c) Contact the installation or organization public affairs officer for help if you cannot determine the official within a specific organization to whom your request should be addressed.

(2) Department of the Army publications.

(a) Write to the U.S. Government Printing Office, which has many DA publications for sale. Address: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-0001.

(b) Use the facilities of about 1,000 Government publication depository libraries throughout the United States. These libraries have copies of many DA publications. Obtain a list of these libraries from the Superintendent of Documents at the above address.

(c) Send requests for current administrative, training, technical, and supply publications to the National Technical Information Service, U.S. Department of Commerce, Attn: Order Preprocessing Section, 5285 Port Royal Road, Springfield, VA 22151-2171; commercial telephone, (703) 487-4600. The National Technical Information Service handles general public requests for unclassified, uncopyrighted, and nondistribution-restricted Army publications not sold through the Superintendent of Documents.

(3) Military personnel records. Send requests for military personnel records of information as follows:

(a) Army Reserve personnel not on active duty and retired personnel—Commander, U.S. Army Reserve Personnel Center, 9700 Page Blvd., St. Louis, MO 63132-5200; commercial telephone, (314) 263-7600.

(b) Army officer personnel discharged or deceased after 1 July 1917 and Army enlisted personnel discharged or deceased after 1 November 1912—Director, National Personnel Records Center, 9700 Page Blvd., St. Louis, MO 63132-5100.

(c) Army personnel separated before the dates specified in (ii) above—Textual Reference Division, Military Reference Branch,

National Archives and Records Administration, Washington, DC 20408-0001.

(d) Army National Guard officer personnel[EM]Chief, National Guard Bureau. Army National Guard enlisted personnel[EM]Adjutant General of the proper State.

(e) Active duty commissioned and warrant officer personnel—Commander, U.S. Total Army Personnel Command, Attn: TAPC-ALS, Alexandria, VA 22332-0405; commercial telephone, (703) 325-4053. Active duty enlisted personnel—Commander, U.S. Army Enlisted Records and Evaluation Center, Attn: PCRE-RF, Fort Benjamin Harrison, IN 46249-4701; commercial telephone, (317) 542-3643.

(4) Medical records.

(a) Medical records of non-active duty military personnel. Use the same addresses as for military personnel records.

(b) Medical records of military personnel on active duty. Address the medical treatment facility where the records are kept. If necessary, request locator service per (e) above.

(c) Medical records of civilian employees and all dependents. Address the medical treatment facility where the records are kept. If the records have been retired, send requests to the Director, National Personnel Records Center, 111 Winnebago St., St. Louis, MO 63118-4199.

(5) Legal records.

(a) Records of general courts-martial and special courts-martial in which a bad conduct discharge was approved. For cases not yet forwarded for appellate review, apply to the staff judge advocate of the command having jurisdiction over the case. For cases forwarded for appellate review and for old cases, apply to the U.S. Army Legal Service Agency, Attn: JALS-CC, Nassif Building, Falls Church, VA 22041-5013; AUTOVON 289-1888, commercial telephone, (202) 756-1888.

(b) Records of special courts-martial not involving a bad conduct discharge. These records are kept for 10 years after completion of the case. If the case was completed within the past 3 years, apply to the staff judge advocate of the headquarters where it was reviewed. If the case was completed from 3 to 10 years ago, apply to the National Personnel Records Center (Military Records), 9700 Page Blvd., St. Louis, MO 63132-5100. If the case was completed more than 10 years ago, the only evidence of conviction is the special courts-martial order in the person's permanent records. Request as in (3) above.

(c) Records of summary courts-martial. Locally maintained records are retired 3 years after action of the supervisory authority. Request records of cases less than 3 years old from the staff judge advocate of the headquarters where the case was reviewed. After 10 years, the only evidence of conviction is the summary courts-martial order in

the person's permanent records. Request as in (3) above.

(d) Requests submitted under (b) and (c) above. These requests will be processed in accordance with chapter V. The IDA is The Judge Advocate General, HQDA (DAJA-CL), WASH DC 20310-2213; AUTOVON 225-1891, commercial telephone, (202) 695-1891.

(e) Administrative settlement of claims. Apply to the Chief, U.S. Army Claims Service, Attn: JACS-TCC, Fort George G. Meade, MD 20755-5360; AUTOVON 923-7860, commercial telephone, (301) 677-7860.

(f) Records involving debarred or suspended contractors. Apply to HQDA (JALS-PF), WASH DC 20310-2217; AUTOVON 285-4278, commercial telephone, (202) 504-4278.

(g) Records of all other legal matters (other than records kept by a command, installation, or organization staff judge advocate). Apply to HQDA (DAJA-AL), WASH DC 20310-2212; AUTOVON 224-4316, commercial telephone, (202) 694-4316.

(6) Civil works program records. Civil works records include those relating to construction, operation, and maintenance for the improvement of rivers, harbors, and waterways for navigation, flood control, and related purposes, including shore protection work by the Army. Apply to the proper division or district office of the Corps of Engineers. If necessary to determine the proper office, contact the Commander, U.S. Army Corps of Engineers, Attn: CECC-K, WASH DC 20314-1000; commercial telephone, (202) 272-0028.

(7) Civilian personnel records. Send requests for personnel records of current civilian employees to the employing installation. Send requests for personnel records of former civilian employees to the Director, National Personnel Records Center, 111 Winnebago St., St. Louis, MO 63118-4199.

(8) Procurement records. Send requests for information about procurement activities to the contracting officer concerned or, if not feasible, to the procuring activity. If the contracting officer or procuring activity is not known, send inquiries as follows:

(a) Army Materiel Command procurement: Commander, U.S. Army Materiel Command, Attn: AMCPA, 5001 Eisenhower Ave., Alexandria, VA 22333-0001.

(b) Corps of Engineers procurement: Commander, U.S. Army Corps of Engineers, Attn: CECC-K, WASH DC 20314-1000; commercial telephone, (202) 272-0028.

(c) All other procurement: HQDA (DAJA-KL), WASH DC 20310-2208; AUTOVON 225-6209, commercial telephone, (202) 695-6209.

(9) Criminal investigation files. Send requests involving criminal investigation files to the Commander, U.S. Army Criminal Investigation Command, Attn: CICR-FP, 2301 Chesapeake Ave., Baltimore, MD 21222-4099; commercial telephone, (301) 234-9340. Only the Commanding General, USACIDC, can re-

lease any USACIDC-originated criminal investigation file.

(10) Personnel security investigation files and general Army intelligence records. Send requests for personnel security investigation files, intelligence investigation and security records, and records of other Army intelligence matters to the Commander, U.S. Army Intelligence and Security Command, Attn: IACSF-FI, Fort George G. Meade, MD 20755-5995.

(11) Inspector General records. Send requests involving records within the Inspector General system to HQDA (SAIG-ZXL), WASH DC 20310-1714. AR 20-1 governs such records.

(12) Army records in Government records depositories.

(a) Noncurrent Army records are in the National Archives of the United States, WASH DC 20408-0001; in Federal Records Centers of the National Archives and Records Administration; and in other records depositories. Requesters must write directly to the heads of these depositories for copies of such records.

(b) A list of pertinent records depositories is published in AR 25-400-2, table 6-1.

(c) 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 an FOIA request. Send requests to Chief of Naval Operations, Code OP-09B30, room 5E521, Pentagon, Washington, DC 20350-2000, for records of the Headquarters, Department of the Navy, and to Freedom of Information and Privacy Act Office, Code MI-3, HQMC, room 4327, Washington, DC 20308-0001, for records of the U.S. Marine Corps, or if there is uncertainty as to which Navy or Marine activities may have the records.

(d) Department of the Air Force. Air Force records may be requested from the Commander of any Air Force installation, major command, or separate 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 Secretary of the Air Force, Attn: SAF/AAIS(FOIA), Pentagon, room 4A1088C, Washington, DC 20330-1000.

(e) 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, Cameron Station, Alexandria, VA 22304-6178, for records of its headquarters or if there is uncertainty as to which DCAA region may have the records sought.

(f) Defense Communications Agency (DCA). DCA records may be requested from any DCA

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field activity or from its headquarters. Requesters should send FOIA requests to Defense Communications Agency, Code H104, Washington, DC 20305-2000.

(g) Defense Intelligence Agency (DIA). FOIA requests for DIA records may be addressed to Defense Intelligence Agency, Attn: RTS-1, Washington, DC 20340-3299.

(h) Defense Investigative Service (DIS). All FOIA requests for DIS records should be sent to the Defense Investigative Service, Attn: V0020, 1900 Half St., SW., Washington, DC 20324-1700.

(i) 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: DLA-XAM, Cameron Station, Alexandria, VA 22304-6100.

(j) Defense Mapping Agency (DMA). FOIA requests for DMA records may be sent to the Defense Mapping Agency, 8613 Lee Highway, Fairfax, VA 22031-2137.

(k) Defense Nuclear Agency (DNA). FOIA requests for DNA records may be sent to the Defense Nuclear Agency, Public Affairs Office, room 113, 6801 Telegraph Road, Alexandria, VA 22310-3398.

(l) National Security Agency (NSA). FOIA requests for NSA records may be sent to the National Security Agency/Central Security Service, Attn: Q-43, Fort George G. Meade, MD 20755-6000.

(m) Office of the Inspector General, Department of Defense (IG, DoD). FOIA requests for IG, DoD records may be sent to the Department of Defense Office of the Inspector General, Assistant Inspector General for Investigations, Attn: Deputy Director FOIA/PA Division, 400 Army Navy Drive, Arlington, VA 22202-2884.

(n) 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, Crystal Mall 3, room 416, Washington, DC 20376-5001 for records of its headquarters, or if there is uncertainty as to which DFAS region may have the records sought.

### 3. Other Addressees.

Although the below organizations are OSD and Joint Staff Components for the purposes of the FOIA, requests may be sent directly to the addresses indicated.

(a) Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS). Director, OCHAMPUS, Attn: Freedom of Information Officer, Aurora, CO 80045-6900.

(b) Chairman, Armed Services Board of Contract Appeals (ASBCA). Chairman, Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, VA 22041-3208.

(c) U.S. Central Command. U.S. Central Command/CCJI/AG, MacDill Air Force Base, FL 33608-7001.

(d) U.S. European Command. Headquarters, U.S. European Command/ECJ1-AR(FOIA), APO New York 09128-4209.

(e) U.S. Southern Command. U.S. Commander-in-Chief, Southern Command, Attn: SCJ1, APO Miami 34003-0007.

(f) U.S. Pacific Command. U.S. Commander-in-Chief, Pacific Command, USPACOM FOIA Coordinator (J18A), Administrative Support Division, Joint Secretariat, Box 28, Camp H.M. Smith, HI 96861-5025.

(g) U.S. Special Operations Command. U.S. Special Operations Command, Attn: SOJ6-SI (FOI Officer), MacDill, Air Force Base, FL 33608.

(h) U.S. Atlantic Command. Commander-in-Chief, Atlantic Command, Code J02P6, Norfolk, VA 23511-5100.

(i) U.S. Space Command. Chief Records Management Division, Directorate of Administration, United States Space Command Peterson Air Force Base, CO 80914-5001.

(j) U.S. Transportation Command. U.S. Commander-in-Chief, Transportation Command, Attn: TCDA-RM, Scott Air Force Base, IL 62225-7001.

### 4. National Guard Bureau.

FOIA requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau (NGB-DAI), Pentagon, room 2C362, Washington, DC 20310-2500.

### 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 Office of the Assistant Secretary of Defense (Public Affairs), Attn: Directorate for Freedom of Information and Security Review, room 2C757, The Pentagon, Washington, DC 20301-1400.

## APPENDIX C TO PART 518—LITIGATION STATUS SHEET

1. Case Number\* (Number used by Component for references (for DA, use case name))
2. Requester
3. Document Title or Description
4. Litigation
  - a. Date Complaint Filed
  - b. Court
  - c. Case File Number\*
5. Defendants (agency and individual)
6. Remarks: (brief explanation of what the case is about)
7. Court Action
  - a. Court's Finding
  - b. Disciplinary Action (as appropriate)
8. Appeal (as appropriate)
  - a. Date Complaint Filed
  - b. Court
  - c. Case File Number\*

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- d. Court's Finding
- e. Disciplinary Action (as appropriate)

**APPENDIX D TO PART 518—OTHER  
REASON CATEGORIES**

1. *Transferred Requests.* This category applies when responsibility for making a determination or a decision on categories 2, 3, or 4 below is shifted from one Component to another, or to another Federal Agency.

2. *Lack of Records.* This category covers those situations wherein the requester is advised the DoD Component has no record or has no statutory obligation to create a record.

3. *Failure of Requester to Reasonably Describe Record[EHI].* This category is specifically based on section 552(a)(3)(a) of the FOIA (reference (a)).

4. *Other Failures by Requesters to Comply with Published Rules or Directives.* This category is based on section 552(a)(3)(b) of the FOIA (reference (a)) and includes instances of failure to follow published rules concerning time, place, fees, and procedures.

5. *Request Withdrawn by Requester.* This category covers those situations wherein the requester asks an agency to disregard the request (or appeal) or pursues the request outside FOIA channels.

6. *Not an Agency Record.* This category covers situations where the information re-

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quested is not an agency record within the meaning of the FOIA and this regulation.

**APPENDIX E TO PART 518—DoD FREE-  
DOM OF INFORMATION ACT PROGRAM  
COMPONENTS**

Office of the Secretary of Defense/Joint Staff/Unified Commands,  
Defense Agencies, and the DoD Field Activities

Department of the Army  
Department of the Navy  
Department of the Air Force  
Defense Communications Agency  
Defense Contract Audit Agency  
Defense Finance and Accounting Service  
Defense Intelligence Agency  
Defense Investigative Service  
Defense Logistics Agency  
Defense Mapping Agency  
Defense Nuclear Agency  
National Security Agency  
Office of the Inspector General, Department of Defense  
Defense Finance and Accounting Service

[56 FR 48932, Sept. 26, 1991, as amended at 56 FR 56011, Oct. 31, 1991]

**APPENDIX F TO PART 518—DD FORM  
2564, ANNUAL REPORT—FREEDOM OF  
INFORMATION ACT**

Appendix F--DD Form 2564,  
Annual Report--Freedom of Information Act

ANNUAL REPORT FREEDOM OF INFORMATION ACT										REPORT CONTROL SYMBOL
<b>1. INITIAL DETERMINATIONS</b>										
a. TOTAL REQUESTS	b. GRANTED IN FULL	c. DENIED IN PART	d. DENIED IN FULL	e. "OTHER REASONS"	f. TOTAL ACTIONS					
<b>2a. EXEMPTIONS INVOKED ON INITIAL DETERMINATIONS</b>										
(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)	(b) (7)	(b) (8)	(b) (9)	TOTAL	
<b>2b. (b)(3) STATUTES INVOKED ON INITIAL DETERMINATIONS (Continue on separate sheet if necessary)</b>										
(1) (b)(3) STATUTES CLAIMED									(2) NUMBER OF INSTANCES	
<b>2c. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS</b>										
1	2	3	4	5	6	TOTAL				
<b>3. INITIAL DENIAL AUTHORITIES BY PARTICIPATION (Continue on separate sheet if necessary)</b>										
a. NAME (Last, First, Middle Initial)		b. RANK (If Military)		c. TITLE AND ORGANIZATION				d. NUMBER OF INSTANCES		
<b>4. APPEAL DETERMINATIONS</b>										
a. TOTAL REQUESTS	b. GRANTED IN FULL	c. DENIED IN PART	d. DENIED IN FULL	e. "OTHER REASONS"	f. TOTAL ACTIONS					
<b>5a. EXEMPTIONS INVOKED ON APPEAL DETERMINATIONS</b>										
(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)	(b) (7)	(b) (8)	(b) (9)	TOTAL	
<b>5b. (b)(3) STATUTES INVOKED ON APPEAL DETERMINATIONS (Continue on separate sheet if necessary)</b>										
(1) (b)(3) STATUTES CLAIMED									(2) NUMBER OF INSTANCES	
<b>5c. "OTHER REASONS" CITED ON APPEAL DETERMINATIONS</b>										
1	2	3	4	5	6	TOTAL				
<b>6. APPEAL DENIAL AUTHORITIES BY PARTICIPATION (Continue on separate sheet if necessary)</b>										
a. NAME (Last, First, Middle Initial)		b. RANK (If Military)		c. TITLE AND ORGANIZATION				d. NUMBER OF INSTANCES		

7. COURT OPINIONS AND ACTIONS TAKEN (Continue on separate sheet if necessary)				
8. FREEDOM OF INFORMATION ACT IMPLEMENTATION RULES OR REGULATIONS (Continue on separate sheet if necessary)				
9. FEES COLLECTED FROM THE PUBLIC				
TOTAL AMOUNT COLLECTED FROM PUBLIC				\$
10a. AVAILABILITY OF RECORDS (Continue on separate sheet if necessary)				
10b. FOI PROGRAM COSTS				
I PERSONNEL COSTS				\$
A ESTIMATED MANYEARS				\$
B MANYEAR COSTS				\$
C ESTIMATED MANHOURLY COSTS BY CATEGORY				\$
(1) Search Time				\$
(2) Review and Excising				\$
(3) Coordination and Approval				\$
(4) Correspondence / Form Preparation				\$
(5) Other Activities				\$
(6) Total ((1) through (5))				\$
D OVERHEAD ((B + C) x 25%)				\$
E TOTAL (B through D)				\$
II OTHER CASE - RELATED COSTS				\$
A COMPUTER SEARCH TIME				\$
B OFFICE COPY REPRODUCTION				\$
C MICROFICHE REPRODUCTION				\$
D PRINTED RECORDS				\$
E COMPUTER COPY				\$
F AUDIOVISUAL MATERIALS				\$
G OTHER				\$
H SUBTOTAL (A through G)				\$
I OVERHEAD (25% x H)				\$
J TOTAL (H + I)				\$
III COST OF ROUTINE REQUESTS PROCESSED				\$
IV TOTAL COSTS (I through III)				\$
10c. FORMAL TIME LIMIT EXTENSIONS				
(1) LOCATION	(2) VOLUME	(3) CONSULTATION	(4) COURT	(5) TOTAL

DD Form 2564 Reverse, AUG 90

APPENDIX G TO PART 518—INTERNAL CONTROL REVIEW CHECKLIST

Task: Army Information Management.  
 Subtask: Records Management.  
 This Checklist: Freedom of Information Act Program.  
 Organization:

Action Officer:  
 Reviewer:  
 Date Completed:  
 Assessable Unit: The specific managers responsible for using this checklist (e.g., at applicable FOA, MACOM, SIO, and TOE division headquarters) will be designated by the cognizant headquarters' staff functional

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principal. The responsible principal and mandatory schedule for using the checklist will be shown in the annual updated Management Control Plan

*Event Cycle 1:* Establish and Implement a Freedom of Information Act Program.

*Risk:* If the prescribed policies, procedures, and responsibilities of the Freedom of Information Act Program are not followed the public would not have the ability to obtain access to and release of Army records.

*Control Objective:* To ensure that prescribed policies, procedures, and responsibilities contained in 5 U.S.C. 552 are followed to allow access and release of Army records to the public.

*Control Technique:* The document used to accomplish the control objective is AR 25-55, The Department of the Army Freedom of Information Act Program.

- 1. Ensure that a Freedom of Information Act Program is established and implemented.
- 2. Appoint an individual with Freedom of Information Act responsibilities and ensure designation of appropriate staff to assist him/her.
- 3. Appoint an individual with Operations Security (OPSEC) responsibilities, if required.

*Test Questions*

- 1. Is a Freedom of Information Act Program established and implemented in your organization?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 2. Is an individual appointed Freedom of Information Act Responsibilities?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 3. Is an individual appointed OPSEC responsibilities, if required?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 4. Is DA Form 4948-R, Freedom of Information Act (FOIA)/Operations Security (OPSEC) Desk Top Guide used?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 5. Does DA Form 4948-R contain the current name and office telephone number of the FOIA/OPSEC advisor?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 6. Are provisions of AR 25-55 concerning the protection of OPSEC sensitive information regularly brought to the attention of managers responsible for responding to FOIA requests and those responsible for control of Army records?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

7. Are rules governing "For Official Use Only" information understood and properly applied by functional proponents?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

8. Are names and duty addresses of Army personnel (civilian and military) assigned to units that are sensitive, routinely deplorable, or stationed in foreign territories being denied or forwarded to the proper initial denial authority (IDA) for denial?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

9. Is the format contained in AR 25-55, used when preparing the annual FOIA report?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

10. Is the worksheet contained in AR 25-55 used when preparing the annual FOIA report?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

11. Is the input for the annual FOIA report forwarded to the Army Freedom of Information and Privacy Act Division, Information Systems Command by the second week of each January?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

*EVENT*  
*Cycle 2:* Processing FOIA Requests.

*Risk:* Failure to process FOIA requests correctly and release non-exempt Army records to the public could subject the Department of the Army or individuals to litigation.

*Control Objective:* FOIA requests are processed correctly.

*Control Technique*

- 1. Ensure FOIA requests are logged into a formal control system.
- 2. Ensure FOIA requests are answered promptly and correctly.
- 3. Ensure Army records are withheld only when fall under the purview of one or more of the nine FOIA exemptions.
- 4. Ensure FOIA requests are denied by properly delegated/designated IDAs.
- 5. Ensure all appeals are forwarded to the Office of the Army General Counsel.

*Test Questions*

- 1. Are FOIA requests logged into a formal control system?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 2. Are all FOIA requests date and time stamped upon receipt?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1
- 3. Is the 10 working day time limit met when replying to FOIA requests?  
Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

4. When more than 10 working days are required to respond, is the FOIA requester informed, explaining the circumstances requiring the delay and provided an approximate date for completion?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

5. Are Army records withheld only when they fall under one or more of the nine FOIA exemptions?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

6. Is the FOIA requester informed when a FOIA request is referred to another Army activity or organization?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

7. Do denial letters contain the name and title or position of the official who made the denial determination; explain the basis for the denial determination; cite the exemptions on which the denial is based; and advise the FOIA requester of his or her right to appeal the denial within 60 days to the Secretary of the Army (Office of the Army General Counsel)?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

8. Is the FOIA requester informed of the appellate procedures when an IDA denies a record in whole or in part?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

9. Is the Chief of Legislative Liaison notified of all releases of information to members of Congress or staffs of congressional committees?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

10. Are FOIA requests denied only by properly delegated/designated IDAs?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

11. Is the servicing Judge Advocate consulted prior to forwarding a FOIA request to an IDA for action?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

12. Are the following items included when forwarding a FOIA request to an IDA for a determination of releasability?

a. A copy of the legal review provided by the local legal advisor?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

b. The original copy of the FOIA request?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

c. Copies of the requested information indicating portions recommended for withholding?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

d. A copy of the acknowledgement of receipt to the requester?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

e. A telephone point of contact?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

f. The recommended FOIA exemption?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

g. Any recommendation to deny a request in whole or in part?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

13. Are all FOIA appeals forward to the Office of the General Counsel for a decision with a copy of denied and released records?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

14. Is a copy of the FOIA denial letter included when forwarding appeals to the Office of the General Counsel?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

15. Is DD Form 2086-R, Record of Freedom of Information (FOI) Processing Cost, used to record costs associated with the processing of a FOIA request?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

16. Is DD Form 2086-1-R, Record of Freedom of Information (FOI) Processing Cost for Technical Data, used to record costs associated with the processing of a FOIA request for technical data?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

17. Is the FOIA requester notified when charges will exceed \$250.00?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

18. Are fees collected at the time the requester is provided the records?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

19. Are commercial requesters charged for all search, review, and duplication costs?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

20. Are educational institutions, non-commercial scientific institutions, or news media charged for duplication only, in excess of 100 pages, if more than 100 pages of records are requested?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

21. Are the first 2 hours of search time, and the first 100 pages of duplication provided without charge to all "other" category requesters?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_  
Remarks: 1

22. Are FOIA fees collected and delivered to the servicing finance and accounting office within 30 calendar days after receipt?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

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Remarks: 1

23. Are FOIA fees collected for technical data retained by the organization providing the technical data?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

Event Cycle 3: Records Management.

Risk: Valuable records needed for court actions are destroyed or cannot be located.

Control Objective: Records containing "For Official Use Only" information are correctly marked and FOIA requests are properly maintained throughout their life cycle.

Control Technique: Ensure the prescribed policies and procedures are followed during the life cycle of information.

Test Questions

1. Are unclassified documents containing "For Official Use Only" information marked "FOR OFFICIAL USE ONLY" in bold letters at least 3/16 of an inch high at the bottom of the outside of the front cover (if any), on the first page, and on the outside of the back cover (if any)?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

2. Are individual pages containing both "For Official Use Only" and classified information marked at the top and bottom with the highest security classification of information appearing on the page?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

3. Are photographs, films, tapes, slides, and microform containing "For Official Use Only" information so marked "For Official Use Only" to ensure recipient or viewer is aware of the information therein?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

4. Is "For Official Use Only" material transmitted outside the Department of the Army properly marked "This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption \* \* \* applies"?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

5. Are permanently bound volumes of "For Official Use Only" information so marked on the outside of the front and back covers, title page, and first and last page?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

6. Is DA Label 87 (For Official Use Only Cover Sheet) affixed to "For Official Use Only" documents when removed from a file cabinet?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

7. Do electrically transmitted messages contain the abbreviation "FOUO" before the beginning of the text?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

8. Are "For Official Use Only" records stored properly during nonduty hours?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

9. Are FOIA records maintained and disposed of in accordance with AR 25-400-2, The Modern Army Recordkeeping System (MARKS)?

Response: Yes \_\_\_ No \_\_\_ NA \_\_\_

Remarks: 1

1. Explain rationale for YES responses or provide cross-reference where rationale can be found. For NO responses, cross-reference to where corrective action plans can be found. If response is NA, explain rationale.

I attest that the above-listed internal controls provide reasonable assurance that Army resources are adequately safeguarded. I am satisfied that if the above controls are fully operational, the international controls for this subtask throughout the Army are adequate.

Director of Information for Command, Control, Communications, and Computers

Functional Proponent

I have reviewed this subtask within my organization and have supplemented the prescribed internal control review checklist when warranted by unique environmental circumstances. The controls prescribed in this checklist, as amended, are in place and operational for my organization (except for the weaknesses described in the attached plan, which includes schedules for correcting the weaknesses).

Operating Manager

PART 519—PUBLICATION OF RULES AFFECTING THE PUBLIC

GENERAL

Sec.

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519.52 Explanation of terms.
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INFORMATION TO BE PUBLISHED IN THE FEDERAL REGISTER

- 519.58 General.
519.59 Information to be published.
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