

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

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

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

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

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

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

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

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

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

§ 286.8 Indexes.

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

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

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

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

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

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

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

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

Subpart C—Exemptions

§ 286.11 General provisions.

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

§ 286.12 Exemptions.

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

(a) *Number 1 (5 U.S.C. 552(b)(1))*. Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1-R.⁵ Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be

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

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

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

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

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

⁴See footnote 1 to § 286.1(a).

⁵See footnote 1 to § 286.1(a).