

or section 514(e)(3) of the Act, as applicable, all such persons shall be jointly and severally liable for such failure. For purposes of paragraph (a)(1)(iii) of this section, the term "administrator" shall include plan sponsor (within the meaning of section 3(16)(B) of the Act).

(2) Any person, or persons under paragraph (j)(1) of this section, against whom a civil penalty has been assessed under section 502(c)(4) of the Act, pursuant to a final order within the meaning of § 2570.131(g) of this chapter shall be personally liable for the payment of such penalty.

(k) *Cross-references.* (1) The procedural rules in §§ 2570.130 through 2570.141 of this chapter apply to administrative hearings under section 502(c)(4) of the Act.

(2) When applying procedural rules in §§ 2570.130 through 2570.140:

(i) Wherever the term "502(c)(7)" appears, such term shall mean "502(c)(4)";

(ii) Reference to § 2560.502c-7(g) in 2570.131(c) shall be construed as reference to § 2560.502c-4(g) of this chapter;

(iii) Reference to § 2560.502c-7(e) in § 2570.131(g) shall be construed as reference to § 2560.502c-4(e) of this chapter;

(iv) Reference to § 2560.502c-7(g) in § 2570.131(m) shall be construed as reference to § 2560.502c-4(g); and

(v) Reference to §§ 2560.502c-7(g) and 2560.502c-7(h) in § 2570.134 shall be construed as reference to §§ 2560.502c-4(g) and 2560.502c-4(h), respectively.

Signed at Washington, DC, this 11th day of December, 2007.

**Bradford P. Campbell,**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

[FR Doc. E7-24386 Filed 12-18-07; 8:45 am]

BILLING CODE 4510-29-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[DoD-2007-OS-0086; 0790-AI24]

### 32 CFR Part 286

### DoD Freedom of Information Act (FOIA) Program Regulation

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Defense is proposing to update current policies and procedures to reflect the DoD FOIA Program as prescribed by Executive Order 13392. The proposed changes will

ensure appropriate agency disclosure of information, and offer consistency with the goals of section 552 of title 5, United States Code.

**DATES:** Comments must be received by February 19, 2008.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://regulations.gov> as they are received without change, including any personal identifiers or contact information.

#### FOR FURTHER INFORMATION CONTACT:

James Hogan (703) 696-4495.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 286 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

#### Executive Order 12866, "Regulatory Planning and Review"

It has been certified that 32 CFR part 286 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

#### Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 286 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

#### Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that 32 CFR part 286 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

#### Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 286 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

#### List of Subjects in 32 CFR Part 286

Freedom of information.

Accordingly, 32 CFR part 286 is proposed to be revised to read as follows:

### PART 286—DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM REGULATION

#### Subpart A—General Provisions

Sec.

- 286.1 Purpose.
- 286.2 Definitions.
- 286.3 Public access to DoD information.
- 286.4 Procedures.

#### Subpart B—FOIA Reading Rooms

- 286.7 Requirements.
- 286.8 Record availability.
- 286.9 Indexes.
- 286.10 "(a)(1)" records.

#### Subpart C—Exemptions

- 286.13 General provisions.
- 286.14 Applying the FOIA exemptions.

#### Subpart D—FOIA Request Processing

- 286.17 General provisions.
- 286.18 Processing procedures.
- 286.19 Initial determinations.
- 286.20 Appeals.
- 286.21 Judicial actions.

#### Subpart E—Fee Schedule

- 286.24 General provisions.
- 286.25 Collection of fees and fee rates.
- 286.26 Fees for technical data.
- 286.27 Fees for research data.

#### Subpart F—Education and Training

- 286.30 Purpose and responsibility.
- 286.31 Implementation.

## Appendix A to Part 286—DoD FOIA Program Components

### Appendix B to Part 286—Addressing FOIA Requests

Authority: 5 U.S.C. 552.

#### Subpart A—General Provisions

##### § 286.1 Purpose.

This part promotes uniformity in the DoD FOIA Program. It shall take precedence over all DoD Component publications that supplement and implement the DoD FOIA Program. A list of the DoD FOIA Program Components is at Appendix A to this part.

##### § 286.2 Definitions.

The following terms and meanings shall apply for the purposes of this part:

*Administrative appeal.* A request by a member of the public, made under the FOIA, asking the appellate authority of the DoD Component to reverse any adverse determination by an Initial Denial Authority (IDA). A requester may also appeal the failure of an agency to respond within the statutory time limits.

*Adverse determination.* A decision by an IDA to withhold all or part of a requested record, deny a fee category claim by a requester, deny a request for waiver or reduction of fees, deny a request to review an initial fee estimate, deny a request for expedited processing, confirm that no records were located during the initial search, or any determination that a requester believes is adverse in nature.

*Agency record.* (1) Includes: (i) All products of data compilation made or received by an agency of the U.S. Government under Federal law in connection with the transaction of public business and in DoD possession and control at the time the search in response to a FOIA request is made. Examples include books, papers, maps, photographs, machine-readable materials inclusive of those in electronic form or format, and other documentary materials, regardless of physical form or characteristics.

(ii) Research data produced under a Federal grant used by the Federal Government in developing an agency action that has the force and effect of law (Office of Management and Budget Circular (OMB) A-110).

(2) Does not include:

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

(ii) Anything that is not a tangible or documentary record, such as an

individual's memory or an oral communication.

(iii) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee and not distributed to other agency employees for their official use. Personal papers fall into three categories:

(A) Those created before entering Government service.

(B) Private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business.

(C) Work-related personal papers that are not used in the transaction of Government business.

(iv) A record that is not in the possession and control of the Department of Defense when the search is conducted in response to a FOIA request. (There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.)

*Appellate authority.* The Head of the DoD Component, or designee, having jurisdiction to review and possibly reverse or amend any adverse determination by an IDA.

*Direct costs.* Those expenditures the DoD Component makes in searching for, reviewing, and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay plus 16 percent of that rate to cover benefits) and the costs of operating duplicating machinery. (These factors have been included in the fee rates prescribed at § 286.25. Not included in direct costs are overhead expenses such as the cost of space, heating, or lighting the facility in which the records are stored.

*Electronic records.* Records (including e-mail) created, stored, and retrievable by electronic means.

*Federal agency.* Defined in 5 U.S.C. 551(1) and 552(f)(1). (A Federal agency cannot make FOIA requests.)

*FOIA office.* The DoD Component office that receives FOIA requests from and responds directly to the public.

*FOIA public liaison.* Defined in E.O. 13392.

*FOIA request.* A written request for DoD records that reasonably describes the record(s) sought. The request should also indicate a willingness to pay processing fees even if it contains a request for a fee waiver. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. All requests must have a postal mailing

address included, even if they are received by facsimile or electronically.

*FOIA requester.* Any person, including a partnership, corporation, association, State or State agency, foreign government, foreign national, or a lawyer or other representative acting on behalf of any person, who submits a FOIA request. This definition specifically excludes agencies within the Executive Branch of the Federal Government.

*FOIA requester service center.* Defined in E.O. 13392.

*IDA.* An official who has been granted authority by the Head of the DoD Component to withhold information requested under the FOIA for one or more of the 9 categories of records exempt from mandatory disclosure. An IDA may also deny a fee category claim by a requester, deny a request for expedited processing, deny a request for a waiver or reduction of fees, review a fee estimate, and confirm that no records were located in response to a request.

*Perfect FOIA request.* A FOIA request that meets the conditions identified in definition "FOIA request" and arrives at the FOIA office of the DoD Component in possession of the records. Also referred to as a "correct" request.

*Privacy Act system of records.* Defined in DoD 5400.11-R<sup>1</sup>.

*Public interest.* The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about their Government's activities.

*Search.* Includes all time spent looking, both manually and electronically, for records that are responsive to a FOIA request. The term "search" also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions of it, are responsive to the request. Time spent reviewing documents to determine whether to apply one or more of the statutory exemptions is not search time; it is review time.

(1) *Duplication.* The process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper, microfiche, or audiovisual or machine-readable documentation (e.g., magnetic tape or disc), among others.

(2) *Review.* The examination of documents located in response to a FOIA request to determine whether one

<sup>1</sup> Copies of unclassified DoD issuances may be obtained at <http://www.dtic.mil/whs/directives/>.

or more of the statutory exemptions permit withholding. Review also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general, legal or policy issues regarding the application of exemptions.

*Submitter.* A person or persons outside of the Government providing commercial or financial information or trade secrets to the Government.

*Submitter notice.* The process required by E.O. 12600 whereby when a Component receives a FOIA request for confidential commercial information, it asks the submitter of the information to advise the Component as to the information it considers exempt from release.

### **§ 286.3 Public access to DoD information.**

(a) The public has a right to information concerning the activities of its Government. DoD policy (32 CFR part 285) is to conduct DoD activities in an open manner and to provide the public a maximum of accurate and timely information concerning DoD activities, consistent with the need for security, public and private interests of the American people, and adherence to other requirements of law and regulation. A record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall not be withheld in whole or in part unless the record is exempt from mandatory, partial or total disclosure under the FOIA. The existence of a sound legal basis to withhold information does not preclude the DoD Component from making a discretionary release if release of that information would serve the public interest. Records requested through public affairs channels by news media representatives that would not be withheld if requested under the FOIA should be released promptly upon request. Similarly, requests from other members of the public for information that would not be withheld under the FOIA should continue to be honored through appropriate means without requiring the requester to invoke the FOIA.

(b) The DoD FOIA Program Components shall prepare, in addition to normal FOIA regulations, a guide, or handbook for the use of the public in obtaining information from their Components as required by 5 U.S.C. 552(g) and section 2(b)(v) of E.O. 13392. This guide should be a short, simple explanation of what the FOIA is designed to do and how the public can use it to access Government records. Within OSD, DFOIPO is responsible for

preparing this guide. Each guide shall be available on paper and electronically and shall include:

- (1) An index of all major information systems and a description of major information and record locator systems.
- (2) The types and categories of records that can be obtained through FOIA requests.
- (3) A concise description of the FOIA exemptions and how the Component determines whether the record can be released.
- (4) An explanation of how to make a FOIA request, how long the requester can expect to wait for a reply, and the right of appeal.
- (5) The location of the FOIA reading rooms(s) within the Component.
- (6) The location of the Component's Web site.
- (7) A reference to the Component's FOIA regulation and how to obtain a copy.

### **§ 286.4 Procedures.**

(a) *Compliance with the FOIA.* DoD personnel shall comply with the FOIA, this part, and DoD FOIA policy (32 CFR part 285) in both letter and spirit. This strict adherence is necessary to assure uniformity in implementation of the DoD FOIA Program and to create conditions that promote public trust.

(b) *Customer service.* (1) In signing E.O. 13392, the President ordered agencies to emphasize a new citizen-centered approach to the FOIA with a results-oriented focus. Because FOIA requesters are seeking a service from the Federal Government, the DoD Components shall respond courteously and appropriately to FOIA requesters. Additionally, the Components shall provide the public with citizen-centered ways to learn about the FOIA process, information about agency records that are publicly available, and information about the status of a person's FOIA request and appropriate information about the agency's response.

(2) To meet the objectives of E.O. 13392, the DoD Components shall:

(i) Establish one or more FOIA Requester Service Centers. Normally, every DoD Component FOIA office that responds directly to the public is a FOIA Requester Service Center; however, the Components have the discretion to assign more than one FOIA Office under a FOIA Requester Service Center.

(A) Each FOIA Requester Service Center shall have an internet Web site that serves to educate the public on the FOIA process. At a minimum, each Web site shall have the address, telephone number, facsimile number, and electronic mail address to which FOIA

requests can be sent; a link to the Component's FOIA handbook or guide; a description of the types of records that can be requested; the name and contact information of the Component's FOIA Public Liaison; and information on how a requester can obtain the status of a request. Additionally, each FOIA Requester Service Center Web site will have an electronic FOIA reading room as described in Subpart B to this part.

(B) The Web sites of DoD Component Headquarters FOIA Requester Service Centers shall link to the Web sites of the other Requester Service Centers within their Components.

(C) The Internet home page of every DoD Component shall link to the FOIA Requester Service Center for that activity.

(ii) Submit to the Director of Administration and Management (DA&M), OSD, the names of personnel to serve as DoD Component FOIA Public Liaisons. Each Component shall have at least one FOIA Public Liaison. Intermediate level Public Liaisons may be named within those Components that have a large number of FOIA Requester Service Centers. The FOIA Public Liaisons are responsible to ensure that the FOIA Requester Service Centers' Web sites comply with § 286.4 (b)(2)(i)(A). Additionally, the FOIA Public Liaisons are responsible for the Component's compliance with the objectives of E.O. 13392, to include the reduction or elimination of FOIA backlogs.

(c) *Prompt action on requests.* (1) When a member of the public complies with the procedures in this part and DoD Component supplementing regulations for obtaining DoD records, and the request is received by the official designated to respond, the DoD Component shall endeavor to provide a final response determination within the statutory 20 working days (5 U.S.C. 552(a)(6)(A)(i)). If unusual circumstances prevent a final response determination within the statutory time period, the Component shall advise the requester of this in writing, and provide a new completion date, which shall be not later than an additional 10 working days. If the Component needs more than this 10-day extension, it will provide the requester an opportunity to narrow the scope of the request, or arrange for an alternative timeframe.

(i) Unusual circumstances are:

(A) The responsive documents are located at a facility geographically separated from the office processing the FOIA request.

(B) The responsive documents are voluminous.

(C) One or more other outside agencies have a substantial interest in either the determination or the subject matter of the request, requiring the DoD Component processing the request to consult with the other agencies. This would include the submitter notice process (§ 286.18(d)(1)(i)(A)).

(ii) A final response determination is notification to the requester that the records are released, or that the records cannot be provided for one or more of the reasons in § 286.13. Interim responses acknowledging receipt of the request are encouraged, as are negotiations with the requester concerning the scope of the request, the response timeframe, and the fee agreement. Such communications do not, however, constitute a final response determination.

(2) If a request fails to meet the minimum requirements of this part, the DoD Component shall inform the requester how to perfect or correct the request. The statutory 20-working day time limit applies upon receipt of a perfected or correct FOIA.

(d) *Use of exemptions.* It is DoD policy (32 CFR part 285) to make records publicly available, unless the record or portions thereof qualify for withholding under one or more of the 9 exemptions.

(e) *Waiver of exemptions.* Records released under the authority of this part are considered to be in the public domain. The disclosure of exempt records without authorization by the appropriate DoD official is not considered a FOIA release. Such a release does not waive the Department of Defense's authority to assert FOIA exemptions to withhold the same records in response to a FOIA request. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks the records in a private or personal capacity.

(f) *Creating a record.* (1) A record must exist and be in DoD possession and control at the time of the search to be subject to this part and the FOIA. The DoD Components are not obligated to create, compile, or obtain a record to satisfy a FOIA request. The DoD Components, however, may compile a new record when so doing would result in a more useful response to the requester or would be less burdensome to the agency than providing existing records. Any such compilation should be coordinated with and approved by the requester. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less

than the fee that would be charged for providing the existing record. Fee assessments shall be in accordance with § 286.25.

(2) With regards 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 processing FOIA requests for electronic data where creation of a record, programming, or organizing in a particular format is questionable, if the Component has the capability to respond to the request, and the effort would be a business-as-usual approach then the request should be processed.

(i) A business as usual approach exists when the Component has the capability to process the request without a significant expenditure of resources. If processing a request would cause a significant interference with the operation of the Component's automated information system, then it has a significant expenditure of resources.

(ii) Creating computer programs and/or purchasing additional hardware to extract electronic mail that has been archived for the purpose of emergency retrieval normally are not viewed as business as usual. This is especially true if extensive resources are needed to complete the project.

(iii) Creating a computer program that produces specific requested fields or records contained within a database normally is viewed as business as usual. The time to create this program shall be considered as "computer operator" [clarify] search time for fee assessment purposes and the requester may be assessed fees in accordance with § 286.25.

(3) The DoD Components are not required to expend DoD funds to establish data links that provide real-time or near-real-time data to a FOIA requester. The Components are responsible to provide existing data downloaded to electronic media or printed in hard copy at the time the FOIA request is received or processed. If the information would serve the public interest or need, and is economically feasible, the Component may consider posting the information on the Internet.

(g) *Description of a requested record.* The requester is responsible to provide a description of the desired record that enables the Government to locate the record with a reasonable amount of effort. Generally, a reasonable description contains sufficient information to permit the conduct of an organized, non-random search for the record based on the DoD Component's

filing arrangements and existing retrieval systems. The DoD Component's decision on the reasonableness of the description must be based on a knowledge of its files, and not on the potential volume of records that may be located and the concurrent review effort to determine releasability. The fact that a FOIA request appears broad or burdensome does not, in itself, entitle the DoD Component to deny the request on the grounds that it does not reasonably describe the record sought.

(h) *Consultations and referrals.* The DoD FOIA referral procedures are based on the concept that the originator of information contained within a record shall make a release determination on that information.

(1) If the DoD Component receives a request for records originated by another DoD Component, it should contact that Component to determine if it also received the request, and if not, obtain concurrence to transfer the request or to advise the requester to send the request to the correct Component. If the request is to be transferred, the requester shall be advised of the action taken, unless exempt information would be revealed by the fact of the referral. Any DoD Component receiving a request that has been misaddressed shall transfer the request to the proper address and advise the requester. DoD Components transferring requests shall include point of contact name, telephone number, and e-mail address in the cover memorandum.

(2) The DoD Component holding a record originated by another DoD Component or agency outside the Department of Defense shall refer a FOIA request for that record, as well as the record, to the originating agency for response directly to the requester. If the DoD Component holding the record has an equity in the document, it shall provide an opinion on the releasability of the record with the referral. If appropriate, the name of the IDA responsible for the decision to withhold all or parts of the record should be provided. Whenever a record is referred to another DoD Component or to an agency outside of the Department of Defense for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements. DoD Components referring requests shall include point of contact name, telephone number, and e-mail address in the cover memorandum.

(3) At times, a DoD Component may locate a responsive record that it

originated and determine another DoD Component or agency outside the Department of Defense to have a valid interest or equity in the record. In such situations, the DoD Component shall consult with the other DoD Component or agency and obtain its release recommendation. The consulted agency will provide its release recommendation back to the originating Component, which will then respond to the requester. Normally, the requester will not be advised of this consultation unless information is withheld by the consulted agency. However, if the record was created for the use of the other DoD Component or agency by the originating DoD Component (e.g., Defense Contract Audit Agency audit reports), then the procedures of § 286.18(a) apply.

(4) DoD Components receiving transferred or referred requests shall answer them in accordance with the time limits established by the FOIA, this part, and their multi-track processing systems, based upon the date of initial receipt of the request at the referring component or agency.

(5) Prior to notifying a requester of a transfer or referral to another DoD Component or agency outside the Department of Defense, the DoD Component possessing the initial request shall, as appropriate, consult with the other agency to determine if that agency's association with the subject of the request is exempt. If the association is exempt, the DoD Component possessing the initial request will protect the association and any exempt information without revealing the identity of the protected agency. The protected agency shall be responsible for submitting the justifications required in any litigation.

(6) DoD Components locating records originating with the National Security Council (NSC), the White House, or the White House Military Office (WHMO) or containing information in which these agencies would have a concurrent reviewing interest, shall forward the records to the Executive Services Directorate, Office of Freedom of Information (OFOI). OFOI is also the FOIA Requester Service Center for the OSD/Joint Staff. Its address is at Appendix B to this part. The OFOI shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination for response to the requester.

(7) On occasion, the Department of Defense receives FOIA requests for U.S. Government Accountability Office (GAO) records containing DoD information. Even though the GAO is outside the Executive Branch and not

subject to the FOIA, all FOIA requests for GAO documents containing DoD information received either from the public, or on referral from the GAO, shall be processed under the provisions of the FOIA.

(i) *Authentication.* At the request of a FOIA requester, records provided under this part shall be authenticated with an appropriate seal whenever necessary to fulfill an official Government or other legal function. This service is in addition to that required under the FOIA and is not included in the FOIA fee schedule. The DoD Components may charge a fee of \$5.20 for each authentication.

(j) *Combatant commands.* (1) The Combatant Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department or the Chairman of the Joint Chiefs of Staff, for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3; it authorizes and requires the Combatant Commands to process FOIA requests in accordance with 32 CFR part 285 and this part. When requested, the Combatant Commands shall forward directly to the DFOIPO all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. The Combatant Commands will advise requesters that they have the right to appeal any adverse determinations to the DFOIPO.

(2) The Combatant Commands shall comply with all provisions of this part that apply to the DoD Components except the appointments of an appellate authority and a FOIA Public Liaison.

(k) *Security clearances and access for FOIA personnel.* Due to the nature of their duties and responsibilities, FOIA personnel need access to all records requested through their respective offices, regardless of the sensitivity or classification of the information. The DoD Components shall ensure FOIA personnel have the appropriate clearances and accesses to perform their duties.

(l) *Use of Contractors in FOIA Administration.* According to DoD Instruction 1100.22 and OMB Circular A-76, there are certain functions, known as inherently governmental activities that cannot be outsourced to a contractor. Since some of the functions of the FOIA Officer are inherently governmental, the DoD Components shall be careful not to outsource those FOIA functions that are inherently governmental. Primarily, activities which require the exercise of substantial discretion in applying government

authority or in making decisions for the government are inherently governmental. Inherently governmental FOIA functions include:

(1) Formulating and/or approving FOIA policies and procedures.

(2) Making final determinations regarding whether to treat incoming correspondence as a FOIA or Privacy Act request.

(3) Deciding any issues regarding the scope or interpretation of the request.

(4) Determining the appropriateness of claimed exemptions.

(5) Approving the approach taken in negotiations/discussions with the requester.

(6) Deciding administrative appeals.

(7) Conducting final review of all outgoing correspondence, memoranda, and release packages.

(8) Drafting court documents for filing in FOIA lawsuit in which the government's legal strategy and affirmative defense are determined.

(9) Conducting FOIA training if it involves issues of DoD policy.

(10) Making final determination of requests for expedited processing, fee category, and fee waivers.

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

(n) *Relationship between the FOIA and the Privacy Act.* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records, nor are all of them aware of appeal procedures. In some instances, requesters may cite either the FOIA or 5 U.S.C. 552a, commonly known as the Privacy Act, or they may cite neither the FOIA nor the Privacy Act but will imply one or both. For these reasons, the below guidelines are provided to ensure requesters receive the greatest access rights under both statutes. Privacy Act requests can be made only by requesters asking for information on themselves contained within a Privacy Act system of records. If the requested information is on another person, the Privacy Act does not apply. These requests shall be processed under the FOIA.

(1) Requesters who seek records about themselves contained in a Privacy Act system of records, and who cite or imply the FOIA and/or the Privacy Act, will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1), and if the records, or any portion thereof, are

exempt under the FOIA, the requester shall be so advised with the appropriate Privacy Act and FOIA exemption(s). Appeals shall be processed under both the FOIA and the Privacy Act.

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

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

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

(5) Requesters shall be advised in the final response letter which statutory authorities were used, inclusive of appeal rights.

(o) *Non-responsive information in responsive records.* The DoD Components shall interpret FOIA requests liberally when determining which records are responsive, and may release non-responsive information. Responsive documents may contain large amounts of non-responsive information, the review of which may cause delays in responding to the requester. In these cases, the DoD Components should identify the information which is non-responsive, redact it, and annotate it as non-responsive. The Components shall not apply these procedures to documents that have a relatively small percentage of non-responsive information. Additionally, redactions of non-responsive information shall not be made in sections smaller than the paragraph level. That is, a non-responsive sentence within an otherwise responsive paragraph shall not be redacted as non-responsive.

(p) *Honoring form or format requests.* The DoD Components shall provide the record in any form or format requested if the record is readily reproducible in that form or format in the Component's automated system. Every effort will be made to ensure the copy provided is in a reasonably usable form. The DoD Components shall make reasonable efforts to use available office equipment to digitally reproduce hard copy records onto digital media. If a Component must outsource to reproduce a record into the requested format, the readily-reproducible criterion is not met. In responding to requests for records, the

DoD Components shall make reasonable efforts to search for records in electronic form or format if maintained in automated systems, except when such efforts would significantly interfere with the operation of the automated systems. Such determinations shall be made on a case by case basis.

(q) *Annual report.* The Annual FOIA Report is mandated by 5 U.S.C. 552(e)(1) and completed on a fiscal year basis. Additionally, E.O. 13392 requires additional reporting in the annual report through fiscal year 2007. Due to the magnitude of the requested statistics and the need to ensure accuracy, the DoD Components shall track this data as requests are processed. This will also facilitate quick compilation of the statistics in completing the report.

(1) Each September, DFOIPO shall post on its Web site instructions to the Components concerning Component input for the annual report. The DoD Components shall forward their report to DFOIPO no later than November 30. In turn, the DA&M shall produce a consolidated report for submission to the Attorney General, and will place a copy of this report on the Internet for public access. The DoD Components shall use the current edition of DD Form 2564, "Annual Report: Freedom of Information Act."

(2) This reporting requirement is assigned Report Control Symbol DD-DA&M(A)1365, Freedom of Information Act Report to Congress.

### Subpart B—FOIA Reading Rooms

#### § 286.7 Requirements.

(a) *Reading room.* The FOIA requires records described in 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) be made available in an appropriate facility where the public may inspect or copy them. This facility is known as the "FOIA reading room". In addition to these records, the DoD Components may elect to place other records in their reading rooms. The DoD Components shall comply with this provision of the FOIA by providing a location accessible to the public for viewing these documents. In lieu of paper copies, the Component may digitize the documents and have them available on a personal computer in the reading room. The DoD Components may share reading room facilities if the public is not unduly inconvenienced, and also may establish decentralized reading rooms.

(b) *Electronic reading room.* The FOIA requires records described in 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) and created on or after November 1, 1996, be made available electronically. The DoD Components will meet the electronically

available requirement by posting the records in an electronic reading room on their FOIA Requester Service Center Web sites.

(1) These electronic reading rooms will have four designated sections, each one corresponding to one of the four sections described in paragraph (b) of this section. If a Component does not have relevant documents to post in any of the four sections of the FOIA Requester Service Center electronic reading room, that section of the reading room will contain the annotation that no documents apply.

(2) If a DoD Component has documents that meet the qualifications of 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) posted on a separate Web site, the Component's FOIA Requester Service Center is not required to post these same documents. Instead, the electronic reading room shall link to the other Web site. For example, if a Component maintains electronic copies of its issuances on a separate Web site, then the (a)(2)(C) section of the electronic reading room shall have a link to that site.

(3) *Exemptions.* All information that qualifies for withholding under one or more of the FOIA exemptions described in § 286.14 of this part shall be deleted from all 5 U.S.C. 552(a)(2) records that are made available to the public.

#### § 286.8 Record availability.

5 U.S.C. 552(a)(2)(A), (B), (C), and (D) records are:

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

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

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

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

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

(d) “(a)(2)(D)” records. Records released to the public pursuant to 5 U.S.C. 552(a)(3) 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. Two additional requests satisfy the criterion of subsequent requests. These records are referred to as “FOIA-processed (a)(2) records.”

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

(i) The previous experience of the DoD Component with similar records.

(ii) The particular circumstances of the records involved, including their nature and the type of information they contain.

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

(2) This provision of § 286.8 is intended for situations where public access in a timely manner is important. 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. The DoD Components may remove the (a)(2)(D) records from their Web site when the appropriate officials determine that access is no longer necessary according to the factors of § 286.8(d)(1).

(3) Should a requester submit a FOIA request for FOIA-processed “(a)(2)” records and insist that it be processed, the DoD Components shall process the request. However, the DoD Components have no obligation to process a FOIA request for 552(a)(2)(A), (B), and (C) records because these records are required to be made available to the public.

#### § 286.9 Indexes.

(a) “(a)(2)” records. (1) Each DoD Component shall maintain in each FOIA reading room an index of records described in § 286.7 that are issued, adopted, or promulgated, after July 4, 1967.

(2) Any “(a)(2)” record relied on, used, or cited as precedent by an agency against a party that is issued, promulgated, or adopted after July 4, 1967, must be indexed and either made available or published, or the individual must have actual and timely notice of the contents of such records. Such records issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available

upon request if not exempted under § 286.13.

(3) Each DoD Component shall promptly publish quarterly or more frequently, and distribute by sale or otherwise, copies of each index of “(a)(2)” records 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 § 286.24 of this part.

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

(5) Listing of electronically available “(a)(2)” documents in a Component’s electronic reading room satisfies this requirement.

(b) *Major information systems.* 5 U.S.C. 552(g)(1) and (2) require agencies to make publicly available an index of all major information systems and a description of major information and record locator systems. This requirement will be met for the entire Department of Defense by DFOIPO on its Web site.

#### § 286.10 “(a)(1)” records.

(a) Although (a)(1) records are not required to be made available in response to FOIA requests or in FOIA reading rooms, they shall be made available when feasible. Examples of “(a)(1)” records are descriptions of an agency’s central and field organization and, to the extent they affect the public, rules of procedures; descriptions of forms available; instructions as to the scope and contents of papers, reports, or examinations; and any amendments, revisions, or reports of the aforementioned records.

(b) In accordance with 5 U.S.C. 552(a)(1), each DoD Component shall disclose, through publication in the **Federal Register**, information describing its organization, functions, procedures, substantive rules, and statements of general policy. Any available index of DoD Component records published in the **Federal Register**, in addition to “(a)(1)” records, shall be made available to the public in DoD Component FOIA reading rooms and electronically.

### Subpart C—Exemptions

#### § 286.13 General provisions.

(a) Records that meet FOIA exemption criteria may be withheld from public disclosure and need not be published in the **Federal Register**, made available in a reading room, or provided in response to a FOIA request.

(b) Nine types of records may be withheld in whole or in part from public disclosure unless otherwise prescribed by law. In addition, a discretionary release of a record 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.

(c) 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.

(d) The DoD Components may have a situation where, in responding to a FOIA request, admitting the existence or nonexistence of a record would itself reveal information protected from release by one of the 9 Exemptions. In this situation, the DoD Component shall neither confirm nor deny the existence or nonexistence of the requested record. This is commonly called a “Glomar” response (U.S. Attorney General Memorandum), and the appropriate exemption must be cited in the response. This situation most commonly arises with Exemptions 1, 6, and 7; however, it could arise with other exemptions. 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. If not used consistently, the pattern of 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 exempt information.

#### § 286.14 Applying the FOIA exemptions.

The 9 types of exempted records and procedures for applying them are as follows:

(a) *Exemption 1.* Pursuant to 5 U.S.C. 552(b)(1), records properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by an existing Executive Order establishing classification criteria and implemented by regulation, such as DoD 5200.1–R,

are exempt from disclosure. If the responsive information 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 in this situation. If the information qualifies as Exemption 1 information, there is no discretion regarding its release. The requester will be advised as to which sections of the Executive Order apply in determining the information classified. In addition, Exemption 1 shall be invoked when the following situations are apparent:

(1) Individual items of unclassified information, when compiled, reveal additional associations or relationships that meet the standard for classification under an existing Executive Order and DoD 5200.1-R, and are not otherwise revealed in the individual items of information. This is known as the "mosaic," or "compilation" approach.

(2) The existence or nonexistence of a record would itself reveal classified information.

(b) *Exemption 2.* Pursuant to 5 U.S.C. 552(b)(2), records related solely to the internal personnel rules and practices of the Department of Defense or any of the DoD Components are exempt from disclosure. This exemption has two profiles, high "(b)(2)" and low "(b)(2)."

(1) *High "(b)(2)."* Records qualifying under high "(b)(2)" are those containing or constituting rules, regulations, orders, manuals, directives, instructions, and unclassified portions of security classification guides, the release of which would allow circumvention of these rules, regulations, and policies, thereby substantially hindering the effective performance of the mission of the Department of Defense. Examples include:

(i) Critical infrastructure information that reasonably could be expected to enable someone to succeed in causing the harms described in Homeland Security Presidential Directive 7.<sup>2</sup> This exempt information could include agency vulnerability assessments or evaluations of items of critical infrastructure that are internal to the Government.

(ii) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or examiners that must be protected in order for the DoD Component to fulfill a legal requirement.

(iii) Personnel and other administrative matters, such as

examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(iv) Computer software (Government-owned), the release of which would allow circumvention of a statute or of 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) *Low "(b)(2)."* Records qualifying under low "(b)(2)" 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 for which processing the request would constitute an administrative burden. Examples include rules for personnel use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings.

(c) *Exemption 3.* Pursuant to 5 U.S.C. 552(b)(3), records concerning matters that another statute specifically exempts from disclosure are exempt under this exemption. This exemption allows for the withholding of information because its release is prohibited by another statute only if one of two disjunctive requirements is met: The statute requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or the statute establishes particular criteria for withholding or refers to particular types of matters to be withheld. The DFOIPO maintains on its Web site a list of Exemption 3 statutes used within the Department of Defense.

(d) *Exemption 4.* Pursuant to 5 U.S.C. 552(b)(4), records containing trade secrets or commercial or financial information received by the DoD Component from a person or organization outside the Government are exempt from release. Information protected by this exemption must be trade secrets or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the submitter providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. If the information qualifies as Exemption 4 information, there is no discretion in its release.

(1) Examples of information protected by Exemption 4 include:

(i) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals.

(ii) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures.

(iii) Personal statements given in the course of inspections, investigations, or audits.

(iv) Financial data provided 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.

(v) 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.

(vi) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with Federal funds and in part at private expense. The contractor or subcontractor must retain legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320-2321 and DoD Federal Acquisition Regulation Supplement, Chapter 2 of title 48 Code of Federal Regulations, Subpart 227.71-227.72. Technical data developed exclusively with Federal funds may be withheld under Exemption 3, if it meets the criteria of 10 U.S.C. 130 and 48 CFR. See § 286.14.

(vii) Copyrighted information under 17 U.S.C. 106.

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

(2) When the Components receive FOIA requests for information that could be protected by this Exemption, submitter notice shall be provided. See § 286.2.

(e) *Exemption 5.* Pursuant to 5 U.S.C. 552(b)(5), inter-agency or intra-agency memorandums or letters containing information considered privileged in litigation are exempt from disclosure. The courts have construed "privileged in litigation" to mean information that is normally privileged in the civil discovery context (U.S. Department of

<sup>2</sup> Copies of Homeland Security Presidential Directive can be viewed at <http://www.whitehouse.gov/news/releases/2003/12/20031217-5.html>.

Justice (DOJ) Guide).<sup>3</sup> Merely being an internal record is an insufficient basis for withholding under this exemption. Records that are not available routinely through the discovery process in the course of litigation with the agency because they are privileged should not be withheld under this exemption. The most common discovery privileges have been incorporated into Exemption 5. These privileges are the deliberative process, the attorney work product, and the attorney client privilege.

(1) *Threshold.* (i) A document must meet the threshold requirement of being an inter- or intra-agency document before the proper privilege can be identified in any given case. Because in many instances the Government must seek expert advice from external entities (or consultants), the courts developed an "outside consultant" test which helps in determining whether such an external entity qualifies as an "agency" for the purposes of this exemption. If an entity meets the test, then documents it originates may be protected by Exemption 5.

(ii) The Components should be careful to ensure that the outside consultant is not an interested party in the agency decision-making process. In 2001, the U.S. Supreme Court ruled that the threshold of Exemption 5 does not encompass communications between an outside consultant (in this case, several Indian tribes) and the Government (the U.S. Department of the Interior (DOI)). In this case, the outside consultants offered an expert opinion on an issue under consideration by DOI. The Supreme Court found that the tribes had an interest in the outcome of the DOI final decision; therefore, the DOI communications did not meet the threshold of Exemption 5. (DOJ FOIA Post Web site)

(2) The privileges and types of information protected by Exemption 5 include:

(i) *Deliberative process privilege.* To withhold information under this privilege, the information must be both deliberative and predecisional, and part of the decision-making process. Deliberative means the information is internal advice, recommendations, or subjective evaluations, as contrasted with factual matters, that are reflected in records relied upon in the decision-making process of an agency, whether within or among agencies. Predecisional means the information was created before the decision maker reached a final decision. Factual information

cannot be withheld from a requester under Exemption 5 except under one of two circumstances. The first circumstance is when the author of a document selects specific facts out of a larger group of facts and this very act is deliberative in nature. This information qualifies for withholding because its release would reveal the author's internal thought processes. The second circumstance exists when the factual information is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations. A direction or order from a superior to a subordinate generally does not qualify as a deliberative process document if it constitutes policy guidance or a decision. However, correspondence from a superior to a subordinate may qualify if it constitutes a discussion of preliminary matters or a request for information or advice that would be relied upon in the decision-making process. An agency's final decision cannot be withheld under the privilege unless it becomes part of another, higher-level decision-making process (such as the agency budgetary process). The deliberative process privilege is temporal in nature because once the final agency decision is made the privilege cannot be used to withhold the final decision or any post-decisional documents related to the decision. Examples of deliberative process documents include:

(A) Staff papers, to include after-action reports, inspection reports, lessons learned, 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) Evaluations by DoD Component personnel of contractors and their products.

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

(E) Agency materials underlying the President's budget decisions as described in OMB Circular No. A-11. This includes planning, programming,

and budgetary information that is involved in the defense planning and resource allocation process and outyear discretionary data.

(ii) *Attorney client privilege.* This privilege protects confidential communications between an attorney and a client relating to legal matters for which the client has sought professional advice. The information the client supplies to the attorney and the advice the attorney gives to the client in return are protected under this privilege. Courts extend the "confidential" element of this privilege to lower echelon Government employees because it is recognized when the Government is seeking legal advice it usually involves more than one client and one attorney. This privilege cannot be used if confidentiality is compromised.

(iii) *Attorney work product privilege.* This privilege protects documents prepared by an attorney or at an attorney's direction in reasonable anticipation of litigation. Unlike the deliberative process privilege, under the attorney work product privilege all of the information can be withheld, including the facts. Similarly, this privilege has no time limit. This privilege can be used after the litigation is complete.

(iv) *Government trade secret privilege.* This privilege protects trade secrets or other confidential research, development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

(v) *Aircraft accident witness statements privilege.* This privilege protects witness statements generated during military aircraft accident investigations.

(vi) *Presidential communications privilege.* This privilege protects communications among the President and his advisors created within an agency to assist the President in the exercise of his nondelegable constitutional duties.

(f) *Exemption 6.* Pursuant to 5 U.S.C. 552(b)(6), information in personnel and medical files, as well as similar in other files, that if disclosed to a requester other than the person whom the information is about, would result in a clearly unwarranted invasion of personal privacy is exempt from disclosure. If the information qualifies as Exemption 6 information, there is no discretion in its release.

(1) When applying this exemption, an agency must balance the public interest in disclosure and the individual's privacy interest. When there is no public interest in the requested

<sup>3</sup>Copies of U.S. Department of Justice (DOJ) Guide can be viewed at <http://www.usdoj.gov/oip/>

information, the information can be withheld even if there is only a negligible privacy interest. The public interest to be considered when applying this exemption is whether the information sheds light on the operations or activities of the Federal government. The requester has the burden to show there is a public interest in disclosure.

(2) A privacy interest may exist in personal information even though the information has been disclosed at some place and time. This is known as the concept of practical obscurity. For example, information that was once publicly known (a court-martial trial 40 years ago) may no longer be in the public's eye and has faded from memory. In this case, the privacy interest in this type of situation may have increased over time, the public interest may have decreased over time, and therefore an agency can now withhold the once public information.

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

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

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

(4) On November 9, 2001, subsequent to the President declaring a national emergency, the DA&M issued a memorandum authorizing the DoD Components to withhold lists of personally identifying information of DoD personnel, to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, and military dependents. Additionally, personally identifying information of DoD military and civilian personnel who are assigned to overseas, sensitive, or routinely deployable, units is exempt from release under Exemption 3, with section 130b of 10 U.S.C. as the withholding statute. Names and duty addresses (postal and/or e-mail) published in telephone directories, organizational charts, rosters, and similar materials for personnel are considered "lists of personally identifying information;" and therefore qualify for withholding under Exemption 6 (and Exemption 3 if applicable).

(5) Home addresses, telephone numbers, and private e-mail addresses are normally protected by this exemption. This includes lists of home addressees and military quarters' addressees that do not include the occupants' names.

(6) This exemption shall not be used in an attempt to protect the privacy of a deceased person. It may be used to protect the privacy of the deceased person's surviving family members if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, the DoD Components shall balance the surviving family members' privacy interests and the public's interest to determine its releasability.

(7) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal information in which a privacy interest exists, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, the DoD Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is known as a "Glomar response", and Exemption 6 must be cited in the response. Refusal to confirm or deny should not be used when:

(i) The person whose personal privacy is in jeopardy has provided the requester with a privacy waiver.

(ii) The person seeking access to an agency record initiated or directly participated in an investigation that leads to the creation of that record.

(iii) The person whose personal privacy is in jeopardy is deceased, the agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family.

(g) *Exemption 7.* Pursuant to 5 U.S.C. 552(b)(7), records or information compiled for law enforcement purposes are exempt from disclosure upon the identification of one of the six harms delineated in the 6 subparts of Exemption 7. Law enforcement purposes include civil, criminal, military, regulatory, and administrative 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) *Conditions under which exemption 7 applies.* Exemption 7 applies only when production of such law enforcement records or information:

(i) *Exemption 7A.* This applies when the disclosure of law enforcement records could reasonably be expected to

interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A)).

(ii) *Exemption 7B.* This applies when the disclosure of law enforcement records would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B)).

(iii) *Exemption 7C.* This applies when the disclosure of law enforcement records could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C)).

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

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

(vi) *Exemption 7F.* This applies when the disclosure of law enforcement records could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) *Examples of Exemption 7 applications.* (i) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related Government litigation or adjudicative proceedings may be exempt from disclosure pursuant to Exemptions 7A, 7C, and/or 7D.

(ii) The identity of firms or individuals being investigated for alleged irregularities involving contracting with the Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States may be exempt from disclosure pursuant to Exemptions 7A and/or 7C.

(iii) Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or a lawful national security intelligence

investigation, may be exempt from disclosure pursuant to Exemptions 7A, 7C and/or 7D. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

(iv) Emergency action plans, guidelines for response to terrorist attacks, analyses of security procedures, and other sensitive information that could prove deadly if obtained by those seeking to do harm to the public on a large scale may be exempt from disclosure pursuant to Exemptions 7E and/or 7F. The Components should also assert Exemption 2 in conjunction with Exemption 7E to withhold this type of law enforcement information.

(3) *Exclusions.* The FOIA contains 3 special protection provisions referred to as record "exclusions." Of these exclusions, only 2 are used by the Department of Defense. These exclusions expressly authorize Department of Defense law enforcement agencies to treat especially sensitive records under certain specified circumstances as not subject to the requirements of the FOIA. The DoD Component considering invoking one of these exclusions shall first consult with legal counsel and with DFOIPO. In turn, DFOIPO will consult with the Office of Information and Privacy, Department of Justice. If the records are determined to be excluded, the response to the requester will state that no records were found.

(i) *Exclusion 1.* The DoD Components may treat records requested as not subject to the FOIA when the following circumstance applies:

(A) The request involves access to records or information compiled for law enforcement purposes.

(B) The investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of the pending investigation or proceeding.

(C) The disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

(ii) *Exclusion 2.* The DoD Components may treat records requested as not subject to the FOIA when a third party uses an informant's name or personal identifier to request informant records maintained by a criminal law enforcement organization within the DoD Component, and the informant's status as an informant has not been officially confirmed.

(h) *Exemption 8.* Pursuant to 5 U.S.C. 552(b)(8) of Reference (b), records

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 are exempt from disclosure.

(i) *Exemption 9.* Pursuant to 5 U.S.C. 552(b)(9), records containing geological and geophysical information and data (including maps) concerning wells are exempt from disclosure.

#### Subpart D—FOIA Request Processing

##### § 286.17 General provisions.

(a) *Release of agency records.* 5 U.S.C. 552(a) mandates release of agency records in response to a written request, unless:

(1) The record is subject to one or more FOIA exemptions.

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

(3) The requester has failed to comply with procedural requirements, including failure to comply with a written agreement to pay any required fee incurred in processing previous requests.

(b) *Requests from private parties.* (1) The provisions of the FOIA are reserved for members of the public as opposed to U.S. Federal agencies seeking official information. Requests may be submitted in person, by mail, facsimile, or electronically. Commercial delivery is acceptable; however, due to security concerns, the DoD Components may refuse to accept commercial delivery of requests.

(2) Individuals seeking DoD information should address their FOIA requests to one of the FOIA Requester Service Center addresses listed in Appendix B to this part. If a requester is not sure where to send a FOIA for DoD information, the request can be sent to the OSD/Joint Staff FOIA Requester Service Center.

(3) The subject of a FOIA request may involve documents located at multiple Federal Government agencies. When this is the case, the DoD Components should try to determine whether the requester sent the request to the other relevant agencies. The requester should be contacted by the Component if the request does not mention any other agencies to which the request was sent.

(4) When personally-identifying information in a record is requested by the subject of the record or the subject's representative and the information is contained within a Privacy Act system of records, it will be processed under both the FOIA and the Privacy Act. The

Components shall comply with the provisions of DoD 5400.11-R to confirm the identity of the requester.

(c) *Requests from government officials, Congress, and foreign governments.* (1) State or local Government officials, foreign officials requesting on behalf of their government, foreign individuals, or foreign organizations requesting DoD Component records under the FOIA shall be considered the same as any other FOIA requester. The provisions of the FOIA do not apply to requests from a non-U.S. government entity or representative for records of the DoD Component that is an element of the intelligence community as defined in 50 U.S.C. 401a(4).

(2) Requests from members of Congress who are not seeking records on behalf of a Congressional committee or subcommittee, or on behalf of the House of Representatives or the Senate sitting as a whole, shall be processed as FOIA requests.

(3) Requests submitted by members of Congress for Congressional business that are received by the DoD Component's FOIA office shall be referred to the appropriate office that handles legislative inquiries for processing under DoD Directive 5400.4 or supplementing component directives. Such requests will not be processed under the FOIA.

(4) Requests from officials of foreign governments that do not invoke the FOIA shall be referred to the appropriate office authorized to disclose official DoD information to foreign governments, and the requester shall be so notified.

(5) Because it is a Component of the Department of Defense, requests from *Stars and Stripes* should not be processed under the FOIA. A Federal Agency cannot make a FOIA request.

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

(i) To other Federal agencies, both executive and administrative, as determined by the Head of the DoD Component or designee.

(ii) In response to a State or Federal court order. The DoD Components shall release this information along with a description of the restrictions on its release to the public.

(2) The DoD Components shall inform officials receiving records under the provisions of this paragraph that those records are exempt from public release

under the FOIA. The DoD Components also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1-R. Information contained in a Privacy Act system of records is subject to DoD 5400.11-R.

#### § 286.18 Processing procedures.

(a) *Receipt and control.* When a request for records is received, DoD FOIA Offices shall open a file in a formal control system designed to ensure accountability and compliance with the FOIA. The control system should include the data elements needed to compile the statistics required in the annual FOIA report or other reports required by another authority. Each request shall be assigned a unique tracking number.

(b) *Multi-track processing.* (1) When a FOIA Office has a significant number of pending requests, the requests shall be processed in a multi-track system.

(2) DoD FOIA Offices shall establish a minimum of three processing tracks, all based on a first-in/first-out concept and with requests ranked by date of receipt. One track shall be for simple requests, one for complex requests, and one for expedited requests. Each FOIA Office shall determine whether a request is simple or complex. Requesters whose requests are categorized as "complex" shall be given an opportunity to limit in writing the scope of the request in order to qualify for the simple track.

(c) *Expedited processing.* Two circumstances merit expedited processing according to the procedures that follow. These same procedures apply to requests for expedited processing of administrative appeals.

(1) *Compelling need.* Expedited processing shall be granted to a requester upon a specific request for such and demonstration of a compelling need for the information. The DoD Component shall respond to the requester with the determination whether to grant or deny expedited processing within 10 calendar days after receipt of the request. Once the DoD Component decides to grant expedited processing, the request shall be processed as soon as practicable. Actions by the DoD Components to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review if the requester seeks relief in United States District Court.

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

information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.

(A) "An individual primarily engaged in disseminating information" is a person whose primary activity involves publishing or otherwise disseminating information to the public. To meet this criterion, an organization or person must establish that information dissemination is their principal professional activity or occupation, and not an incidental or secondary activity.

(B) "Urgently needed" means the information has a particular value that will be lost if not disseminated quickly, such as a breaking story of general public interest. Information of historical interest only, or information sought for litigation or commercial activities, would not qualify as "urgently needed," nor would a news media publication or broadcast deadline unrelated to the news-breaking nature of the information. The burden of demonstrating that the requested information has a particular value that will be lost if not disseminated quickly is on the requester.

(ii) A "demonstration of compelling need" means a statement certified to be true and correct to the best of the requester's knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(2) *Imminent loss of due process rights.* Expedited processing shall also be granted to a requester if loss of substantial due process rights is imminent. A demonstration of imminent loss of substantial due process rights by the requester shall include a description of the due process rights that would be lost and a statement certified to be true and correct to the best of the requester's knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. If the DoD Component decides to expedite the request for this reason, the request may be processed in the expedited track behind those requests qualifying for compelling need.

(d) *Consultation and referrals.* The DoD Component shall take appropriate action as described in § 286.4(h)(2) when the record is not under its release authority because it requires consultation with another DoD Component or non-DoD agency, because the record was not originated by the Component, or because the record is not in the Component's system of records

but is likely to be held by another DoD Component or non-DoD agency. The following actions are necessary when the record was originated by a non-Government source:

(1) When a request is received for a record that arguably contains information exempt from release under Exemption 4, the provisions of E.O. 12600 apply.

(i) When a FOIA request is received for records that may contain confidential commercial information (e.g., government contracts), the submitter shall be notified promptly of that request and afforded reasonable time (e.g., 20 calendar days) to present any objections concerning release. This practice of giving submitter notice is required by E.O. 12600 for those FOIA requests for data not deemed clearly exempt from disclosure under Exemption 4. The submitter notice letter should include, as an attachment, a copy of the requested information. Any objections to release provided by the submitter shall be evaluated. The final decision to disclose information claimed to be exempt under Exemption 4 shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised or when the objections submitted lack specificity, the DoD Component may seek additional information from the submitter and afford the submitter a reasonable opportunity to present arguments on the legal and substantive issues involved prior to making an agency determination. If the Component and submitter cannot come to agreement as to what information is exempt from release under Exemption 4, the Component shall provide the submitter a date on which the information in question will be released to the FOIA requester. This date should provide the submitter sufficient time to block the release of the information by obtaining an injunction in Federal Court (which is known as a reverse FOIA lawsuit), if the submitter so chooses. If no response is forthcoming the component shall release the information on the date provided to the submitted.

(ii) The requester shall be notified when:

(A) The Component notifies the submitter of the FOIA request and asks for comments.

(B) The Component advises the submitter that the requested information will be released over the submitter's objections.

(iii) The submitter shall be notified immediately whenever the requester

brings suit seeking to compel disclosure of the submitter's information.

(iv) If the submitted information is a proposal provided in response to a solicitation for a competitive proposal, and the proposal is in DoD possession and control and meets the requirements of 10 U.S.C. 2305(g), the proposal shall not be disclosed, and no submitter notification and subsequent analysis is required. The proposal shall be withheld from public disclosure pursuant to Reference (m) and Exemption 3. This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between the DoD Component and the offeror that submitted the proposal. In such situations, normal submitter notice and analysis shall be conducted in accordance with § 286.18 (l) except sealed bids that are opened and read to the public. The term "proposal" means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal. The term "proposal" does not include an offeror's name, total price, or unit prices when set forth in a record other than the proposal itself.

(v) If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and it is absolutely clear that the record or information would customarily not be released to the public the submitter need not be notified. The Component shall withhold this information under Exemption 4.

(2) The coordination provisions of this paragraph apply to the release of responsive information received from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, foreign governments, or international organizations (e.g., the International Committee of the Red Cross).

(i) Coordination with foreign governments under the provisions of this paragraph may be made through the Department of State, the specific foreign embassy, or any other coordination channel the Component has established. OFOI has established a coordination channel with the United Kingdom Ministry of Defence (MOD). If the DoD Component has MOD-originated information within its files, it shall be forwarded to OFOI, which shall coordinate with the MOD for release. The MOD release recommendation will

be forwarded by OFOI back to the Component for direct response to the requester. Coordination with most international organizations may be made directly with those organizations. However, for NORAD coordination the Components shall refer the documents to the FOIA Office at the United States Northern Command, which will consult with NORAD.

(ii) If an international organization or foreign government asks the Department of Defense to withhold classified information originated by the multi-national organization or foreign government, it will be withheld under the provisions of Exemption 1.

(iii) If the DoD Component is asked to withhold sensitive unclassified information originated by the multi-national organization or foreign government, then the Component will withhold it under the provisions of Exemption 3, and shall reference the relevant statute as 10 U.S.C. 130c. To qualify for withholding under this statute, the Component IDA must make the three following determinations concerning the requested foreign information:

(A) The information was provided by or produced in cooperation with a foreign government or international organization.

(B) The information is withheld from public disclosure by the foreign government or international organization (the foreign government or international organization should make this representation in writing).

(C) Any of the following three conditions are met:

(1) The foreign government or international organization requests in writing that the information be withheld.

(2) The foreign government or international organization provides the information to the U.S. Government on the condition that it not be released to the public.

(3) The requested information is specified in agency regulations as being information the release of which would have an adverse effect on the ability of the Government to obtain the same or similar information in the future.

(D) To qualify for withholding, the information must meet the following limitations:

(1) If the information came into the possession or under the control of the U.S. Government prior to October 30, 2000, and more than 25 years prior to receipt of the FOIA request, the DoD Component shall notify the foreign government or international organization of the request for disclosure. The information then

qualifies for withholding only if the foreign government or international organization requests in writing that the information not be disclosed for a specific period of time. This date can be extended with a later request by the foreign government or international organization.

(2) If the information came into the possession or under the control of the U.S. Government after October 30, 2000, the information cannot be withheld after the release date specified by the foreign government or international organization. In the case where one or more foreign governments or international organizations provided the information, the latest date specified by any of them will be used. If no release date was specified, and the information came into the possession of the DoD Component more than 10 years prior to receipt of the FOIA request, the procedures set forth in § 286.18(d)(1)(i) apply.

#### **§ 286.19 Initial determinations.**

(a) IDA. (1) The determination whether to withhold information responsive to a FOIA request shall be made by any suitable official designated in writing as an IDA by the DoD Component. In designating IDAs, the DoD Component shall balance the goals of centralization of authority to promote uniform decisions, and decentralization to facilitate responding to each request within the time limitations of the FOIA. The IDA shall review all withheld information to determine whether it meets the criteria for withholding under one or more of the FOIA exemptions. This determination may be made upon the recommendation of a review official.

(2) IDAs and review officials shall not use the existence of classification markings, distribution limiting statements, such as "For Official Use Only" markings, as justification to withhold information. Information so marked must be reviewed after the receipt of a FOIA request to determine if the markings still apply.

(3) To deny, in whole or in part, a requested record that is in the possession and control of the DoD Component, the IDA must determine that one or more of the FOIA exemptions justify withholding all or part of the record.

(4) The IDA should consult with public affairs officers (PAOs) to become familiar with subject matter considered to be newsworthy at the local or national level, and advise PAOs of all requests from news media representatives. In addition, the IDA should inform PAOs in advance when they intend to withhold or partially

withhold a record if it appears the withholding action may be a media issue.

(b) *Reasons for not releasing a record.* The following are reasons for not complying with a request for a record pursuant to 5 U.S.C. 552(a)(3). These reasons are data items that should be maintained in the control system database for ease of retrieval and reporting in the Annual FOIA Report.

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

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

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

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

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

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

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

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

(9) *Other (Specify).* Any other reason a requester does not comply with published rules other than those outlined in paragraph (b) of this section.

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

(c) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester. Unless disclosing the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas. In no case shall the deleted areas be left "white" without the use of brackets to show the bounds

of deleted information. In the case of electronic deletion or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the exemption under which the deletion was made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information.

(d) *Response to requester.* (1) When a decision is made to release a record, a copy should be made available promptly to the requester.

(2) When a request for a record is denied in whole or in part, the official designated to respond shall provide the requester a written explanation of the substantive basis for denial including specific citation of the statutory exemption applied under provisions of this part (e.g., 5 U.S.C. 552 (b)(1)) and advise the requester of their appeal rights, including the address to which any appeal should be mailed. The basis for the determination shall be in sufficient detail to permit the requester to make a decision concerning an appeal. If the IDA does not sign the response letter, the name and duty title of the IDA will be specified in the letter. The official also shall advise the requester that any appeal to the adverse determination must be postmarked no later than 60 days after the date of the initial denial letter.

(3) The DoD Component shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation.

(4) When a denial is based on a statute qualifying as a FOIA Exemption 3 statute, the DoD Components shall state the particular statute relied upon to deny the information.

(5) When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the final response letter. The DoD Components also shall provide the requester with a complete cost breakdown (e.g., 15 pages of office reproduction at \$.15 per page; three hours of professional level search at \$53.00 per hour, etc.) in the response letter.

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

compilation, and management evaluation. Records denied for any of the reasons contained in § 286.14 (for which no appeal was filed) shall be maintained for a period of 6 years to meet the statute of limitations requirement.

(f) *Special mail services.* The DoD Components are authorized to use registered mail, certified mail, certificates of mailing, and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. The requester shall be notified that they are responsible for the full costs of special services. A commercial delivery service may be used provided the requester asks for such service to receive the requested information in a timelier manner and the requester pays directly for the service.

(g) *Receipt account.* The Treasurer of the United States has established an account for FOIA receipts. This account, receipt account 3210, shall be used for depositing all FOIA receipts, except receipts for "Working Capital" and non appropriated funded activities. Components are reminded that the account number must be preceded by the appropriate disbursing office two-digit prefix. "Working Capital" and non-appropriated funded activity FOIA receipts shall be deposited to the applicable fund. All money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer.

#### § 286.20 Appeals

(a) *General.* If the DoD Component IDA denies a record for any of the reasons contained in § 286.14 the DoD Component shall advise the requester that the decision may be appealed in writing to a designated appellate authority. The Component will further advise the requester that the appeal should be accompanied by a copy of the denial letter. In addition to appeal rights associated with the denial of information, the following are adverse determinations and are subject to appeal:

(1) The disapproval of a fee category claim by a requester, the disapproval of a request for waiver or reduction of fees, and a dispute regarding fee estimates.

(2) A determination not to grant expedited processing.

(3) Not providing a response determination to a FOIA request within the statutory time limits.

(4) Any determination found to be adverse in nature by the requester.

(b) *FOIA/Privacy Act appeals.* When denials have been made under the provisions of the Privacy Act and the

FOIA and the denied information is contained in a Privacy Act system of records, appeals shall be processed under both the Privacy Act and the FOIA. If the denied information is not maintained in a Privacy Act system of records, the appeal shall be processed under the FOIA.

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

(d) *Time limits.* (1) If the requester submits an appeal after the conclusion of the 60-day time established by the date of the initial denial letter, the appeal may be considered closed. However, the Components are encouraged to make exceptions on a case by case basis. In cases where the requester is provided several incremental determinations for a single request, the time period for the appeal shall not begin until the date of the final response. Denied records shall be retained for a period of 6 years after final adjudication to meet the statute of limitations requirement.

(2) Final determinations on appeals normally shall be made within 20 working days after receipt. When the DoD Component has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multi-track system, based at a minimum, on the three processing tracks established for initial requests according to § 286.18(b). The provisions of § 286.18(b) also apply to appeals of initial determinations, to include establishing additional processing tracks as needed.

(e) *Delay in responding to an appeal.* If a determination cannot be made and the requester notified within 20 working days, the appellate authority or the appellate authority's representative shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in § 286.4(b)(2)(ii)(C), they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response.

(f) *Response to the requester.* (1) When an appellate authority makes a final determination to release all or a portion of records withheld by an IDA,

a written response and a copy of the records released should be forwarded promptly to the requester. If the requester owes outstanding fees from the initial request, and these fees were not appealed, the final appellate response will not be made until the fees are paid.

(2) Final denial of an appeal must be made in writing and signed by the appellate authority. The response shall include the following:

(i) The basis for the denial, to include an explanation of the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and of other appeal matters set forth in § 286.20(a).

(ii) A determination that the record meets the cited criteria and rationale of the governing Executive Order if the final refusal is based in whole or in part on Exemption 1.

(iii) A statement that the information being denied does not contain meaningful portions that are reasonably segregable in the case of appeals for total denial of records.

(iv) The requester's right to judicial review.

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

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

#### § 286.21 Judicial actions.

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

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

(b) *Venue.* The requester may bring suit in the U.S. District Court in the district in which the requester resides,

the district where the requester's place of business is located, the district in which the record is located, or the District of Columbia.

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

(d) *Actions by the court.* (1) The U.S. District Court for the District of Columbia has ruled that, when the DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Component additional time to complete its review of the records (Department of Justice FOIA Update Web site). The Component must request that the Court retain jurisdiction by seeking an "Open America" stay (Department of Justice FOIA Update Web site).

(2) If the Court determines that the plaintiff substantially prevails, it may require the United States to pay reasonable attorney fees and other litigation costs.

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

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

(e) *Non-United States Government source information (business information).* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a submitter or records based on information obtained from a submitter. The submitter shall be notified promptly of the court action pursuant to E.O. 12600. When the submitter advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the

complainant as long as permitted by the court, or until a decision is rendered in the court action of the source, whichever is sooner.

(f) *FOIA litigation.* Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Whenever a complaint is filed in a U.S. District Court under the FOIA, the DoD Component named in the complaint shall forward a copy of the complaint to DFOIPO with an information copy to the DoD Office of the General Counsel, ATTN: Office of Legal Counsel.

### Subpart E—Fee Schedule

#### § 286.24 General provisions.

(a) *Application.* (1) The fees described in this subpart apply to requests submitted pursuant to 5 U.S.C. 551, 552, and 552(a) and conform to the OMB Uniform Freedom of Information Act Fee Schedule and Guidelines S. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents.

(2) The fees are neither intended to imply they must be charged in connection with providing information to the public pursuant to the FOIA request nor are they meant to substitute for any other charges established by the Department of Defense, such as DoD 7000.14–R, to recoup direct costs of authorized services provided by DoD Components that are not FOIA related.

(3) Nothing in this subpart shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records, such as the GPO or the National Technical Information Service. The Components should ensure documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs and inform requesters of the steps necessary to obtain records from those sources.

(b) *Fee restrictions.* (1) No fees may be charged by any DoD Component if the total assessable fees are less than or equal \$25.00. For requesters in the educational institution, noncommercial scientific institution, or news media categories, the Components shall provide all search time and the first 100 pages of duplication without charge. For requesters in the “all other” category, the Components shall provide the first 2 hours of search time, and the first 100 pages of duplication without charge. The Components shall provide all review time without charge except for requesters in the commercial category.

Time expended shall be computed to the nearest 15 minutes.

(2) Requesters receiving the first 2 hours of search and the first 100 pages of duplication without charge are entitled to such only once per request. Therefore, if the Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another Federal agency for action on their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(3) For the purposes of these restrictions, the word “pages” refers to paper copies of a standard size, which will normally be “8½ x 11” or “11 x 14”. Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example.

(4) In the case of computer searches, the first 2 free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$40.00 (2 hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search. See § 286.25(b)(1) for further details regarding fees for computer searches.

(c) *Fee waivers.* (1) When assessable costs for a FOIA request total \$25.00 or less, fees shall be waived automatically for all requesters, regardless of category.

(2) Documents shall be furnished without charge, or at a reduced charge, when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester. Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis and after a search for responsive records is completed, consistent with the following factors:

(i) Disclosure of the information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government.” The factors identified must be met to some

degree to warrant waiving or reducing assessable fees in the “public interest.”

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

(B) *The informative value of the information to be disclosed.* This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of Defense. While the subject of a request may contain information that concerns the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of DoD operations or activities must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative or nearly identical information already existing in the

public domain may not add meaningful new information concerning the operations and activities of the Department of Defense.

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

(D) *The significance of the contribution to public understanding.* In applying this factor, the Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previously unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public? A decision regarding significance requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant public understanding of the issue. The Components shall not make value judgments as to whether the information is important enough to be made public.

(ii) Disclosure of the information "is not primarily in the commercial interest of the requester." Determining "commercial interest" requires consideration of the following issues:

(A) *The existence and magnitude of a commercial interest.* If the request is determined to be of a commercial interest, the Components should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial

interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether the requester is of a commercial nature, the Components may draw inference from the requester's identity and circumstances of the request. The Components are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

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

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

(4) In addition, the following additional circumstances describe

situations where waivers or reductions of fees are most likely to be warranted:

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

(ii) A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. \$25.00–\$50.00).

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

(2) Fees are assessed based on the category determined to be appropriate for the requester's status and the FOIA request should contain a willingness to pay fees appropriate to that category. The categories are identified below:

(i) *Commercial.* Requesters should indicate a willingness to pay all search, review, and duplication costs when the records are requested for commercial use.

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

(B) When the Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Accordingly, commercial requesters are not entitled to 2 hours of free search time and 100 free pages of reproduction.

(C) Commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive determining criterion, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial

use. Such situations must be addressed on a case-by-case basis.

(ii) *Educational, non-commercial scientific institution, or news media.*

Requesters should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(A) *Educational institution.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. The term "educational institution" refers to a pre-school, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the fee waiver criteria are met.

(B) *Non-commercial scientific institution.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as defined in § 286.24(d)(2)(i)(A), and is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. Fees shall be waived or reduced in the public interest if the fee waiver criteria are met.

(C) *Representatives of the news media.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages). Fees shall be waived or reduced if the fee waiver criteria are met.

(1) The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of

news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services and the Internet), such alternative media might be included in this category.

(2) To be eligible for inclusion in this category, a requester must meet the criteria in the preceding paragraph, and his or her request must not be made for commercial use. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the Components may also look to the past publication record of a requester in making this determination. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

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

(D) *All others.* Requesters who do not fit into any of the categories described above should indicate a willingness to pay assessable search and duplication costs if more than 2 hours of search effort or 100 pages of records are desired. Fees shall be waived or reduced if the fee waiver criteria are met.

(E) The fee provisions of E.O. 12600 apply when requesters ask for information about themselves under the Privacy Act of 1974. In these cases, the only assessable processing fees are for duplication. Components are reminded in these cases requesters may also be eligible for a waiver or reduction of fees if the fee waiver criteria are met.

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

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

(A) Notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a

reasonable period of time (e.g., 30 calendar days), the Component shall render a final category determination and notify the requester of such determination, to include normal administrative appeal rights of the determination.

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

(ii) If these conditions are not met the request need not be processed and the requester shall be so informed.

(iii) The Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. If Components' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement. Even though Components do not need to advise requesters of their appeal rights when provided fee estimates, such estimates may be appealed and litigated by the requester.

(iv) No DoD Component may require advance payment of any fee; i.e., payment before work starts or continued on a request, unless either of the following conditions are met:

(A) The requester has a history of failing to pay fees in a timely fashion (within 30 days of the billing date) on a previous request

(B) The Component determines that the fee will exceed \$250.00.

(iv) Where the Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment. The Component may ask for an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment or a history of late payments. If the Component learns that a requester has an outstanding overdue debt with any other DoD Component or other Federal agency, the Component may administratively close all of the requester's requests after giving notice to the requester.

(v) Where a requester has previously failed to pay a fee charged in a timely fashion to any Federal agency, the Component may require the requester to pay the full amount owed, plus any applicable interest, before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 32 U.S.C. 3717, and confirmed with respective Finance and Accounting Offices.

(vi) When the Components dispute a requester's fee category assertion, the administrative time limits of the FOIA will begin only after the Component has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate).

(vii) The Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request. The Components may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure.

(viii) If the Component estimates processing charges are likely to exceed what the requester is willing to pay, it shall notify the requester of the estimate of fees. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(e) *Aggregating requests.* Except requests that are for a commercial use, the Component may not charge for the first 2 hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or

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

(f) *Effect of the "Debt Collection Act of 1982" (Pub. L. 97-365).* The Debt Collection Act of 1982 provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in DoD 7000.14-R, Volume 11A. Components should verify

the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Components may submit the debt to respective Finance and Accounting Offices for collection pursuant to the Debt Collection Act of 1982.

(g) *Computation of fees.* The fee schedule in this subchapter shall be used to compute the assessable fees based upon the time actually spent on the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized. The appropriate fee category of the requester shall be determined before computing fees. All time computations will be to the nearest 15 minutes or quarter hour.

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

**§ 286.25 Collection of fees and fee rates.**

(a) *Collection of fees.* Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs.

(b) *Fees for search time.* (1) *Manual search fees.* This table shows FOIA hourly processing fees.

| Type               | Grade  | Hourly rate (\$) |
|--------------------|--|------------------|
| Clerical .....     | E9/GS8 and below/NSPS pay band 1 .....             | 27.00            |
| Professional ..... | O1-O6/W01-05/GS9-GS15/NSPS pay bands 2 and 3 ..... | 53.00            |
| Executive .....    | O7/GS16/SES and above .....                        | 108.00           |
| Contractor .....   | .....  | 53.00            |

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

(i) *Human time.* Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. This includes the time spent to create a program to extract specific fields out of a database. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms "programmer/

operator" shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g., technician, administrative support, operator, programmer, database administrator, or action officer).

(ii) *Machine time.* Machine time involves only direct costs of the Central Processing Unit (CPU), input/output devices, and memory capacity used in the actual computer configuration. Only

this CPU rate shall be charged. No other machine related costs shall be charged. In situations where the capability does not exist to calculate CPU time, no machine costs can be passed on to the requester. When CPU calculations are not available, only human time costs shall be assessed to requesters. Should the DoD Components lease computers, the services charged by the lessor shall not be passed to the requester under the FOIA.

(c) *Duplication.* This table shows duplication costs.

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

(d) *Review Fees.* See paragraph (b)(1) of this section.

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

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

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

(1) Certifying that records are true copies.

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

#### **§ 286.26 Fees for technical data.**

(a) Technical data is recorded information related to experimental, developmental, or engineering works that can be used to define an engineering or manufacturing process or to design, procure, produce, support, maintain, operate, repair, or overhaul material. The data may be graphic or pictorial delineations in media, such as drawings or photographs, text in specification or related performance or design type documents, or computer printouts. Examples of tech data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information and computer software documentation.

(b) Unless technical data qualifies for withholding from public release under one or more of the FOIA exemptions, it shall be released to the requester after

all reasonable costs attributed to search, duplication, and review are paid as authorized by 10 U.S.C. 2328. All reasonable costs are the full costs to the Federal Government for rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographic area. In the absence of a known market value, charges will be based on recovery of all direct and indirect costs to conduct the search, review, and duplicate the documents. This cost is to be differentiated from the direct costs allowable under § 286.24 for other types of information released under the FOIA.

(1) The DoD Components shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request.

(2) The DoD Components that process FOIA requests for technical data and are eligible to recoup the direct costs for providing the records shall establish an appropriate fee schedule taking into account the prevailing commercial rates.

(c) *Waiver.* The DoD Components shall waive the payment of costs required in § 286.24(a) which are greater than the costs that would be required for release of this same information under § 186.25(a) of this subchapter if:

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

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

(3) The Component determines in accordance with § 286.24(c)(4)(i)(D) that

such a waiver is in the interest of the United States.

#### **§ 286.27 Fees for research data.**

Research data described in § 286.2, definition "Agency record" obtained by the DoD Component from a grant recipient solely in response to a request submitted by a FOIA requester, may charge that requester a reasonable fee equaling the full incremental cost of obtaining the research data. The fee should reflect costs incurred by the Component, grant recipient, and sub-recipients. This fee is in addition to any fees the Component may assess under the FOIA.

#### **Subpart F—Education and Training**

##### **§ 286.30 Purpose and responsibility.**

(a) *Purpose.* The purpose of the Component FOIA educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD FOIA Program. Fulfilling this purpose will improve customer service with members of the public and improve the public trust in the Department of Defense.

(b) *Responsibility.* Each DoD Component shall establish educational and training programs on the provisions and requirements of this part. These should be targeted toward developing in all Component personnel a general understanding and appreciation of the DoD FOIA Program. The training programs should be focused on providing personnel involved in the day-to-day processing of FOIA requests with a thorough understanding of the procedures outlined in this part.

(c) *Scope and principles.* Each DoD Component shall design its FOIA educational and training programs to fit the particular requirements of its personnel, dependent upon their degree of involvement in implementing this part. These programs should be designed for two target audiences; those personnel who are involved in the day-to-day processing of FOIA requests, and those staff personnel who provide search and/or review staff support to the Component FOIA process. The programs should be designed to accomplish the following objectives:

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

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

(3) Provide procedural and legal guidance and instruction to initial denial and appellate authorities concerning the discharge of their responsibilities.

(4) Emphasize that the processing of FOIA requests must be citizen-centered and results-oriented.

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

### **§ 28.31 Implementation.**

To ensure uniformity of interpretation, the Components should coordinate their educational and training programs with DFOIPO.

### **Appendix A to Part 286—DoD FOIA Program Components**

#### **List of DoD FOIA Program Components**

Office of the Secretary of Defense  
Office of the Chairman of the Joint Chiefs of Staff  
Combatant Commands  
DoD Field Activities  
Department of the Army  
Department of the Navy  
Department of the Air Force  
Defense Commissary Agency  
Defense Contract Audit Agency  
Defense Contract Management Agency  
Defense Finance and Accounting Service  
Defense Information Systems Agency  
Defense Intelligence Agency  
Defense Logistics Agency  
Defense Security Service  
Defense Threat Reduction Agency  
National Geospatial Intelligence Agency  
National Reconnaissance Office  
National Security Agency  
Office of the Inspector General, Department of Defense

### **Appendix B to Part 286—Addressing FOIA Requests**

#### *AP2.1. General.*

AP2.1.1. The Department of Defense does not have a central repository for DoD records. FOIA requests, therefore, should be addressed to the FOIA Requester Service Center of the DoD Component that has custody of the record desired. DFOIPO maintains a current list of links to FOIA Requester Service Centers at <http://www.dod.mil/odam/DFOIPO/ServiceCenters.html>.

AP2.1.2. If uncertain as to the ownership of the record, DoD personnel shall refer the requester to the FOIA Requester Service Center most likely to have the record, or to the OSD/ Joint Staff FOIA Requester Service Center.

AP2.2. *DoD Component FOIA Requester Service Center Addresses.*

#### *AP2.2.1. OSD and the Chairman of the Joint Chiefs of Staff.*

AP2.2.1.1. Address all requests to: FOIA Requester Service Center, Office of the Secretary of Defense/Joint Staff, 1155 Defense Pentagon, Washington, DC 20301-1155. <http://www.dod.mil/pubs/foi/index.html>. The OSD/Joint Staff FOIA Requester Service Center also processes FOIA requests for the activities in paragraph AP2.2.1.2.

#### *AP2.2.1.2. Activities for Which the OSD/ Joint Staff FOIA Requester Service Center Processes Requests.*

American Forces Information Service  
Armed Forces Radiology Research Institute  
Defense Acquisition University  
Defense Advanced Research Projects Agency  
Defense Business Transformation Agency  
Defense Prisoner of War/Missing Persons Office  
Defense Security Cooperation Agency  
Defense Systems Management College  
Defense Technology Security Administration  
DoD Counterintelligence Field Activity  
DoD Human Resources Activity  
Joint Professional Military Education Colleges  
Missile Defense Agency  
National Defense University  
Pentagon Force Protection Agency  
Uniformed Services University of the Health Sciences  
Washington Headquarters Services  
White House Military Office

AP2.2.2. *Department of the Army.* Address requests for Headquarters, U.S. Army, records, or if there is uncertainty as to which Army activity may have the records, address requests to: Department of the Army, Freedom of Information and Privacy Acts Office, TAPC-PDR-PF, 7798 Cissna Road, Suite 205, Springfield, VA 22150-3166. <https://www.rmda.belvoir.army.mil/rmdxml/rmda/FPHomePage.asp>.

AP2.2.3. *Department of the Navy.* Address requests to the Commanding Officer of any Navy or Marine Corps activity. Clearly indicate that the request is a FOIA request. For Secretary of the Navy, Chief of Naval Operations, and Naval Historical Center records, or if there is uncertainty as to which Navy activity may have the records, send requests to: Chief of Naval Operations, DNS-36, 2000 Navy Pentagon, Washington, DC 20350-2000. Electronic requests may be filed at <http://foia.navy.mil/>. For U.S. Marine Corps records, or if there is uncertainty as to which Marine activity may have the records, send requests to: Commandant of the Marine Corps, HQ USMC (ARSF), 2 Navy Annex, Washington, DC 20380-0001. <http://hqinet001.hqmc.usmc.mil/FOIA/index.htm>.

AP2.2.4. *Department of the Air Force.* Address requests to the Commander of any Air Force installation, major command, or field operating agency, to the attention of the FOIA Requester Service Center. For Headquarters, United States Air Force, records, or if there is uncertainty as to which Air Force activity may have the records, send requests to: Department of the Air Force, HAF/ICIOD (FOIA), 1000 Air Force Pentagon, Washington, DC 20330-1000. <http://www.foia.af.mil/>.

AP2.2.5. *Defense Commissary Agency.* Defense Commissary Agency, FOIA/Privacy

Act Officer, 1300 E. Avenue, Fort Lee, VA 23801-1800. <http://www.commissaries.com/foiainfo.cfm>.

AP2.2.6. *Defense Contract Audit Agency (DCAA).* Address requests to any DCAA regional office or to DCAA Headquarters. For Headquarters, DCAA, records, or if there is uncertainty as to which DCAA region may have the records, send requests to: Defense Contract Audit Agency, ATTN: CMR, FOIA Requester Service Center, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219. DCAA regional office addresses can be found at: <http://www.dcaa.mil/foia.htm>.

AP2.2.7. *Defense Contract Management Agency.* Defense Contract Management Agency, Attn: DCMA-DSA, 6350 Walker Lane #300, Alexandria, VA 22310-3226. <http://www.dcm.mil/foia.htm>.

AP2.2.8. *Defense Finance and Accounting Service (DFAS).* Address requests to any DFAS regional office or to Headquarters, DFAS. For Headquarters, DFAS, records, or if there is uncertainty as to which DFAS region may have the records, address requests to: Defense Finance and Accounting Service, DFAS-HAC/DE, Corporate Communications, 6760 East Irvington Place, Denver, CO 80279-8000. Addresses for DFAS regional office FOIA Requester Service Centers are located at <http://www.dfas.mil>.

AP2.2.9. *Defense Information Systems Agency (DISA).* DISA records may be requested from any DISA field activity or from its Headquarters. Requesters should send FOIA requests to Defense Information Systems Agency, Attn: Headquarters FOIA Requester Service Center, P.O. Box 4502, Arlington, VA 22204-4502. <http://www.disa.mil/gc/foia/foia.html>.

AP2.2.10. *Defense Intelligence Agency.* Defense Intelligence Agency, Attn: DIAC, DAN-1A (FOIA), Washington, DC 20340-5100. <http://www.dia.mil/publicaffairs/Foia/foia.htm>.

AP2.2.11. *Defense Logistics Agency (DLA).* DLA records may be requested from its headquarters or from any of its field activities. Requesters should send FOIA requests to Defense Logistics Agency, Attn: DP-FOIA, 8725 John J. Kingman Road, Suite 2533, Ft. Belvoir, VA 22060-6221. Addresses for DLA field activity FOIA Requester Service Centers are located at [http://www.dla.mil/public\\_info/efoia/FOIAPOC.html](http://www.dla.mil/public_info/efoia/FOIAPOC.html).

AP2.2.12. *Defense Security Service.* Defense Security Service, Office of FOIA and Privacy, 1340 Braddock Place, Alexandria, VA 22314-1651. <http://www.dss.mil/foia/foia.htm>.

AP2.2.13. *Defense Threat Reduction Agency.* Defense Threat Reduction Agency, COSMI FOI/Privacy Office, 8725 John J. Kingman Rd., Fort Belvoir, VA 22060-6201. <http://www.dtra.mil/be/FOIA/index.cfm>.

AP2.2.14. *National Geospatial-Intelligence Agency.* National Geospatial-Intelligence Agency, Office of General Counsel, Attn: GCP, Mail Stop D-10, 4600 Sangamore Road, Bethesda, MD 20816-5003. <http://www.nga.mil>.

AP2.2.15. *National Reconnaissance Office.* National Reconnaissance Office, Information Access and Release Center, Attn: FOIA Officer, 14675 Lee Road, Chantilly, VA

20151-1715. <http://www.nro.gov/foia/index.html>

AP2.2.16. *National Security Agency*. National Security Agency/Central Security Service, FOIA/PA Services, DC34, 9800 Savage Road, Suite 6248, Fort George G. Meade, MD 20755-6248. <http://www.nsa.gov/foia/index.cfm>.

AP2.2.17. *Inspector General of the Department of Defense*. Inspector General of the Department of Defense, Chief FOIA/PA Office, 400 Army Navy Drive, Room 201, Arlington, VA 22202-4704. <http://www.dodig.osd.mil/fo/foia/foia.htm>.

AP2.3. *DoD Field Activity And Combatant Command Addresses*

Although the below FOIA Requester Service Centers are OSD Components for the purposes of the FOIA, these Centers respond directly to the public on initial requests. Accordingly, initial requests should be sent to the addresses indicated.

AP2.3.1. *DoD TRICARE Management Activity*. TRICARE Management Activity, Attention: Freedom of Information Act Officer, 16401 East Centretex Parkway, Aurora, CO 80011-9043. <http://www.tricare.mil/tmaprivacy/foia.cfm>.

AP2.3.2. *Chairman, Armed Services Board of Contract Appeals*. Chairman, Armed Services Board of Contract Appeals, Skyline Six Room 703, 5109 Leesburg Pike, Falls Church, VA 22041-3208.

AP2.3.3. *Defense Technical Information Center*. Defense Technical Information Center, Attn: FOIA Program Manager, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22062-6218. <http://www.dtic.mil/dtic/foia/>.

AP2.3.4 *DoD Education Activity*. DoD Education Activity, Freedom of Information Act Officer, 4040 North Fairfax Dr., Arlington, VA 22203-1635. <http://www.dodea.edu/foia/>.

AP2.3.5. *U.S. Central Command*. U.S. Central Command, CCJ6-RD (FOIA), 7115 South Boundary Blvd., MacDill Air Force Base, FL 33621-5101. <http://www.centcom.mil/sites/foia/default.aspx>.

AP2.3.6. *U.S. European Command*. U.S. European Command, FOIA Requester Service Center, Unit 30400 Box 1000, APO AE 09131. <http://www.eucom.mil/english/FOIA/main.asp>.

AP2.3.7. *U.S. Joint Forces Command*. U.S. Joint Forces Command, Code J024, 1526 Mitscher Ave., Ste. 200, Norfolk, VA 23511-5100. <http://www.jfcom.mil/about/foia.htm>.

AP2.3.8. *U.S. Northern Command*. U.S. Northern Command, FOIA Officer, 250 Vandenberg Street, Suite B016, Peterson Air Force Base, CO 80914-38040. <http://www.northcom.mil/foia/home.htm>.

AP2.3.9. *U.S. Pacific Command*. U.S. Pacific Command, J151 FOIA, Box 64017, Camp H. M. Smith, HI 96861-4017. <http://www.pacom.mil/foia/homepage.shtml>.

AP2.3.10. *U.S. Southern Command*. U.S. Southern Command, SCJ1-A (FOIA), 3511 NW .91st Avenue, Miami, FL 33172-1217. <http://www.southcom.mil/AppsSC/pages/foia.php>.

AP2.3.11. *U.S. Special Operations Command*. U.S. Special Operations Command, SOCS-SJS-I/FOIA Requester Service Center, 7701 Tampa Point Blvd.,

MacDill Air Force Base, FL 33621-5323. <http://www.socom.mil/foia/>.

AP2.3.12. *U.S. Strategic Command*. U.S. Strategic Command, Attn: J01031 (FOIA), 901 SAC Blvd., Suite 1E5, Offutt Air Force Base, NE 68113-6000. <http://www.stratcom.mil/foia/>.

AP2.3.13. *U.S. Transportation Command*. U.S. Transportation Command, Attn: TCCS-IM, 508 Scott Drive, Scott Air Force Base, IL 62225-5357. <http://www.transcom.mil/foia.cfm>.

AP2.4. *National Guard Bureau*. The National Guard Bureau FOIA Requester Service Center is unique in that it processes its own initial FOIA requests; however, FOIA appeals are handled either by the Department of the Army or the Department of the Air Force. The address is: Chief, National Guard Bureau, Attn: NGB-SDA (FOIA), 1411 Jefferson Davis Highway, Arlington, VA 22202-3231. <http://www.ngb.army.mil/sitelinks/foia.aspx>.

Dated: December 11, 2007.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, DoD.*

[FR Doc. E7-24359 Filed 12-18-07; 8:45 am]

**BILLING CODE 5001-06-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of Inspector General

#### 42 CFR Part 1001

#### Solicitation of New Safe Harbors and Special Fraud Alerts

**AGENCY:** Office of Inspector General (OIG), HHS.

**ACTION:** Notice of intent to develop regulations.

**SUMMARY:** In accordance with section 205 of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, this annual notice solicits proposals and recommendations for developing new and modifying existing safe harbor provisions under the Federal anti-kickback statute (section 1128B(b) of the Social Security Act), as well as developing new OIG Special Fraud Alerts.

**DATES:** To assure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on February 19, 2008.

**ADDRESSES:** In commenting, please refer to file code OIG-112-N. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of three ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific

recommendations and proposals through the Federal eRulemaking Portal at <http://www.regulations.gov>. (Attachments should be in Microsoft Word, if possible.)

2. *By regular, express, or overnight mail.* You may send written comments to the following address: Office of Inspector General, Department of Health and Human Services, Attention: OIG-112-N, Room 5246, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By hand or courier.* If you prefer, you may deliver, by hand or courier, your written comments before the close period to Office of Inspector General, Department of Health and Human Services, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201. Because access to the interior of the Cohen Building is not readily available to persons without Federal Government identification, commenters are encouraged to schedule their delivery with one of our staff members at (202) 358-3141.

For information on viewing public comments, please see the Supplementary Information section.

**FOR FURTHER INFORMATION CONTACT:** Joel Schaer, (202) 619-0089, OIG Regulations Officer.

#### **SUPPLEMENTARY INFORMATION:**

*Submitting Comments:* We welcome comments from the public on recommendations for developing new or revised safe harbors and Special Fraud Alerts. Please assist us by referencing the file code OIG-112-N.

*Inspection of Public Comments:* All comments received before the end of the comment period are available for viewing by the public. All comments will be posted on <http://www.regulations.gov> as soon as possible after they have been received. Comments received timely will also be available for public inspection as they are received at Office of Inspector General, Department of Health and Human Services, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (202) 619-0089.

### **I. Background**

#### *A. OIG Safe Harbor Provisions*

Section 1128B(b) of the Social Security Act (the Act) (42 U.S.C. 1320a-7b(b)) provides criminal penalties for individuals or entities that knowingly