AUTHENTICATED
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INFORMATION
GPO

POC to determine if the record in question is currently and properly classified under Executive Order 12958, and if any information contained in the record may be segregated for release to the FOIA requester. The MDO forwards the results of the declassification review to GC, in writing, along with any recommendations on whether information in the record can be reasonably segregated and released to the FOIA requester.

(d) Withholding Agency records from public release. If the requested record is not releasable because it is either currently and properly classified or falls within another FOIA exemption, GC prepares an analysis on the rationale for denying the record, prepares the initial denial letter to be sent to the FOIA requester, and forwards the materials to the Agency IDA. The Agency IDA reviews the FOIA request and rationale for withholding the record and, if he or she concurs, signs the letter prepared by GC. The letter signed by the Agency IDA advises the FOIA requester that the records requested are being withheld from release, states the amount of material withheld from release, states the FOIA exemptions supporting the denial, and provides information on appealing the decision to the Agency AA. A copy of all initial denial letters is forwarded to GC and maintained in the individual FOIA file.

(e) *Appeal rights of FOIA requesters*. (1) If a FOIA requester appeal the initial denial decision of the agency IDA, GC processes the appeal for review by the agency AA. The AA reviews the initial FOIA request, GC's analysis, and the denial decision made by the IDA. The AA has the authority to either uphold the decision made by the IDA, and withhold the requested records from release, or reverse the decision made by the IDA and release all or a portion of the records requested. GC prepares the written response to the FOIA requester for the AA's signature. If the AA makes a final determination to uphold the decision made by the agency IDA, the final Agency response includes the basis for the decision and advises the FOIA requester of the right to seek judicial review.

(2) In addition to denials of information, a FOIA requester also has a right to appeal initial assessments made by GC regarding fee categories, fee waivers, fee estimates, requests for expedited processing, no record determinations, failure to meet the statutory time limits, or any determination found to be adverse by the requester. The authority to uphold or reverse initial assessments made by GC in these areas is the agency AA. The decision of the AA is final.

(f) *Relationship between the FOIA and the Privacy Act*. Not all requesters will be knowledgeable of the appropriate act to cite when requesting records or access to records. In some instances, either the FOIA or the Privacy Act may be cited.

(1) Both the FOIA and the Privacy Act give the right to request access to records held by Federal Agencies. Access rights under the FOIA are given to any individual, business, or organization, but the Privacy Act gives access rights only to those individuals who are the subject of the records being requested.

(2) When responding to a request for records under the Privacy Act, detailed guidance on which act to apply may be found in 32 CFR part 286 and 32 CFR part 310. Additional assistance is also available from GC.

PART 295—OFFICE OF THE INSPECTOR GENERAL, FREEDOM OF INFORMATION ACT PROGRAM

Sec.

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APPENDIX A TO PART 295—FOR OFFICIAL USE ONLY (FOUO)
APPENDIX B TO PART 295—EXEMPTIONS

AUTHORITY: 5 U.S.C. 552.

SOURCE: 56 FR 49694, Oct. 1, 1991, unless otherwise noted.

§295.1 Purpose.

This part establishes the policy and sets forth the procedures by which the public may obtain information and

records from the Inspector General (IG) under the Freedom on Information Act (FOIA). It implements title 5, United States Code (U.S.C.) section 552, as amended by the Freedom of Information Reform Act of 1986, 32 CFR part 285 and 32 CFR part 286.

§ 295.2 Applicability.

The provisions of this part are applicable to all components of the Office of the Inspector General (OIG) and govern the procedures by which FOIA requests for information will be processed and records may be released under the FOIA.

§ 295.3 Definition of OIG records.

(a) The products of data compilation, such as books, papers, maps, and photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in the OIG's possession and control at the time the FOIA request is made.

(b) The following are not included within the definition of the word ''record'':

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

(2) Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of the OIG. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of medium are not agency records. (This does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software.) Exceptions to this position are outlined in § 295.4(c).

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

(4) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an OIG employee, and not distributed to any other OIG employee for their official use, or otherwise disseminated for official use.

(5) Information stored within a computer for which there is no existing computer program for retrieval of the requested information.

(c) In some instances, computer software may have to be treated as an agency record and processed under the FOIA. These situations are rare, and shall be treated on a case-by-case basis. Examples of when computer software may have to be treated as an agency record are:

(1) When the data is embedded within the software and can not be extracted without the software. In this situation, both the data and the software must be reviewed for release or denial under the FOIA.

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

(3) See appendix B to this part for further information on release determinations of computer software.

(d) If unaltered publications and processed documents, such as regulations, manuals, maps, charts, and related geophysical materials are available to the public through an established distribution system with or without charge, the provisions of 5 U.S.C. 552(a)(3) normally do not apply and they need not be processed under the FOIA. Normally, documents disclosed to the public by publication in the FEDERAL REGISTER also require no processing under the FOIA. In such cases, the OIG will direct the requester to the appropriate source to obtain the record.

§ 295.4 Other definitions.

(a) *FOIA Request*. A written request for OIG records, made by any person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law that either explicitly or implicitly invokes

the FOIA, 32 CFR part 285 and 32 CFR part 286, or this part.

(b) *Initial Denial Authority (IDA).* The official who has been granted authority to withhold records requested under the FOIA, for one or more of the nine categories of records exempt from mandatory disclosure, by the head of the OIG Component designated by the IG to administer the IG FOIA Program.

(c) *Appellate Authority.* The IG or his or her designee having jurisdiction for this purpose over the record.

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

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

§ 295.5 Policy.

(a) *General.* (1) It is the policy of the OIG to promote public trust by conducting its activities in an open manner, and by providing the public with the maximum amount of accurate and timely information concerning those activities, consistent with the need for security and adherence to other requirements of law and regulation.

(2) Records not specifically exempt from disclosure under the FOIA or prohibited by statutory or other regulatory requirements will, upon request, be made readily accessible to the public.

(3) Records that are specifically exempt from disclosure under the FOIA or prohibited by statutory or other regulatory requirements will be withheld from the public only upon the determination of the initial Denial Authorities identified in § 295.6 of this part, or the designated Appellate Authority.

(b) *News Media Requests.* (1) Requests from news media representatives for records that would not be withheld if requested under the FOIA or prohibited from release under other statutory or regulatory authority, will be released promptly by the OIG element originating the record.

(2) Requests from news media representatives for records that are exempt from release under the FOIA, or prohibited from release under other statutory or regulatory authority will be provided to the Freedom of Information Act and Privacy Act (FOIA/PA) Division, Office of the Assistant Inspector General for Investigations, along with the requested records, for review and a release determination and the news media representatives will be so advised.

(3) Extracts of the nonexempt portions of such records may be prepared in response to a specific request from a news media representative but shall be coordinated for release with the FOIA/PA Division. Extracts shall be prepared in accordance with the sample at appendix to § 295.5.

(c) *Control System.* (1) A request for OIG records that invokes the FOIA shall enter a formal control system designed to ensure compliance with the FOIA. A release determination must be made and the requester informed within the time limits specified in this part.

(2) Any request for OIG records that either explicitly or implicitly cites the FOIA will be processed under the provisions set forth in this part, unless otherwise required by § 295.5(m) of this part. All such requests shall be forwarded to the FOIA/PA Division.

(d) *Promptness of Response.* (1) A request from a member of the public for OIG records will be responded to within 10 working days of the date of its receipt in the FOIA/PA Division, unless a delay is authorized.

(2) Receipt of the request will be acknowledged and the requester will be promptly advised of any additional information needed to assure compliance with procedures established in this part. In the event there are a significant number of requests, e.g., 10 or more, the requests will be processed in order of date of receipt. This does not

preclude the OIG from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. The OIG may expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need will be determined at the discretion of the OIG.

(3) These provisions also apply to a request received on referral from another DoD Component or government agency and time limits will begin on the date of receipt in the OIG FOIA/PA Division.

(e) *Use of Exemptions.* It is OIG policy to make records publicly available unless they qualify for exemption under one or more of the nine exemptions. The OIG may elect to make a discretionary release, however, a discretionary release is generally not appropriate for records exempt under exemptions (b)(1), (b)(3), (b)(4), (b)(6) and (b)(7)(C). Exemptions (b)(4), (b)(6) and (b)(7)(C) can not be claimed when the requester is the submitter of the information. The categories of records which are exempt from release are identified in appendix B of this part.

(f) *For Official Use Only (FOUO).* The use of FOUO markings will be accomplished in accordance with the provisions of appendix A of this part, and exemptions (b)(2) through (b)(9) as set forth in appendix B of this part. Additional guidance will be provided to OIG elements, as needed, by the FOIA/PA Division.

(g) *Public Domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in the OIG Reading Room located in the FOIA/PA Division. Exempt records released pursuant to this part or other statutory or regulatory authority, however, may be considered to be in the public domain only when their release constitutes a waiver of the FOIA exemption. When the release does not constitute such a waiver, such as when disclosure is made to a properly constituted advisory committee or to a Congressional Committee, or to an individual to whom the record pertains, the released records do not lose their exempt 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 to use the records in a private or personal capacity.

(h) *Creation of Records.* (1) A record must exist and be in the possession or control of the OIG at the time of the request to be considered subject to release under this part and the FOIA. Mere possession of a record does not presume OIG control and such records, or identifiable portions thereof, will be referred to the originating agency for a release determination and/or direct response to the requester. There is no obligation to create nor compile a record to satisfy a FOIA request; however, the OIG may compile a new record when doing so would result in a more useful response to the requester, or be less burdensome to the OIG than providing the existing records, and the requester does not object. The cost of creating or compiling such a record will not be charged to the requester unless the fee is equal to, or less than, the fee that would be charged for providing the existing record. Any fee assessments will be made in accordance with chapter IV of DoD 5400.7–R (32 CFR part 286).

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, the OIG will apply a standard of reasonableness. In other words, if the capability exists to respond to the request, and the effort would be a business as usual approach, then the request will be processed. However, the request will not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not be a normal business as usual approach.

(i) *Describing Records Sought.* (1) It is the responsibility of the member of the public requesting records to adequately identify the records. A member of the public must describe the records sought with sufficient information to permit the OIG to locate the records with a reasonable amount of effort,

since the FOIA does not authorize ''fishing expeditions.'' Descriptive information about a record may be divided into two broad categories:

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

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

(2) When the OIG receives a request that does not ''reasonably describe'' the requested record with sufficient Category I information to permit the conduct of an organized nonrandom search, or sufficient Category II information to permit inference of the Category I elements needed to conduct such a search, the requester will be notified in writing of the defect and of the need for more specific identification of the records sought. The specificity letter will provide guidance in identifying the records sought and in reformulating the request to reduce the burden on the OIG in complying with the FOIA. The OIG is not obligated to act on requests until an adequate description is provided by the requester.

(3) When the OIG receives a request in which only personal identifiers, e.g., name and Social Security Account Number, are provided in connection with the request for records concerning the requester, only records retrievable by personal identifiers will be searched. The search for such records may be conducted under Privacy Act procedures. No record will be denied that is releasable under the FOIA.

(j) *Referrals.* (1) The OIG has the responsibility of protecting the identity of individuals who make protected disclosures of wrongdoing on the part of others, under the ''Whistleblower Protection Acts''. When a FOIA requester has identified himself/herself as the ''Whistleblower'' in the matter for which records are being sought, in accordance with § 295.7(b)(3) of this part, or the FOIA/PA Division can reasonably determine that the FOIA requester is the ''Whistleblower'', the individual's identity will continue to be protected in all of the following circumstances involving referrals, except to the extent that such protection will impede the release of responsive records to the requester. In such event, the requester will be advised of the impedance and offered the option of allowing himself/herself to be identified solely for the purpose of obtaining maximum release of records responsive to the FOIA request. If the requester chooses to continue anonymity, the request will be processed only to the extent that will allow continued protection of the individual's identity.

(2) The OIG will refer a FOIA request to another DoD Component or to a Government agency outside the DoD when the OIG has no records responsive to the request, but believes the other DoD Component or outside agency may have, and the other DoD Component or outside agency has confirmed that it holds the record. When the other DoD Component or outside agency agrees to the referral, the requester will be advised of the referral and that the OIG has no responsive records, with the following exceptions:

(i) If it is determined by the other DoD Component or outside agency that the existence or nonexistence of the record itself is classified, the OIG will inform the requester only that the OIG has no responsive record and no referral will take place.

(ii) If the record falls under one or more of the ''Exclusions'' under the FOIA (see appendix B of this part), as determined by the other DoD Component or outside agency, the OIG will advise the requester only that the OIG has no responsive record and no referral will take place.

(3) The OIG will refer a record, or portions of a record that holds but that was originated by another DoD Component or outside agency, or for a record that contains substantial information that originated with another DoD Component or outside agency, to that Component or agency (unless the agency is not subject to the FOIA) for a release determination and/or direct response to the requester. In any such case, direct coordination will be effected and concurrence obtained from the other Component or agency prior to the referral. A copy of the record will be provided to

the Component or agency with the referral, and the requester will be notified of the referral, consistent with any security requirements or ''Exclusion'' provisions of the FOIA. The OIG will not, in any case, release or deny such records without prior consultation with the other DoD Component or outside agency. If the requester is the ''Whistleblower'', the record or portion of the record will be provided to the DoD Component or agency, with a request for a release determination and return of the record to the OIG for response to the requester.

(4) The OIG will refer a FOIA request for a classified record that it holds, but did not originate, to the originating DoD Component or outside agency (unless the agency is not subject to the FOIA). If the record originated with the OIG but the classification is derivative, i.e., contains classified information that originated elsewhere and was incorporated in the OIG record, the record will be referred to the originating authority with a recommendation for release; or, after consultation with the originating authority, with a request for a declassification review and/or release determination and return of the record. If the requester is the ''Whistleblower'', the record will be provided to the originating authority with a request for a release determination and return of the record to the OIG for response to the requester.

(5) The OIG may also refer a request for a record that was originated by the OIG for the use of another DoD Component or outside agency, to that Component or agency with a recommendation for release, after any necessary coordination. The requester will be notified of such action consistent with any security requirements or ''Exclusion'' provisions of the FOIA.

(6) A FOIA request for investigative, intelligence, or any other type of record on loan from another DoD Component or outside agency to the OIG for a specific purpose will be referred to the DoD Component or outside agency that provided the records, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside Component or agency desires anonymity as determined through coordination, the OIG will respond directly to the requester.

(7) A FOIA request for a record, or portions of a record, held by the OIG, that originated with a non-U.S. government agency that is not subject to the FOIA, will be responded to by the OIG.

(8) Notwithstanding anything to the contrary in this section, all requesters seeking National Security Council (NSC) or White House documents will be advised that they should write directly to the NSC or White House for such documents. Should the requester insist upon an OIG search for these records, the OIG will conduct an appropriate search pursuant to the FOIA. OIG/DoD documents in which the NSC or White House has a concurrent reviewing interest will be forwarded by the FOIA/PA Division to the Director, Freedom of Information and Security Review (DFOISR), Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), which shall effect coordination with the NSC or White House, and return the documents to the originating agency after NSC review and determination. The FOIA/PA Division will forward any documents found in OIG files that are responsive to the FOIA request to DFOISR, OASD(PA) for their coordination with the NSC or White House, and return to the OIG with a release determination for final processing of the request.

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

(k) *Authentication of Records*. Records provided under this part will be authenticated, upon written request, to fulfill an official Government or other legal function. This service is in addition to that required under the FOIA and is not included in the FOIA fee schedule; therefore, a fee of $5.20 may be charged for each such authentication.

(l) *Records Management*. FOIA records shall be maintained and disposed of in

accordance with Inspector General Defense Manual (IGDM) 5015.2,[1] ''Records Management Program''.

(m) *Relationship Between the FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts:

(1) Where requesters seek records about themselves which are contained in a PA system of records and cite or imply the PA, the OIG will process their requests under the provisions of the PA.

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

(3) Where requesters seek records about themselves that are contained in a PA system of records and cite or imply the FOIA or both Acts, the requests will be processed under the time limits of the FOIA and the exemptions and fees of the PA. This is appropriate since greater access will generally be received under the PA.

(4) Where requesters seek agency records (as opposed to personal records) and cite or imply the PA and FOIA, or where requesters cite or imply only the FOIA, the requests will be processed under the FOIA.

(5) Requesters will be advised in the final responses to their requests why a particular Act was used in processing their requests.

(n) *Index and ''(a)(2)'' Materials.* (1) No order, opinion, statement of policy, interpretation, staff manual or instruction (except as indicated below) issued after July 4, 1967, which is not indexed and either made available or published, may be relied upon, used, or cited as a precedent against any member of the public unless that individual has actual and timely notice of the contents of such materials. Such actual and timely notice may not be after-the-fact; i.e., after the individual has suffered some adverse effect. Materials identified as ''(a)(2)'' are:

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

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

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

(A) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

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

(2) Thus, materials considered to meet the preceding definition of the FOIA ''(a)(2)'' requirements will be made available for public inspection and copying upon written request to the address indicated in § 295.7(b)(1) of this part, unless such materials have been published and are offered for sale or subscription. Upon receipt of the request, arrangements will be made at a time convenient to both the requester and the OIG, for the review and copying. If the publishing activity is out of stock of the published, for sale material and does not intend to reprint, then the preceding procedure will apply to the published material as well.

(3) When appropriate, the cost of copying any ''(a)(2)'' materials will be

[1] Copies may be obtained, if needed, from the Information and Operations Support Directorate, Publications Management Branch, room 420, 400 Army Navy Drive, Arlington, VA 22202–2884.

imposed upon the individual requesting the copy in accordance with chapter VI of DoD 5400.7–R (32 CFR part 286).

(4) The OIG will prepare an index of ''(a)(2)'' materials, or supplement thereto, arranged topically or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Separate case name and numbering arrangements may be added for OIG convenience.

(5) The IG has determined that it is not practical nor feasible to prepare an index of the ''(a)(2)'' materials on a quarterly basis, nor to publish the annual ''IG Publications Index'' in the FEDERAL REGISTER because of the volume. This index is available to the public at no cost upon written request to: Acquisition and Resources Administration Directorate, Publications Management Branch, room 413, 400 Army Navy Drive, Arlington, Virginia 22202–2884. It may be necessary to deny all or portions of some documents listed in the index that fall within one or more exemptions of the FOIA.

(o) *Fees and Fee Waivers*. (1) Fees will be assessed under the FOIA as set forth in chapter VI of DoD 5400.7–R (32 CFR part 286).

(2) Requesters must indicate their willingness to pay fees in their initial FOIA request. If a waiver of fees is requested, a statement regarding their willingness to pay fees in the event a waiver or reduction of fees is denied is still required. Any requests not containing a statement regarding a willingness to pay assessed fees will not be processed and the requester will be so advised.

(3) Fees will not be required to be paid in advance of processing the request for release of the records requested except:

(i) When the requester is known to be in default of payment of fees incurred in connection with a previous request.

(ii) When the total amount of estimated fees assessable to the requester exceeds $250.00 and waiver is not appropriate, a ''good faith'' deposit of half of the amount of the estimated fees may be required before completing the processing of the request, or providing the requested records, in the case of a requester with no history of payment. Where the requester has a history of prompt payment, the OIG will notify the requester of the likely cost and obtain satisfactory assurance of full payment.

(4) When the OIG has completed all work on a request and the documents are ready for release, advance payment may be requested before forwarding the documents if there is no payment history on the requester. Where there is a history of prompt payment by the requester, the OIG will not hold documents ready for release pending payment.

(5) Fee waivers will be granted on a case-by-case basis when the OIG determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the OIG and the Department of Defense and is not primarily in the commercial interest of the requester. In any request for waiver of fees, the requester must provide sufficient information to enable the IDA to make a proper determination of whether or not the fees should be waived.

(6) In cases where the requester fails to provide sufficient persuasive information upon which to make a determination for waiver of the fees, the requester shall be so informed and given the opportunity to submit additional justification. Absent such justification, the requester may be required to pay fees appropriate to his/her category, if provision of the information is determined not to be in the public interest or benefit.

(7) Payments of fees must be by check or U.S. Postal money order made payable to the Treasurer of the United States. Cash payments cannot be accepted.

(p) *Appeals and Judicial Action*. (1) If the designated IDA declines to provide a requested record because the official considers it exempt from disclosure under one or more of the nine exemptions of the FOIA, that decision may be appealed by the requester to the designated Appellate Authority. The appeal should be submitted in writing by the requester within 60 calendar days after the date of the initial denial letter. In cases where incremental release

actions have been taken on an initial request, the time for the appeal will not begin until the date of the last denial of release letter.

(2) A ''no record'' finding may be considered to be adverse, and if so interpreted by the requester, may be appealed using the normal OIG appeal procedures. The OIG will conduct an additional search of files, based on the receipt of an appeal to a ''no record'' response, as a part of the appellate process.

(3) All final decisions rendered on appeals will be made to the requesters in writing by the Appellate Authority, after consultation with the Office of General Counsel (OGC) representative to the OIG, and other appropriate OIG elements.

(4) Final determinations on appeals normally shall be made within 20 working days after receipt. The appeal will be deemed to have been received when it reaches the FOIA/PA Division, for administrative processing on behalf of the Appellate Authority. Misdirected appeals are to be referred expeditiously to the FOIA/PA Division.

(5) A requester will be deemed to have exhausted his/her administrative remedies after he/she has been denied the requested record or waiver/reduction of fees, by the designated Appellate Authority, or when the OIG FOIA/PA Division fails to respond to the request within the time limits prescribed by the FOIA, DoD 5400.7–R (32 CFR part 286) and this part. The requester may then seek judicial action from a U.S. Distrist Court in the district in which the requester resides, has a principal place of business, in the district in which the record is located, or in the District of Columbia.

(6) Records that are denied on appeal shall be retained for a period of six years, in accordance with IGDM 5015.2,[2] ''Records Management Manual,'' to meet the statute of limitations of claims requirements.

APPENDIX TO § 295.5

EXTRACT

The material contained herein is an Extract of information from (Name of Original Document), which has been determined to be in the public domain. The remaining material not provided herein may be requested under the provisions of the Freedom of Information Act.

§ 295.6 Responsibilities.

(a) The Assistant Inspector General (AIG) for Investigations is responsible for the overall implementation and administration of the FOIA program in the OIG, and for the designation of the IDAs.

(b) The Director, Investigative Support is designated as an IDA and is responsible for the overall operation of the FOIA program in the OIG.

(c) The Assistant Director, FOIA/PA Division, Investigative Support Directorate is designated as an IDA and will:

(1) Serve as the point of contact on all FOIA matters for the OIG.

(2) Coordinate and respond to all requests received from the public for records in accordance with the policy established and procedures set forth in this part, and in all applicable DoD directives, regulations and instructions.

(3) Coordinate requests received from the public for records to the extent considered necessary, with the DFOISR, OASD(PA), other DoD Components, other Federal agencies, and other OIG elements.

(4) Arrange for the collection of fees are prescribed by the policy as established in this part.

(5) Maintain the FOIA case files in accordance with IGD Manual (IGDM) 5015.2,[3] ''Records Management Program''.

(6) Recommend action to be taken on all appeals of fees, appeals of fee waiver denials, and appeals of denials to access of records requested, to the Appellate Authority.

(7) Review OIG publications to assure that those which meet the FOIA ''(a)(1)'' and ''(a)(2)'' requirements for publication in the FEDERAL REGISTER are prepared in proper form and transmitted promptly for publication in the FEDERAL REGISTER.

(8) Maintain copies of material required to be made available under the ''(a)(2)'' provisions of the FOIA for examination and copying by the public,

[2] See footnote 1 to § 295.5(1).

[3] See footnote 1 to § 295.5(1).

and provide the required FOIA Reading Room for use by the public in doing so.

(9) Establish a training program for OIG personnel who are involved in preparing responsive records for release to the public under the FOIA.

(10) Prepare the Annual Report on the FOIA for forwarding to DFOISR, OASD(PA) as required by 32 CFR part 286.

(d) The AIGs and the Director, IG Regional Office-Europe will:

(1) Comply with, and assure compliance by all of their subcomponents with, the policy established and the procedures set forth in this part.

(2) Appoint a Point of Contact (POC) to interact with the FOIA/PA Division on all FOIA matters, and notify the FOIA/PA Division of any changes in the appointment.

(3) Provide all records responsive to a request as directed by the FOIA/PA Division.

(4) Recommend release/denial action to be taken, indicate applicable exemptions, and provide appropriate rationales.

(e) The Freedom of Information Act Appellate Authority is designated by the Inspector General and will:

(1) Determine the action to be taken on all appeals made by the public of fees, fee waiver/reduction denials, and access denials in accordance with chapter V, section 3, of DoD 5400.7–R (32 CFR part 286).

(2) Coordinate all appellate decisions with the Office of General Counsel, Assistant General Counsel (Fiscal and Inspector General).

(f) The AIG for Administration and Information Management will:

(1) Prepare annually an index of IG publications, statements and documents pertaining to any matter issued, adopted, or promulgated and required to be made available to the public by publication or sale.

(2) Establish and implement any necessary procedures to effect disciplinary action recommended by the Special Counsel of the Merit Systems Protection Board in cases involving the arbitrary and capricious withholding of information and records requested under the FOIA as required by chapter V, section 4, of DoD 5400.7–R (32 CFR part 286).

§ 295.7 Procedures.

(a) *General.* The provisions of the FOIA are reserved for persons with private interests as opposed to Federal governmental agencies seeking official information. The procedures for making requests, whether as a private party or governmental representative, are set forth below.

(b) *Requests From Private Parties.* (1) Members of the public may make requests in writing for copies of records, or permission to examine or copy records, directly to the FOIA/PA Division addressed to: Assistant Director, FOIA/PA Division, OAIG for Investigations, 400 Army Navy Drive, Arlington, VA 22202–2884.

(2) Requests must identify each record sought with sufficient specificity to enable the custodian to locate the record with a reasonable amount of effort. Requesters should provide such information as where the record originated and by whom, its subject matter, its approximate date or timeframe, which element of the OIG is likely to have custodianship, or any other similar information that would assist in locating the record. Requests must also contain a statement regarding willingness to pay fees.

(3) A request from an individual who made an allegation of wrongdoing to the IG, or any protected disclosure under the ''Whistleblower Protection Acts,'' and who is seeking the results of any investigation or inquiry conducted into the allegation, should identify him/herself as the ''Whistleblower'' in the request. The request should indicate whether he/she wishes to continue anonymity, should be notarized to avoid the risk of losing the anonymity, and should contain a statement regarding willingness to pay fees.

(4) A request for a personal record or investigative record pertaining to the individual making the request, that is in a system of records whether nonexempt or exempted from mandatory release under the Privacy Act, must be notarized to avoid the risk of invasion of personal privacy. In any such request, the individual may designate another individual to act as his/her representative in making the request and in receiving the records on his/her behalf; however, the authorization must

be in writing, specifically name the representative and kinds of records authorized to be provided, and be notarized to avoid the risk of invasion of personal privacy.

(5) A request for a record that was obtained from a non-U.S. Government source, and that is subject to exemption (b)(4) under the FOIA, will be released to the individual or firm making the request without further exception, if:

(i) The individual or firm is clearly the submitter of the information and/or is clearly acting on behalf of the submitter in making the request.

(ii) The request contains a statement from a company official or other representative of the submitter clearly capable of certifying that the requester is acting on behalf of the submitter of the information in making the request; i.e., a Vice-President certifies on his/her company letterhead that XYZ Law Firm is acting on behalf of the company in requesting copies of documents submitted to the government by the company. A mere assertion by the requester that the requester is acting on behalf of the submitter in making the request will not be honored, if it cannot be readily verified through records available to the OIG.

(c) *Requests From Government Officials.* (1) Requests from officials of State, or local Governments for OIG records will be considered the same as any other requester, except where the request is for a personal record in a system of records subject to the Privacy Act, in which case the provisions of DoD 5400.11–R (32 CFR part 286a) apply.

(2) Requests from members of Congress, or their staffs, not seeking records on behalf of a Congressional Committee, Subcommittee, or either House sitting as a whole, will be considered the same as any other requester. Requests from members of Congress, or their staffs, made on behalf of their constituents will also be considered the same as any other requester.

(3) Requests from officials of foreign governments shall be considered the same as any other requester. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

(d) *Misdirected Requests.* Requests misdirected to other OIG elements will be forwarded promptly to the FOIA/PA Division. The statutory period allowed for response to a request misdirected by the requester shall not begin until the request is received in the FOIA/PA Division. The OIG components and field elements receiving misdirected requests should advise the requester that the request is being forwarded to the office having the authority to act on and respond to the request.

(e) *Privileged Release to Officials.* (1) Subject to DoD 5200.1–R,[4] ''Information Security Program Regulation'', applicable to classified information, DoD Directive 5400.11 (32 CFR part 286a), applicable to personal privacy or other applicable law, records exempt from release under appendix B of this part may be authenticated and released, without requiring release to other FOIA requesters, in accordance with OIG rules to U.S. Government officials requesting them on behalf of Federal governmental bodies, whether legislative, executive, administrative, or judicial, as follows:

(i) To a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4,[5] ''Provision of Information to Congress,'' and this part.

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

(iii) To other Federal agencies both executive and administrative as determined by the IG or the IG's designee.

(2) On all such releases, the officials receiving records under the above provisions will be informed in writing that the records are exempt from public release under the FOIA and are privileged. The OIG components will also advise the receiving officials of any special handling instructions.

(f) *Processing Requests.* (1) Upon receipt in the FOIA/PA Division, a request for records will be assigned a control number, logged, and reviewed

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

[5] See footnote 4 to § 295.7(e).

for adequacy and compliance with the procedures for submitting requests outlined in § 295.7(b).

(2) If the request does not meet the adequacy of description test, contain a statement regarding fees, or contain a notarized signature/authorization or a certification of submitter representation, if applicable; the request will be acknowledged as having been received and the requester will be notified of the defect and advised of the means necessary to correct the defect and comply with the procedures. If the requester does not correct the defect within the time allowed (generally 30 calendar days) in the defect notice, the following actions will be taken:

(i) Where the request does not meet the adequacy of description test, the request will be administratively closed and the requester so advised.

(ii) Where the request meets the adequacy of description test but fails to comply with the remaining procedural requirements, and the time allowed in the defect notice for compliance by the requester has elapsed, the request will be processed to the extent possible consistent with DoD 5400.7–R (32 CFR part 286) and this part.

(3) When it is determined that a request complies with all applicable procedures, the necessary search and collection of responsive records will be initiated through the Component(s) of the OIG likely to have custodianship of the sought records.

(4) Where the appropriate OIG Component has determined that no record responsive to the request exists, the POC for the OIG Component will so advise the FOIA/PA Division within the due date assigned to the POC. The requester will be notified in writing by the IDA, within 10 working days from the date of receipt of the request, that no responsive records exist; and, of the right and means by which to appeal the no record response as an adverse determination.

(5) When it is determined that the records sought are part of an ongoing audit, inspection, or investigation, the requester will be advised of such (subject to the ''Exclusions'' under the FOIA identified in appendix B, of this part). The requester will be informed of the estimated timeframe for completion of the ongoing audit, inspection, or investigation and asked if he/she wishes to withdraw the request and resubmit it upon completion of the ongoing process. If the requester chooses not to withdraw the request, the processing will be continued and an appropriate release determination will be made, consistent with the statutory provisions of the FOIA.

(6) When responsive records have been located, the POC for the OIG element having the records will forward the records to the FOIA/PA Division with a recommendation for release on SD Form 472, ''Request Information Sheet,'' along with a completed DD Form 2086. ''Record of Freedom of Information (FOI) Processing Cost.'' The records will be reviewed and an initial determination to release or deny will be made.

(g) *Initial Determinations.* (1) The initial determination of whether to make a record available upon request may be made only by the IDAs designated by the IG in this part. Further, the number of IDAs designated by the IG will be limited and based on a balance of the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limitations of the FOIA.

(2) Other than statutory denials, there are six other reasons for not complying with a request for a record:

(i) The request is transferred to another DoD Component or Federal agency.

(ii) The request is withdrawn by the requester.

(iii) The information requested is not a record within the meaning of the FOIA and § 295.3(a) of this part.

(iv) A record has not been described with sufficient particularity to enable those that OIG to locate it by conducting a reasonable search.

(v) The requester has failed unreasonably to comply with the procedural requirements, including the payment of fees, imposed by 32 CFR part 286 and this part.

(vi) The OIG has determined through knowledge of its files and reasonable search efforts that it neither controls nor possesses the requested record.

(3) Initial determinations to release or deny a record normally will be made and the decision reported to the requester within 10 working days, provided that the requester has complied with the preliminary procedural requirements.

(4) When requests are denied in whole in part, the requester will be informed in writing of the reasons for the denial, the identity of the official making the denial, the right of appeal of the decision, and the identity and address of the official to whom an appeal may be made.

(5) The explanation of the substantive basis for a denial will include specific citation of the statutory exemption applied under provisions of the FOIA. Mere reference to a classification or to a ''For Official Use Only'' marking will not constitute a basis for invoking an exemption. When the initial denial is based in whole or in part on a security classification, the explanation will include a summary of the applicable criteria for the classification.

(h) *Denial Tests*. (1) To deny a requested record that is in the possession and control of the OIG, it must be determined that the record is included in one or more of the nine categories of records exempt from mandatory disclosure as provided by the FOIA and outlined in chapter III of DoD 5400.7–R (32 CFR part 286), and this part. No OIG record may be otherwise withheld from the public, whether in whole or in part, except as determined by the designated IDAs in accordance with FOIA exemptions.

(2) Although portions of some records may be denied, the remaining reasonably segregable portions will be released to the requester when it can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. When a record is denied in whole, the IDA will advise the requester of that determination.

(i) *Extension of Time*. (1) In unusual circumstances, responsive records may be located by the office having custodianship over the record, but the records can not be made immediately available to the FOIA/PA Division, or the FOIA/PA Division can not make them immediately available to the requester. The unusual circumstances justifying the delay will be the result of the following:

(i) The requested record is located in whole or in part at another geographic location than that of the FOIA/PA Division.

(ii) The request requires the collection and/or evaluation of a substantial number of records.

(iii) Consultation is required with other DoD Components or agencies having substantial interest in the subject matter to determine whether the records requested are exempt from disclosure in whole or in part under provisions of the FOIA and this part or should be released as a matter of discretion.

(2) In any such event, efforts will be made to negotiate an informal extension in time with the requester by the FOIA/PA Division. If the requester chooses not to agree informally to an extension in time, a written explanation of the reasons for delay will be provided to the requester and the requester will be asked to await a substantive response by an anticipated date.

(j) *Fee Assessments*. (1) When it is determined that the fees assessable to a request undergoing final processing may exceed the limit established by the requester, or may be in excess of $250, the processing will be discontinued and the requester notified so that he/she may advise of his/her desire to continue.

(2) If a ''good faith'' deposit is required, the requester will be allowed a reasonable time (generally 30 calendar days) in which to provide payment. If the requester fails to provide the ''good faith'' deposit within the time allowed, the request will be closed and the requester so notified.

(3) In all other cases, the requester will be notified of any fees due at the time the requested records are provided to the requester, and allowed a reasonable time (generally 30 calendar days) in which to pay the fees.

(4) If the requester fails to pay the fees in the time allowed, a notice of nonpayment will be placed in the formal control system and no further FOIA requests from the requester will

be honored until the fees have been paid.

(k) *Records on Non-U.S. Government Sources.* (1) When it is determined that the records or data contained within the records responsive to a request were obtained from a non-U.S. Government source by the OIG, and the requester is not the submitter of the non-U.S. Government record nor acting as the submitter's representative; and it is further determined the source or submitter may have a valid objection to release of the material, the submitter will be promptly notified of the request and afforded a reasonable time (generally 30 calendar days) to present any objections to the release.

(2) This procedure is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4). If, for example, the record or data was submitted by the non-U.S. Government source with the actual or presumptive knowledge of the source, and established that it would be made available to the public upon request, there is no requirement to notify the source.

(3) All objections will be evaluated. When a substantial issue has been raised, the OIG may seek additional information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making a determination.

(4) The OIG will not ordinarily exercise its discretionary authority to release information clearly meeting the exemption (b)(4) criteria. Further, the final decision to disclose information not deemed to clearly meet exemption (b)(4) criteria will be made by an official equivalent in rank or greater to the official who would make the decision to withhold that data under a FOIA appeal.

(5) When the source or submitter advises of the intent to seek a restraining order or to take court action to prevent release of the data, the requester will be notified and action will not be taken on the request until after the outcome of the court action is known. When the requester brings court action to compel disclosure, the source shall be promptly notified of this action.

(6) These procedures also apply to any non-U.S. Government record in the possession and control of the OIG from multi-national organizations, such as the North Atlantic Treaty Organization (NATO) and the North American Aerospace Defense Command (NORAD), or foreign governments. Coordination of such FOIA requests with foreign governments will be made through the Department of State by the FOIA/PA Division.

(l) *Coordination With Department of Justice.* (1) Where the custodian of an OIG element determines that records responsive to a FOIA request are pertinent to pending or potential litigation involving the United States, the FOIA/PA POC for the element shall promptly notify the FOIA/PA Division so that the necessary coordination can be effected with the Office of General Counsel (OGC) representative to the IG.

(2) The OGC representative shall effect all necessary coordination with the United States Attorney and/or Department of Justice prior to any release of such records.

(m) *Procedures for Appeals.* (1) A requester may appeal the initial decision to deny access to requested records, in writing, to the designated OIG Appellate Authority. The requester may also appeal a no record determination, any fees assessed and the denial of a request for waiver/reduction of fees. All such appeals should be made no later than 60 calendar days after the date of the initial denial letter or letter of advisement regarding fees.

(2) All appeals should provide sufficient information and justification upon which a determination may be made by the Appellate Authority as to whether to grant or deny the appeal; or, in the event of a ''no record determination'' sufficient information and/or justification upon which additional record searches may be based. A copy of the initial request and initial denial, and ''no record'' or fee advisement letter should be included.

(3) The FOIA/PA Division administers the appeals for the Appellate Authority. All appeals should be addressed to the Assistant Director, FOIA/PA Division, OAIG for investigations, 400 Army Navy Drive, Arlington, VA 22202–2884.

(4) Upon receipt in the FOIA/PA Division, the appeal will be assigned a control number, logged, and prepared for provision to the Appellate Authority for a final determination. Receipt will be acknowledged in writing within 10 working days and the requester advised of any additional time needed due to the unusual circumstances described in § 295.7(i) of this part.

(5) If additional time is required, the final decision may be delayed for the number of working days (not to exceed 10) that were not used as additional time for responding to the initial request. If no additional time is required, the requester will be advised in writing of the final decision within 20 working days.

(6) If the appeal is approved in part or in whole, or responsive records located upon additional search, the requester will be informed and promptly provided any records determined to be releasable.

(7) If ''no records'' can be located in response to the appeal, the requester will be informed that no records were located, of the identity of the official making the final determination, and of the right to judicial review.

(8) If the appeal of the initial denial of responsive records is denied in part or in whole, the requester will be advised of the applicable statutory exemption or exemptions invoked under the provisions of the FOIA for the denial, the identity of the official making the final determination, that meaningful portions of any denied records were not reasonably segregable, and of the right to judicial review.

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

(10) Final refusal involving issues not previously resolved or that the OIG knows to be inconsistent with rulings of other DoD components ordinarily will not be made before consultation with the Assistant General Counsel (Fiscal and Inspector General), OGC, DoD.

(11) Tentative decisions to deny records that raise new or significant legal issues of potential significance to other agencies of the Government shall be provided to the Department of Justice, Attn: Office of Legal Policy, Office of Information and Policy, Washington, DC 20530 after coordination with the Assistant General Counsel (Fiscal and Inspector General), OGC, DoD.

§ 295.8 Annual report.

The FOIA Annual Report, assigned Report Control System DD-PA (A) 1365, will be prepared by the FOIA/PA Division for the preceding calendar year and submitted to the Assistant Secretary of Defense (PA) on or before February 1 of each year. The report will be compiled and formatted in accordance with chapter VII, DoD 5400.7–R (32 CFR part 286).

§ 295.9 Organization and mission.

(a) The organization of the OIG includes the Headquarters located in Arlington, Virginia, consisting of the Inspector General, Deputy Inspector General, the Offices of the Assistant Inspector General (AIG) for Analysis and Followup, the AIG for Audit Policy and Oversight, the AIG for Auditing with its subordinate field elements located throughout the Continental United States (CONUS), the AIG for investigations with its field elements located throughout the CONUS and Europe, the AIG for Administration and Information Management, the AIG for Departmental Inquiries, the AIG for Inspections, and the Director, IG Regional Office-Europe (IGROE) located in Wiesbaden, Germany. The IGROE has representatives assigned from the Offices of the AIG for Investigations, the AIG for Inspections, the AIG for Auditing and the AIG for Departmental Inquiries, who fulfill the missions of their respective components.

(b) The ''Organization and Staff Listing'' (Inspector General, Defense List (IGDL) 1400.7),[6] provides organization

[6] See footnote 1 to § 295.5(i).

charts for the OIG elements and mailing addresses of all OIG operating locations and will be made available to the public upon written request.

(c) As an independent and objective office in the Department of Defense (DoD) the mission of the OIG is to:

(1) Conduct, supervise, monitor, and initiate audits, inspections and investigations relating to programs and operations of the DoD.

(2) Provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency, and effectiveness in the administration of, and to prevent and detect fraud and abuse in, such programs and operations.

(3) Provide a means for keeping the Secretary of Defense and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action.

(4) Further information regarding the responsibilities and functions of the IG is encompassed in Public Law 95–452, the ''Inspector General Act of 1978,'' as amended and 32 CFR part 373.

APPENDIX A TO PART 295—FOR OFFICIAL USE ONLY (FOUO)

I. General Provisions

A. General

Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of the reasons cited in FOIA exemptions (b)(2) through (b)(9) shall be considered as being for official use only. No other material shall be considered or marked ''For Official Use Only'' (FOUO), and FOUO is not authorized as an anemic form of classification to protect national security interests.

B. Prior FOUO Application

The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release.

C. Historical Papers

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

D. Time To Mark Records

The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

E. Distribution Statement

Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24,[1] ''Distribution Statements on Technical Documents'', shall bear that statement and may be marked FOUO, as appropriate.

II. Markings

A. Location of Markings

(1) An unclassified document containing FOUO information shall be marked ''For Official Use Only'' at the bottom on the outside of the front cover (if any), on each page continuing FOUO information, and on the outside of the back cover (if any).

(2) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(3) Within a classified document, an individual page that contains FOUO information but no classified information shall be marked ''For Official Use Only'' at the bottom of the page.

(4) Other records, such as, photographs, films, tapes, or slides, shall be marked ''For Official Use Only'' or ''FOUO'' in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

(5) The FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information EXEMPT FROM MANDATORY DISCLOSURE

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

under the FOIA. Exemptions . . . . . apply

III. Dissemination and Transmission

A. Release and Transmission Procedures

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

(1) The FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

(2) The DoD holders of FOUO information are authorized to convey such information to officials in other departments and agencies of the executive and judicial branches to fulfill a Government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked ''For Official Use Only'', and the recipient shall be advised that the information has been exempted from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

(3) Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4,[2] ''Provision of Information to Congress''. Release to the GAO is governed by DoD Directive 7650.1,[3] ''General Accounting Office Access to Records''. Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

B. Transporting FOUO Information

Records containing FOUO information shall be transported in a manner that precludes disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations may be sent by fourth-class mail.

C. Electrically Transmitted Messages

Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviated ''FOUO'' before the beginning of the text. Such messages shall be transmitted in accordance with communications security procedures in ACP–121 (United States Supplement 1) for FOUO information.

IV. Safeguarding FOUO Information

A. During Duty Hours

During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-governmental personnel.

B. During Non-Duty Hours

At the close of business, FOUO records shall be stored so as to preclude unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of Public Law 86–36, National Security Agency Act shall meet the safeguards outlined for that group of records.

V. Termination, Disposal and Unauthorized Disclosures

A. Termination

The originator or other component authority, e.g., initial denial and appellate authorities, shall terminate ''For Official Use Only'' markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the ''For Official Use Only'' markings, but records in file or storage need not be retrieved solely for that purpose.

B. Disposal

(1) Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but give due consideration to the additional

[2] See footnote 1 to section I.E. of this appendix.

[3] See footnote 1 to section I.E. of this appendix.

expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

(2) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. chapter 33, as implemented by Inspector General Defense Manual (IGDM) 5015.2,[4] ''Records Management Program''.

C. Unauthorized Disclosure

The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may also result in civil and criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

APPENDIX B TO PART 295—EXEMPTIONS

I. General

The exemptions listed apply to categories of records that may be withheld in whole or in part from public disclosure, unless otherwise prescribed by law. A discretionary release (see also §295.5(e) of this part) to one requester may preclude the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. In applying the exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. The examples provided of the types of records that may be exempted from release are not at all inclusive.

II. FOIA Exemptions

A. Exemption (b)(1).

Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations, such as DoD 5200.1–R[1] (32 CFR part 159a), ''Information Security Program Regulation''. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1–R, section 2–204f, apply, In addition, this exemption shall be invoked when the following situations are apparent:

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

(2) Information that concerns one or more of the classification categories established by executive order and DoD 5200.1–R (32 CFR part 159a) shall be classified if its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

B. Exemption (b)(2)

Those related solely to the internal personnel rules and practices of DoD or the OIG. This exemption has two profiles, *high (b)(2)* and *low (b)(2)*.

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

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

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

(c) Computer software meeting the standards of §295.3(c) of this part, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the use of the software must be closely examined to ensure a circumvention possibility exists.

(2) Records qualifying under the low (b)(2) profile are those that are trivial and 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

[4] Copies may be obtained, if needed, from the Information and Operations Support Directorate, Publications Management Branch, room 420, 400 Army Navy Drive, Arlington, VA 22202–2884.

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

in order to disclose the records. Examples include: rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and trivial administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

C. Exemption (b)(3)

Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. Examples of statutes are:

(1) National Security Agency Act information exemption, Public Law 86–36, section 6.

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

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

(4) Communication intelligence, 18 U.S.C. 798.

(5) Authority to Withhold from Public Disclosure Certain Technical Data, 10 U.S.C. 130, and 32 CFR part 250.

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

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

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

D. Exemption (b)(4)

Those containing trade secrets or commercial or financial information that the OIG receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Examples include:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. See also 32 CFR part 286h, ''Release of Acquisition-Related Information''.

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

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

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

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

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interest in such data in accordance with title 10, U.S.C. 2320–2321 and DoD Federal Acquisition Regulation Supplement (DFARS), subpart 27.4 (see section C.(5) of this appendix).

(7) Computer software meeting the conditions of §295.3(c), which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

E. Exemption (b)(5)

Except as provided in subsections (2) through (5), below, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)), DoD Components or OIG components. Also exempted are records pertaining to attorney-client privilege and the attorney work-product privilege.

(1) Examples include:

(a) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

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

(c) Those non-factual portions or evaluations by DoD or OIG Components personnel of contractors and their products.

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

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

(f) Records that are exchanged among agency personnel and within and among DoD Components or agencies as part of the preparation for anticipated administrative proceeding by an agency or litigation before any Federal, state, or military court, as well as records that qualify for the attorney-client privilege.

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

(h) Computer software meeting the standards of §295.3(c), which is deliberative in nature, the disclosure of which would inhibit or chill the decision-making process. In this situation, the use of software must be closely examined to ensure its deliberative nature.

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

(2) If any such intra or interagency record or reasonably segregable portion of such record hypothetically would be made available routinely through the ''discovery process'' in the course of litigation with the agency, i.e., the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing, then it should not be withheld from the general public even though discovery has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant, balanced against the interests of the agency in maintaining its confidentiality, then the record or document need not be made available under this part. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

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

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

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

F. Exemption (b)(6)

Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.

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

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

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

(2) Home addresses are normally not releasable without the consent of the individuals concerned. In addition, the release of lists of DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

(a) Privacy interest. A privacy interest may exist in personal information even though the information has been disclosed at

some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

(b) Published telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

(3) This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

(4) Individuals' personnel, medical, or similar file may be withheld from them or their designated legal representative only to the extent consistent with DoD Directive 5400.11 (32 CFR part 286a).

(5) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record. When withholding personal information from the subject of the record, legal counsel should first be consulted.

G. Exemption (b)(7)

Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes.

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

(a) Could reasonably be expected to interfere with enforcement proceedings.

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

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

(i) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, the OIG shall neither confirm nor deny the existence or nonexistence of the record being requested.

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

(iii) Refusal to confirm or deny should not be used when (1) the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or (2) the person whose personal privacy is in jeopardy is deceased, and the OIG is aware of that fact.

(d) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense, a State, local, or foreign agency or authority, or any private institution which furnishes the information on a confidential basis.

(e) Could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

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

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

(2) Examples include:

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

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

(c) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

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

(4) When the subject of an investigative record is the requester of the record, it may

be withheld only as authorized by DoD Directive 5400.11 (32 CFR part 286a).

(5) Exclusions. Excluded from the above exemptions are the following two situations as applicable to the Department of Defense and the OIG:

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

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

H. Exemption (b)(8)

Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

I. Exemption (b)(9)

Those containing geological and geophysical information and data (including maps) concerning wells.

PART 296—NATIONAL RECONNAISSANCE OFFICE FREEDOM OF INFORMATION ACT PROGRAM REGULATION

Sec.

296.1 Purpose.
296.2 Definitions.
296.3 Indexes.
296.4 Procedures for request of records.
296.5 Appeals.
296.6 Reading room.

AUTHORITY: 5 U.S.C. 552, as amended.

SOURCE: 64 FR 71298, Dec. 21, 1999, unless otherwise noted.

§ 296.1 Purpose.

The purpose of this part is to provide policies and procedures for the National Reconnaissance Office (NRO) implementation of the Freedom of Information Act (5 U.S.C. 552 as amended) (FOIA), and to promote uniformity in the NRO FOIA program.

§ 296.2 Definitions.

The terms used in this part, with the exception of the following, are defined in 32 CFR part 286:

(a) *Freedom of Information Act appellate authority*. The Chief of Staff, NRO.

(b) *Initial denial authority*. The Chief, Information Access & Release Center NRO.

§ 296.3 Indexes.

(a) The NRO does not originate final orders, opinions, statements of policy, interpretations, staff manuals or instructions that affect a member of the public of the type covered by the indexing requirement of 5 U.S.C. 552(a)(2). The Director, NRO, has therefore determined, pursuant to pertinent statutory and executive order requirements, that it is unnecessary and impracticable to publish an index of the type required by 5 U.S.C. 552(a)(2), except the index noted in paragraph (b) of this section.

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

§ 296.4 Procedures for request of records.

(a) *Requests*. Requests for access to records of the National Reconnaissance Office may be filed by mail or FAX addressed to the Chief, Information Access and Release Center, National Reconnaissance Office, 14675 Lee Road, Chantilly, VA 20151–1715, FAX Number (703) 808–5082. Requests need not be made on any special form but must be by letter or FAX or other written statement identifying the request as a Freedom of Information Act request and setting forth sufficient information reasonably describing the requested record. All requests should contain a willingness to pay assessable FOIA fees.