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PART 286—DOD FREEDOM OF INFORMATION ACT PROGRAM REGULATION

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Subpart A—General Provisions

§ 286.1 Purpose and applicability.

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

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

§ 286.2 DoD public information.

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

[1] Copy may be viewed via internet at *http://web7.whs.osd.mil/corres.htm*.

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

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

(3) DoD Components shall also prepare, in addition to normal FOIA regulations, a handbook for the use of the public in obtaining information from their organization. This handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each DoD Component should explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the DoD Component determines whether the record can be released. The handbook should also explain how to make a FOIA request, how long the requester can expect to wait for a reply, and explain the right of appeal. The handbook should supplement other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The handbook should be available on paper and through electronic means and contain the following additional information, complete with electronic links to the below elements; the location of reading room(s) within the Component and the types and categories of information available, the location of Component's World Wide Web page, a reference to the component's FOIA regulation and how to obtain a copy, a reference to the Component's FOIA annual report and how to obtain a copy and the location of the Component's GILS page. Also, the DoD Components' Freedom of Information Act Annual Reports should refer to the handbook and how to obtain it.

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

§ 286.3 Definitions.

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

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

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

readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of Defense possession and control at the time the FOIA request is made. Care should be taken not to exclude records from being considered agency records, unless they fall within one of the categories in paragraph (2) of this definition.

(2) The following age not included within the definition of the word ''record''.

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

(ii) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(iii) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories: those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business; and work-related personal papers that are not used in the transaction of Government business (see ''Personal Papers of Executive Branch Officials: A Management Guide''[2]).

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

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

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

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

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

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

FOIA request. A written request for DoD records that reasonably describes the record(s) sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), an organization, or a business, but not including a Federal Agency or a fugitive from the law, that either explicitly or

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

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

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

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

§ 286.4 Policy.

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

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

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

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

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

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

(3) *Expedited processing*. A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the DoD Component's office that will determine whether to grant expedited processing. Once the DoD Component has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by DoD Components to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review.

(i) Compelling need means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

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

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

(B) [Reserved]

(iii) A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

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

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

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

(f) *Public domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in Components' reading rooms in paper form, as well as electronically, to facilitate public access. Discretionary releases to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise apply. Disclosure to a properly constituted advisory committee, to Congress, or to other Federal Agencies does not waive the exemption. (See § 286.22(d).) Exempt records disclosed without authorization by the appropriate DoD official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this Part apply if the same individual seeks the records in a private or personal capacity.

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

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

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

(h) *Description of requested record.* (1) Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. In order to assist DoD Components in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When a DoD Component receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined in paragraph (h)(2) of this section. DoD Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DoD Components shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act.

(2) The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort (Descriptive information about a record may be divided into two broad categories.):

(i) Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(3) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non-random search based on the DoD Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(j) *Authentication.* Records provided under this part shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of $5.20 for each authentication.

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

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

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

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

[3] See footnote 1 to § 286.1(a).

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

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

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

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

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

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

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

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

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

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

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

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

same location within the processing queue as the original request.

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

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

Subpart B—FOIA Reading Rooms

§ 286.7 Requirements.

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

(b) *Record availability.* The FOIA requires that records described in 5 U.S.C. 552(a)(2) (A), (B), (C), and (D) created on or after November 1, 1996, shall be made available electronically by November 1, 1997, as well as in hard copy in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. Personal privacy information, that if disclosed to a third party requester, would result in an invasion of the first party's personal privacy, and contractor submitted information, that if disclosed to a competing contractor, would result in competitive harm to the submitting contractor shall be deleted from all 5 U.S.C. 552(A)(2) records made available to the general public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DoD Component may publish in the FEDERAL REGISTER a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. 5 U.S.C. 552(a)(2) (A), (B), (C) and (D) records are:

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 286.8 Indexes.

(a) *''(a)(2)'' materials.* (1) Each DoD Component shall maintain in each facility prescribed in § 286.7(a), an index of materials described in § 286.7(b) that are issued, adopted, or promulgated, after July 4, 1967. No ''(a) (2)'' materials issued, promulgated, or adopted after July 4, 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and-timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this part.

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

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

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

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

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

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

Subpart C—Exemptions

§ 286.11 General provisions.

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

§ 286.12 Exemptions.

The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law: A discretionary release of a record (see also § 286.4(e)) to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11–R[4] and by a FOIA exemption.

(a) *Number 1 (5 U.S.C. 552(b)(1))*. Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1–R.[5] Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1–R apply. If the information qualifies as exemption 1 information, there is no discretion regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

(1) The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no record'' response when a record does not exist, and a ''refusal to confirm or deny'' when a record does exist will itself disclose national security information.

(2) Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for classification and DoD 5200.R–1, and is not otherwise revealed in the individual items of information.

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

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

[4] See footnote 1 to § 286.1(a).
[5] See footnote 1 to § 286.1(a).

of the Department of Defense. Examples include:

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

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

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

(2) Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. DoD Components shall not invoke the low (b)(2) profile.

(c) *Number 3 (5 U.S.C. 552(b)(3))*. Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. The Directorate for Freedom of Information and Security Review maintains a list of (b)(3) statutes used within the Department of Defense, and provides updated lists of these statutes to DoD Components on a periodic basis. A few examples of such statutes are:

(1) *Patent Secrecy, 35 U.S.C. 181–188*. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

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

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

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

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

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

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

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

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

(d) *Number 4 (5 U.S.C. 552(b)(4))*. Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm (see paragraph (d)(8) of this section). If the information qualifies as exemption 4 information, there is no discretion in its release. Examples include:

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

[6] See footnote 1 to § 286.1(a).

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

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

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

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

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

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

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

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

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

(1) Examples of the deliberative process include:

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

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

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

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

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

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

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

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

(3) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

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

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

(f) *Number 6 (5 U.S.C. 552(b)(6))*. Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption 6 information, there is no discretion in its release.

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

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

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

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

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

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

(3) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to the immediate next of kin as defined in DoD Directive 5154.24.[7]

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

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

(i) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information.

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

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

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

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

[7] See footnote 1 to § 286.1(a).

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

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

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

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

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C)).

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

(B) A ''refusal to confirm or deny'' response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a ''no records'' response when a record does not exist and a ''refusal to confirm or deny'' when a record does exist will itself disclose personally private information.

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

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

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

(D) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D)).

(E) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law (5 U.S.C. 552(b)(7)(E)).

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

(2) Some examples of exemption 7 are:

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

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

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

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

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

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

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

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

(h) *Number 8 (U.S.C. 552 (b)(8))*. Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(i) *Number 9 (5 U.S.C. 552(b)(9))*. Those containing geological and geophysical information and data (including maps) concerning wells.

Subpart D [Reserved]

Subpart E—Release and Processing Procedures

§ 286.22 General provisions.

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

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

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

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

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

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

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

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

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

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

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

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

(2) DoD Components shall inform officials receiving records under the provisions of this paragraph that those records are exempt from public release under the FOIA. DoD Components also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1–R, and information contained in Privacy Act systems of records is subject to DoD 5400.11–R.

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

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

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

§ 286.23 Initial determinations.

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) *Other (specify).* Any other reason a requester does not comply with published rules other than those outlined paragraphs (b)(1) through (b)(8) of this section.

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

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

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

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

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

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

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

(4) The final response to the requester should contain information concerning the fee status of the request, consistent with the provisions of subpart F of this part. When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response letter. Components also shall provide the requester with a complete cost breakdown (e.g., 15 pages of office reproduction at $0.15 per page; 5 minutes of computer search time at $43.50 per minute, 2 hours of professional level search at $25 per hour, etc.) in the response letter.

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

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

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

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

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

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

(3) Unusual circumstances that may justify delay are:

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

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

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

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

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

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

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

(h) *Records of non-U.S. government source.* (1) When a request is received for a record that falls under exemption 4 (see § 286.12(d)), that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information (also known as ''the submitter'' for matters pertaining to proprietary data under 5 U.S.C. 552, Exemption (b)(4)) (§ 286.12(d), this part and E.O. 12600 (3 CFR, 1987 Comp., p. 235)) shall be notified promptly of that request and afforded reasonable time (e.g., 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4) of 5 U.S.C. 552. If, for example, the record

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

(2) If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DoD, and meets the requirements of 10 U.S.C. 2305(g), the proposal shall not be disclosed, and no submitter notification and subsequent analysis is required. The proposal shall be withheld from public disclosure pursuant to 10 U.S.C. 2305(g) and exemption (b)(3) of 5 U.S.C. 552. This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between a DoD Component and the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted in accordance with paragraph (h)(1) of this section, except for sealed bids that are opened and read to the public. The term proposal means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in 10 U.S.C. 2305(g).

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

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

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

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

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

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

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

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

§ 286.24 Appeals.

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

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

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

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

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

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

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

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

(2) Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response, at a minimum, shall include the following:

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

(ii) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

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

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

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

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

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

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

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

§ 286.25 Judicial actions.

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

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

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

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

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

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

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

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

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

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

Subpart F—Fee Schedule

§ 286.28 General provisions.

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

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

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

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

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

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

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

[11] See footnote 1 to § 286.1(a).

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

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

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

(3) The elements to be considered in determining the ''cost of collecting a fee'' are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

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

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

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

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

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

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

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

(B) *The informative value of the information to be disclosed*. This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determinate whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of Defense. While the subject of a request may contain information that concerns operations or activities of the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the Department of Defense must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the Department of Defense.

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

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

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

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

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

(B) *The primary interest in disclosure.* Once a requester's commercial interest has been determined, Components should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) In the situations described by paragraphs (e)(2)(i) and (e)(2)(ii) of this section, Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Components' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

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

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

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

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

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

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

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

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

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

(ii) When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commerical requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, commerical 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 commerical 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 commerical use. Such situations must be addressed on a case-by-case basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 286.29 Collection of fees and fee rates.

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

(b) *Search time*—(1) *Manual search*.

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

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

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

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

(c) *Duplication.*

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

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

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

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

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

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

(1) Certifying that records are true copies.

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) *Duplication.*

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

(4) *Review time*—(i) *Clerical.*

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

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

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

(1) Minimum charge for office copy (up to six images)	$3.50
(2) Each additional 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

§ 286.33 Reports control.

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

produce a consolidated report for submission to the Attorney General, and ensure that a copy of the DoD consolidated report is placed on the Internet for public access.

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

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

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

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

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

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

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

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

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

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

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

(A) Interfere with enforcement;

(B) Fair trial right;

(C) Invasion of privacy;

(D) Protect confidential source;

(E) Disclose techniques; and

(F) Endanger life or safety.

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

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

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

(C) *Request withdrawn*. Enter the number of times a request and/or appeal was withdrawn by a requester.

[12] See footnote 1 to § 286.1(a).

(For appeals, report number in Item 4b on the report form. (See appendix E of this part.))

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

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

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

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

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

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

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

(iii) *(b)(3) statutes invoked on initial determinations.* Identify the number of times you have used a specific statute to support each (b)(3) exemption. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the acts invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 2a on the report form.

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

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

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

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

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

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

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

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

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

(A) Interfere with enforcement;

(B) Fair trial right;

(C) Invasion of privacy;

(D) Protect confidential source;

(E) Disclose techniques; and

(F) Endanger life or safety.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) *Number of part time staff:* Enter the number of personnel your agency had dedicated to working FOIA part time during the fiscal year. This will be expressed in work-years (manyears). For example: ''5.1, 3.2, 1.0, 6.5, et al.'' A sample calculation follows:

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

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

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

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

(A) Before the close of each fiscal year, the Directorate for Freedom of Information and Security Review (DFOISR) will dispatch the latest OSD Composite Rate Chart for military personnel to DoD Components. This information may be used in computing military personnel costs.

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

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

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

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

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

Subpart H—Education and Training

§ 286.36 Responsibility and purpose.

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

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

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

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

(2) Instruct personnel, who act in FOIA matters, concerning the provisions of this part, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.

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

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

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

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

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

AP1.1. *General*

AP1.1.1. In accordance with DoD Directive 5400.7[1] and this part, the Combatant Commands are placed under the jurisdiction of the Office of the Secretary of Defense, instead of the administering Military Department, only for the purpose of administering the Freedom of Information Act (FOIA) Program. This policy represents an exception to the policies in DoD Directive 5100.3.[2]

AP1.1.2. The policy change in AP1.1.1. of this appendix authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 and DoD Instruction 5400.10[3] and to forward directly to the Director, Freedom of Information and Security Review, all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

AP1.2. *Responsibilities of Commands*

Combatant Commanders in Chief shall:

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

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

[1] Copy may be viewed via internet at *http://web7.whs.osd.mil/corres.htm*.

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

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

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

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

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

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

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

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

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

AP1.3. *Fees for FOIA Requests*

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

AP1.4. *Communications*

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

AP1.5. *Information Requirements*

AP1.5.1. The Combatant Commands shall submit to the Director, Freedom of Information and Security Review, an annual report. The instructions for the report are outlined in subpart G of this part.

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

APPENDIX B TO PART 286—ADDRESSING FOIA REQUESTS

AP2.1. *General*

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

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

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

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

Executive Secretariat
Under Secretary of Defense (Policy)
Assistant Secretary of Defense (International Security Affairs)
Assistant Secretary of Defense (Special Operations & Low Intensity Conflict)
Assistant Secretary of Defense (Strategy & Threat Reduction)
Deputy to the Under Secretary of Defense (Policy Support)
Director of Net Assessment
Defense Security Assistance Agency
Defense Technology Security Administration
Under Secretary of Defense (Acquisition & Technology)
Deputy Under Secretary of Defense (Logistics)

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

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

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

AP2.2.3. *Department of the Navy*. Navy and Marine Corps records may be requested from any Navy or Marine Corps activity by addressing a letter to the Commanding Officer and clearly indicating that it is a FOIA request. Send requests to Chief of Naval Operations, N09B30, 2000 Navy Pentagon, Washington, DC 20350–2000, for records of the Headquarters, Department of the Navy, and to Commandant of the Marine Corps, (ARAD), Headquarters U.S. Marine Corps, 2 Navy Annex, Washington, DC 20380–1775 for records of the U.S. Marine Corps, or it there is uncertainty as to which Navy or Marine activities may have the records.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AP2.3.4. *U.S. European Command*. Commander-in-Chief, Headquarters, U.S. European Command/ECJ1–AA(FOIA) Unit 30400 Box 1000, APO AE 09128–4209.

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

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

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

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

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

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

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

AP2.4. *National Guard Bureau*

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

AP2.5. *Miscellaneous*

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

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

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST

Please read instructions on back before completing form.

REPORT CONTROL SYMBOL: DA&M(A)1365

1. REQUEST NUMBER	2. TYPE OF REQUEST *(X one)*		3. DATE COMPLETED *(YYYYMMDD)*
98-F-8888	X a. INITIAL	b. APPEAL	19980701

	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
4. CLERICAL HOURS *(E-9/GS-8 and below)*					
a. SEARCH	1.00	X	$12.00	=	12.00
b. REVIEW/EXCISING	2.00				24.00
c. CORRESPONDENCE AND FORMS PREPARATION	1.00				12.00
d. OTHER ACTIVITY	2.00				24.00
5. PROFESSIONAL HOURS *(O-1 - O-6/GS-9 - GS-15)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	2.00	X	$25.00	=	50.00
b. REVIEW/EXCISING	1.00				25.00
c. COORDINATION/APPROVAL/DENIAL	1.00				25.00
d. OTHER ACTIVITY	0.00				0.00
6. EXECUTIVE HOURS *(O-7 - GS-16/ES 1 and above)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	0.00	X	$45.00	=	0.00
b. REVIEW/EXCISING	0.00				0.00
c. COORDINATION/APPROVAL/DENIAL	0.50				22.50
7. COMPUTER SEARCH	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. MACHINE HOURS	0.00	X	0.00	=	0.00
b. PROGRAMMER/OPERATOR TIME					
(1) Clerical	1.00		$12.00		12.00
(2) Professional	1.00		$25.00		25.00
8. OFFICE COPY REPRODUCTION	NUMBER (1)		RATE (2)		COST (3)
a. PAGES REPRODUCED	450	X	.15	=	67.50
9. MICROFICHE REPRODUCTION	NUMBER (1)		RATE (2)		COST (3)
a. MICROFICHE REPRODUCED	0	X	.25	=	0.00
10. PRINTED RECORDS	TOTAL PAGES (1)		RATE (2)		COST (3)
a. FORMS	0	X	.02	=	0.00
b. PUBLICATIONS	156				3.12
c. REPORTS	45				0.90
11. COMPUTER COPY	NUMBER (1)		ACTUAL COST (2)		COST (3)
a. TAPE	0	X	0.00	=	0.00
b. PRINTOUT	0		0.00		0.00
12. AUDIOVISUAL MATERIALS	NUMBER (1)		ACTUAL COST (2)		COST (3)
a. MATERIALS REPRODUCED	0	X	0.00	=	0.00

13. FOR FOI OFFICE USE ONLY

a. SEARCH FEES PAID	$99.00	f. TOTAL COLLECTABLE COSTS	$219.52
b. REVIEW FEES PAID	$49.00	g. TOTAL PROCESSING COSTS	$303.02
c. COPY FEES PAID	$71.52	h. TOTAL CHARGED	$219.52
d. TOTAL PAID	$219.52	i. FEES WAIVED/REDUCED *(X one)*	Yes / X No
e. DATE PAID *(YYYYMMDD)*	19980801	*See Chapter 6, Fee Schedule, DoD 5400.7-R, to determine appropriate assessment of fees.*	

DD FORM 2086, AUG 1998 (EG) PREVIOUS EDITION MAY BE USED. Designed using Perform Pro, WHS/DIOR, Jul 98

SAMPLE

INSTRUCTIONS FOR COMPLETING DD FORM 2086

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

1. REQUEST NUMBER - First two digits will express Calendar Year followed by dash (-) and Component's request number, i.e., 97-001.

2. TYPE OF REQUEST - Mark the appropriate block to indicate initial request or appeal of a denial.

3. DATE COMPLETED - Enter year, month and day, i.e., 19970621.

4. CLERICAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search - Time spent in locating from the files the requested information.

Review/Excising - Time spent in reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered.

Correspondence and Forms Preparation - Time spent in preparing the necessary correspondence and forms to answer the request.

Other Activity - Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.

5. PROFESSIONAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising, and Other Activity - See explanation above.

Coordination/Approval/Denial - Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.

6. EXECUTIVE HOURS - For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category.

7. COMPUTER SEARCH - When the amount of government-owned (not leased) computer processing machine time required to complete a search is known, and accurate cost information for operation on an hourly basis is available, enter the time used and the hourly rate. Then, calculate the total cost which is fully chargeable to the requester.

- Programmer and operator costs are calculated using the same method as in Items 4 and 5. This cost is also fully chargeable to requesters as computer search time.

8. OFFICE COPY REPRODUCTION - Enter the number of pages reproduced.

- Multiply by the rate per copy and enter cost figures.

9. MICROFICHE REPRODUCTION - Enter the number of microfiche copies reproduced.

- Multiply by the rate per copy and enter cost figures.

10. PRINTED RECORDS - Enter total pages in each category. The categories are:

Forms *(Include any type of printed forms)*

Publications *(Include any type of bound document, such as directives, regulations, studies, etc.)*

Reports *(Include any type of memorandum, staff action paper, etc.)*

- Multiply the total number of pages in each category by the rate per page and enter cost figures.

11. COMPUTER COPY - Enter the total number of tapes and/or printouts.

- Multiply by the actual cost per tape or printout and enter cost figures.

12. AUDIOVISUAL MATERIALS - Duplication cost is the actual cost of reproducing the material, including the wages of the person doing the work.

13. FOR FOI OFFICE USE ONLY -

Search Fees Paid - Enter total search fees paid by the requester.

Review Fees Paid - Enter total review fees paid by the requester.

S A M P L E

Copy Fees Paid - Enter the total of copy fees paid by the requester.

Total Paid - Add search fees paid and copy fees paid. Enter total in the total paid block.

Date Paid - Enter year, month, and day, i.e., 19971024, the fee payment was received.

Total Collectable Costs - Add the blocks in the cost column and enter total in the total collectable cost block. Apply the appropriate waiver for the category of requester prior to inserting the final figure. Further discussion of chargeable fees is contained in Chapter VI of DoD Regulation 5400.7-R.

Total Processing Costs - Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.

Total Charged - Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.

Fees Waived/Reduced - Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "Yes" block or the "No" block.

DD FORM 2086 (BACK), AUG 1998

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

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST FOR TECHNICAL DATA

Please read instructions on back before completing form.

REPORT CONTROL SYMBOL: DA&M(A)1365

1. REQUEST NUMBER	2. TYPE OF REQUEST *(X one)*		3. DATE COMPLETED *(YYYYMMDD)*
98-F-9999	X a. INITIAL	b. APPEAL	19980701

4. CLERICAL HOURS *(E-9/GS-8 and below)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	2.00	X	$13.25	=	* 26.50
b. REVIEW/EXCISING	1.00				* 13.25
c. CORRESPONDENCE AND FORMS PREPARATION	0.00				0.00
d. OTHER ACTIVITY	0.00				0.00
e. MINIMUM CHARGE	3.00		$ 8.30		24.90

5. PROFESSIONAL HOURS *(O-1 - O-6/GS-9 - GS/GM-15)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	1.00	X	ACTUAL HOURLY RATE	=	* 25.00
b. REVIEW/EXCISING	1.50				* 37.50
c. COORDINATION/APPROVAL/DENIAL	0.25				6.25
d. OTHER ACTIVITY	0.00				0.00
e. MINIMUM CHARGE	2.75		1/2 HOURLY RATE		34.38

6. EXECUTIVE HOURS *(O-7/GM-16/ES 1 and above)*	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. SEARCH	0.00	X	ACTUAL HOURLY RATE	=	* 0.00
b. REVIEW/EXCISING	0.00				* 0.00
c. COORDINATION/APPROVAL/DENIAL	0.25				25.00
d. MINIMUM CHARGE	0.25		1/2 HOURLY RATE		12.50

S A M P L E

7. COMPUTER SEARCH	TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)
a. MACHINE HOURS	0.00	X	0.00	=	* 0.00
b. PROGRAMMER/OPERATOR TIME					
- Clerical	1.00		$13.25 OR MINIMUM		* 13.25
- Professional	1.00		ACTUAL OR MINIMUM		* 25.00

8. REPRODUCTION	NUMBER (1)		RATE (2)		COST (3)
a. AERIAL PHOTOGRAPHS, SPECIFICATIONS, PERMITS, CHARTS, BLUEPRINTS, AND OTHER TECHNICAL DOCUMENTS	1	X	$ 2.50	=	* 2.50
b. ENGINEERING DATA *(Microfilm)*					
- Aperture cards					
-- Silver duplicate negative, per card	0		.75		* 0.00
-- When keypunched and verified, per card	0		.85		* 0.00
-- Diazo duplicate negative, per card	1		.65		* 0.65
-- When keypunched and verified, per card	0		.75		* 0.00
- 35 mm roll film, per frame	0		.50		* 0.00
- 16 mm roll film, per frame	0		.45		* 0.00
- Paper prints *(engineering drawings)*, each	0		1.50		* 0.00
- Paper reprints of microfilm indices, each	0		.10		* 0.00
c. AUDIOVISUAL MATERIALS *(Insert actual cost in block (2))*	25		1.24		* 31.00
d. OTHER TECHNICAL DATA RECORDS Charges for any additional services not specifically provided above shall be made by components at the following rates:					
- Minimum charge for office copy *(up to six images)*	1	X	$ 3.50	=	* 3.50
- Each additional image	30		.10		* 3.00
- Each typewritten page	0		3.50		* 0.00
- Certification and validation with seal, each	0		5.20		* 0.00
- Hand-drawn plots and sketches, each hour or fraction thereof	0.00		12.00		* 0.00

** Chargeable to all requesters.*

9. FOR FOI OFFICE USE ONLY			
a. SEARCH FEES PAID	89.75	f. TOTAL COLLECTABLE	181.15
b. REVIEW FEES PAID	50.75	g. TOTAL PROCESSING	212.40
c. COPY FEES PAID	40.65	h. TOTAL CHARGED	181.15
d. TOTAL PAID	181.15	i. FEES WAIVED/REDUCED *(X one)*	YES X NO
e. DATE PAID *(YYYYMMDD)*	19980801		

DD FORM 2086-1, JUL 1997 (EG) PREVIOUS EDITION MAY BE USED UNTIL SUPPLY IS EXHAUSTED. Designed using Perform Pro, WHS/DIOR, Jul 97

INSTRUCTIONS FOR COMPLETING DD FORM 2086-1

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

1. REQUEST NUMBER - First two digits will express Calendar Year followed by dash (-) and Component's request number, i.e., 87-001.

2. TYPE OF REQUEST - Mark the appropriate block to indicate initial request or appeal of a denial.

3. DATE COMPLETED - Enter year, month and day, i.e., 19970621.

4. CLERICAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search - Time spent in locating from the files the requested information.

Review/Excising - Time spent reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered.

Correspondence and Forms Preparation - Time spent in preparing the necessary correspondence and forms to answer the request.

Other Activity - Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Both search and review costs are chargeable to the requester.

5. PROFESSIONAL HOURS - For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising, and Other Activity - See explanation above.

Coordination/Approval/Denial - Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.

- Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Both search and review costs are chargeable to the requester.

6. EXECUTIVE HOURS - For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

- Multiply the time in the total hours column in each category by the hourly rate and enter the cost figures for each category. Review costs are chargeable to the requester.

7. COMPUTER SEARCH - When the amount of government-owned (not leased) computer processing machine time is known, and accurate cost information for operation on an hourly basis is available, enter the time used and the hourly rate. Then, calculate the total cost which is fully chargeable to the requester.

- Programmer and operator costs are calculated using the same method as in Items 4 and 5. This cost is also fully chargeable to requesters as computer search time.

8. REPRODUCTION - Enter the number of pages or items reproduced.

- Multiply by the rate per copy and enter cost figures. The entire cost is chargeable to the requester. Reproduction cost for audiovisual material is the actual cost of reproducing the material, including the wage of the person doing the work.

9. FOR FOI OFFICE USE ONLY -

Search Fees Paid - Enter total search fees paid by the requester.

Review Fees Paid - Enter total review fees paid by the requester.

Copy Fees Paid - Enter the total of copy fees paid by the requester.

Total Paid - Add search fees paid and copy fees paid. Enter total in the total paid block.

Date Paid - Enter year, month, and day, i.e., 19971024, the fee payment was received.

Total Collectable Costs - Add the blocks in the cost column marked with an asterisk and enter total in the total collectable cost block. Only search, reproduction and printed records are chargeable to the requester. Further discussion of collectable costs is contained in Chapter VI, Section 3, DoD Regulation 5400.7-R.

Total Processing Costs - Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.

Total Charged - Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.

Fees Waived/Reduced - Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "YES" block or an "X" in the "NO" block.

SAMPLE

DD FORM 2086-1 (BACK), JUL 1997

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

ANNUAL REPORT
FREEDOM OF INFORMATION ACT

REPORT CONTROL SYMBOL
DD-DA&M(A)1365

1. INITIAL REQUEST DETERMINATIONS

a. TOTAL REQUESTS	b. GRANTED IN FULL	c. DENIED IN PART	d. DENIED IN FULL	e. "OTHER REASONS"	f. TOTAL ACTIONS
30	24	3	1	6	34

2a. EXEMPTIONS INVOKED ON INITIAL REQUEST DETERMINATIONS

(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)
3	0	2	1	0	0

(b) (7)(A)	(b) (7)(B)	(b) (7)(C)	(b) (7)(D)	(b) (7)(E)	(b) (7)(F)	(b) (8)	(b) (9)
0	0	0	1	1	1	0	0

2b. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS

1	2	3	4	5	6	7	8	9	TOTAL
1	4	1	1	0	0	0	0	0	7

2c. STATUTES CITED ON INITIAL REQUEST (b)(3) EXEMPTIONS

(1)(b)(3) STATUTE CLAIMED	NUMBER OF INSTANCES	COURT UPHELD? *(Yes or No)*	CONCISE DESCRIPTION OF MATERIAL WITHHELD
10 USC §130	1	Y	Unclassified technical data regarding design of reentry vehicles (RV)
10 USC §424	1	N	Organizational data for protected organizations

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3. APPEAL DETERMINATIONS

a. TOTAL REQUESTS	b. GRANTED IN FULL	c. DENIED IN PART	d. DENIED IN FULL	e. "OTHER REASONS"	f. TOTAL ACTIONS
4	0	3	1	0	4

DD FORM 2564, AUG 1998 (EG) PREVIOUS EDITION IS OBSOLETE. Designed using Perform Pro, WHS/DIOR, Jul 98

4a. EXEMPTIONS INVOKED ON APPEAL DETERMINATIONS							
(b) (1)	(b) (2)	(b) (3)	(b) (4)	(b) (5)	(b) (6)		
4	0	1	0	0	0		
(b) (7)(A)	(b) (7)(B)	(b) (7)(C)	(b) (7)(D)	(b) (7)(E)	(b) (7)(F)	(b) (8)	(b) (9)
0	0	0	0	0	0	0	0

4b. "OTHER REASONS" CITED ON APPEAL DETERMINATIONS									
1	2	3	4	5	6	7	8	9	TOTAL
0	0	0	0	0	0	0	0	0	0

4c. STATUTES CITED ON APPEAL (b)(3) EXEMPTIONS			
(1)(b)(3) STATUTE CLAIMED	NUMBER OF INSTANCES	COURT UPHELD? *(Yes or No)*	CONCISE DESCRIPTION OF MATERIAL WITHHELD
10 USC §424	1	N	Organizational data for a protected organization.

5. NUMBER AND MEDIAN AGE OF INITIAL CASES PENDING	(1) AS OF BEGINNING REPORT PERIOD	(2) AS OF END REPORT PERIOD
a. TOTAL INITIAL REQUESTS PENDING *(open)*	15	12
b. MEDIAN AGE *(in days)* OF OPEN INITIAL REQUESTS	62	60
6. TOTAL NUMBER OF INITIAL REQUESTS RECEIVED DURING THE FISCAL YEAR		27
7. TYPES OF INITIAL REQUESTS PROCESSED AND MEDIAN AGE	TOTAL NUMBER OF CASES	MEDIAN AGE *(Days)*
a. SIMPLE	28	57
b. COMPLEX	1	348
c. EXPEDITED PROCESSING	1	13
8. TOTAL AMOUNT COLLECTED FROM THE PUBLIC		$ 22

S A M P L E

9. PROGRAM COST	
a. NUMBER OF FULL TIME STAFF	1
b. NUMBER OF PART TIME STAFF	1.6
c. ESTIMATED LITIGATION COST	$ 2,495
d. TOTAL PROGRAM COST	$ 121,345

10. AUTHENTICATION		
a. SIGNATURE *(Approving Official)*		
b. TYPED NAME *(Last, First, Middle Initial)* A. G. CAMPBELL, Colonel, U. S. Army	c. DUTY TITLE Asst Chief of Staff, J-1	
d. AGENCY NAME United States Antarctic Command (USARCCOM) APO AS 00000-0001		e. TELEPHONE NUMBER *(Include Area Code)* 77-100-555-1212, DSN 314-999

DD FORM 2564 (BACK), AUG 1998

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

Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff/Combatant Commands, Defense Agencies, and the DoD Field Activities
Department of the Army
Department of the Navy
Department of the Air Force
Defense Information Systems Agency
Defense Contract Audit Agency

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

PART 286h—RELEASE OF ACQUISITION-RELATED INFORMATION

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

AUTHORITY: Pub. L. 101–189.

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

§ 286h.1 Purpose.

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

§ 286h.2 Applicability and scope.

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

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

§ 286h.3 Policy.

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

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

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

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

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

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

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

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

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

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