FEDERAL DOCKET MANAGEMENT SYSTEM OFFICE
DEPT. OF DEFENSE
1160 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1160

JANUARY 24, 2008

Re: Department of Defense
Comment to Proposed Rulemaking at 72 F.R. 71847
DoD-2007-05-0086; 0790-AI24

The DOD proposes new rules to regulate FOIA requests. The proposed rule makes clear that the time spent reviewing documents to determine whether to apply a statutory exemption is not search time, but is review time. 72 F.R. at 71848. The proposed rule then proceeds to tax review time as "direct costs", which is imposed upon requestors exempt from review time costs through the incorporation of review time costs into the Fee rates at 32 C.F.R. §286.25. See id and 71865-66. In this way, non-commercial requestors who are not affiliated with an educational or non-commercial scientific institution, and not a representative of the news media, and consequently fall into the "default category" and are exempt from review costs by 5 U.S.C. § 552(a)(4)(A)(ii)(III), will be charged for review through "direct costs". Accordingly, I object to the inclusion of review time costs within the direct costs calculation as applied to default category requestors.

Thank you for your consideration.

Sincerely,

Mark Jordan

MARK JORDAN

Comment Icon **PUBLIC SUBMISSION**

B. Carter Comment

Posted by the **Department of Defense** on Feb 21, 2008

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Comment

pg 71854 (d)(1)(vi) delete at end of ? ?See ? 286.14?

pg 71855 (e) 4th sentence is confusing. ?Records that are not available routinely through the discovery process. . . should not be withheld under this exemption.

Combine next to last and last sentence to read:
The most common discovery privileges incorporated in Exemption 5 are the deliberative process, the attorney work product, and the attorney client privilege.

pg. 71856 (g)(1) delete Exemption 7 applies only when production of such law enforcement records or information:
replace (g)(1) (i)?(vi) 7A thru 7F with: Exemption 7A applies when

pg. 71858 para(d)(1)(i) last word ?submitted? sh/be ?submitter?

pg. 71862 para (4) 2nd sentence, $40.00 sh/be $54.00
(2 hours of clerical @ $27 an hour)

(c) Fee waivers. suggest sentence read:
When assessable costs for a FOIA request total $25.00 or less, fees shall not be

assessed for all requesters, regardless of category.

pg. 71867 AP2.2.13 delete COSMI and add DIR-COSM-F

Chapter 6: Recommend adding to C6.1.1. after DoD personnel, ?to include contractors and business partners? This will make it consistent with the Privacy Act.

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Comment Details

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February 19, 2008

Chief FOIA Officer
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1160 Defense Pentagon
Washington, DC 20301-1160

RE: Department of Defense Proposed Freedom of Information Act Program Regulation, 72 Fed. Reg. at 71847 (Dec. 19, 2007) [DoD-2007-OS-0086; 0790-AI24]

To Whom It May Concern:

I am writing to comment on the Department of Defense (DoD) proposed Freedom of Information Act (FOIA) Program Regulation, 72 Fed. Reg. at 71847 (Dec. 19, 2007).

Implementation of Exec. Order 13392 and Improvements to FOIA Web Sites and Electronic Reading Rooms

DoD's efforts to implement key provisions of Executive Order 13392 ("Improving Agency Disclosure of Information") and to ensure that all DoD components are following the Electronic Freedom of Information Act of 1996 (E-FOIA) are commendable. By incorporating the customer service oriented structure established by the executive order, the proposed regulations provide FOIA requesters with clear and simple direction about where to seek assistance and additional information about their FOIA request. Moreover, the proposed regulations seek to ensure that internet Web sites for all FOIA Requester Service Centers and DoD components are both user-friendly and in compliance with the law. The National Security Archive conducted a comprehensive survey of federal agency Web sites in 2007 to evaluate compliance with the E-FOIA amendments and concluded at that time that several components of DoD had poorly organized Web sites with outdated or incorrect information about how and where to file FOIA requests.[1] Since our survey was published, however, DoD has substantially improved Web sites agency-wide.

Proposed § 286.7(b) would require agency and component electronic reading rooms to comply with the specific requirements of the E-FOIA amendments. Of course, electronic reading room and Web site compliance requires an ongoing effort. Accordingly the Web site provisions, including in particular, proposed § 286.4(b)(A) of the proposed regulations, should make clear that information provided on each service center Web site, including key contact information, be regularly updated and checked to ensure accuracy.

[1] National Security Archive, "File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent" (March 12, 2007), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm.

Application of FOIA Exemptions

DoD has proposed several significant changes in § 286.14 of the proposed regulations on "Applying the FOIA exemptions." In particular, the proposed regulations no longer recognize that several of the FOIA exemptions—most notably Exemption 2 and Exemption 5—are discretionary. This contrasts with DoD's existing FOIA regulations note for each exemption whether or not the agency has discretion to release certain information that is covered by the exemption and specify that the application of both Exemption 2 and Exemption 5 is "entirely discretionary." 32 C.F.R. § 286.12(b), § 286.12(e). No change has been made to the standards for disclosure under each exemption, and courts have clearly held that "FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information." *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997). Discretionary disclosure under the FOIA also is recognized by Attorney General Ashcroft's 2001 memorandum. Discretionary disclosure is prohibited only for information that properly fits within those FOIA exemptions—in particular, Exemptions 1, 3, 4, 6, and 7(C)—where release of certain information is *prohibited* by a law other than the FOIA.

Exemption 5

In § 286.12(e) of the proposed regulations, the Department has gone too far in its attempt to incorporate governing case law regarding the application of Exemption 5. In several cases, the proposed regulations may be misleading for agency employees attempting to apply them to particular FOIA cases. Specifically, the proposed regulations state that "[a]n agency's final decision cannot be withheld under the [deliberative process] privilege unless it becomes part of another, higher-level decision-making process (such as the agency budgetary process)." § 286.12(e)(2)(i). This statement is highly misleading, particularly in light of the Supreme Court's holding that Exemption 5 can never apply to final opinions, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 155-59, and generally will not apply to any "statements of policy and interpretations which have been adopted by the agency" or "instructions to staff that affect a member of the public," which are subject to FOIA's affirmative disclosure requirements under § 552(a)(2)(B) and (C). *Id.* at 153-54. Courts have also held that some materials that constitute final agency decisions but may nonetheless be used or applied in subsequent decision-making by agency officials—such as legal opinions—are not exempt under the deliberative process privilege because of their conclusive nature. *See Tax Analysts v. Internal Revenue Services*, 294 F.3d 71, 82 (D.C. Cir. 2002) (legal advice memos from Office of Chief Counsel to IRS field officers not protected by deliberative process privilege where they represented "OCC's final legal position," even though the memos did not necessarily "reflect the final *programmatic* decisions of the program officers that request[ed] them") (emphasis in original); *see also Evans v. U.S. Office of Personnel Management*, 276 F. Supp. 2d 34, 40 (D.D.C. 2003).

The brief description of deliberative process privilege case law included in the proposed regulations also excludes the significant principle that any predecisional, deliberative document that is later adopted as agency policy will no longer be covered by the privilege. DoD should properly instruct its employees that in processing FOIA requests for information that may be exempt under the deliberative process privilege of Exemption 5, they should fully consider whether in fact a predecisional recommendation has been adopted or incorporated by reference as agency policy. *Sears*, 421 U.S. at 161. Moreover, Exemption 5 does not protect the "working law" of an agency, such as those orders, instructions, and guidelines which affect the public. *See Schlefer v. United States*, 702 F.2d 233 (D.C. Cir. 1983); *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 682-84 (D.C. Cir. 1981).

The proposed regulations also wrongly convey the way in which the Presidential communications privilege should be applied by federal agencies in the context of FOIA exemption 5. It is not settled law that the presidential communications 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." § 286.12(e)(2)(vi) (emphasis added). Courts have not extended the presidential communications privilege beyond those officials who have a direct advisory role to the president. *In re Sealed case*, 121 F.3d 729, 745 (D.C. Cir. 1997). The privilege applies "[o]nly [to] communications [that] are close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers." *Id.* at 752; *see also Judicial Watch v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004) (rejecting expansion of presidential privilege to all documents prepared by those within the Justice Department). Although courts have not defined the precise outer limits of this privilege, it is clear that it does not apply, as the proposed regulations suggest, to protect from disclosure any and all records created by an agency to assist the President.

Exemption 7

Finally, in § 286.12(g)(2)(iv), the proposed regulations wrongfully characterize an example of a type of record that may be withheld under Exemption 7. The Department would add language asserting that "[e]mergency 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 exemption from disclosure pursuant to Exemptions 7E and/or 7F." Courts must construe narrowly the statutory exemptions, "resolving all doubts in favor of disclosure." *Wood v. FBI*, 432 F.3d 78, 83 (2d Cir. 2005) (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)); see also *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988). The interpretation of Exemption 7(F) that underlies this approach expands that exemption far beyond what Congress originally intended and decimates the core purposes of FOIA, including ensuring an informed electorate, to "opening administrative processes to the scrutiny of the press and general public," *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974) (citation omitted); "enabl[ing] the public to have sufficient information in order to be able . . . to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Id.* These purposes are at their apex when the record(s) at issue contain information that could be essential to the public in an emergency, such as action plans or security procedures.

At the very least, the law is unsettled on this point, with a handful lower courts around the country adopting a broader interpretation of Exemption 7(F) but the vast majority of courts that have applied this exemption finding that its proper application is "to protect all those put at risk through their participation in law enforcement proceedings, whether as sources of information or as witnesses." *ACLU*, 389 F. Supp. 2d at 576; *see Garcia v. Dep't of Justice*, 181 F. Supp. 2d 356 (S.D.N.Y. 2002); *Manna v. Dep't of Justice*, 815 F. Supp.798 (D.N.J. 1993). Therefore, DoD should clarify that broad categories of records that are of particular public interest and the disclosure of which is essential to public health and safety may not be withheld except where there is a specific risk of harm from disclosure within the required narrow interpretation of Exemption 7.

Grounds for Expedited Processing

In enacting the 1996 amendments to the FOIA, Congress established two circumstances in which agencies are required to grant expedited processing, but also provided for agency discretion in establishing additional reasons for expediting certain requests, particularly where an agency's unique work necessitates expedited processing in situations other than those covered in the statute. DoD's existing FOIA regulations, which provide as a ground for expedition "humanitarian need" where "disclosing the information will promote the welfare and interests of mankind," 32 C.F.R. § 286.4(d)(3)(iv), are acutely attuned to the nature of the Department's work and particularly the impact on and interaction between

Defense programs and the lives of millions of individuals around the world. The U.S. military is an important presence abroad, often in nations where instability or conflict has resulted in refugee crises, human rights violations, or other humanitarian challenges. If DoD has the opportunity through FOIA to speed release of information that could assist, for example, in bringing justice to victims of human rights violations or help to prevent harm or unjust persecution of people in this country or around the world, unquestionably it should do so.

The language of the existing humanitarian need provision may be broader and more vague than necessary to accomplish the critical purpose that the provision was intended to serve. It is important to note that the Department of State has in its FOIA regulations a similar provision that is drafted in a way that better defines its reach and makes its application more straightforward than DoD's current provision. In particular, the State Department's regulations provide that there is a compelling need meriting expedited processing where "[f]ailure to obtain requested information on an expedited basis could reasonably be expected to . . . harm substantial humanitarian interests." 22 CFR § 171.12(b)(1). This approach better allows the agency to weigh the type of humanitarian interest at stake against the significant action of moving one requester to the front of the queue in front of others who may have been waiting significantly longer. Moreover, it places the consideration of humanitarian interests within the established concept of "compelling need" that exists in the FOIA statutory language. DoD should strongly consider maintaining the humanitarian need provision in its current regulations, but amending the language to allow requesters to make a clear, targeted argument for expedited processing and to permit the agency to make a reasoned decision about when humanitarian conditions in fact constitute compelling need for expedition.

Please feel free to contact me if you have any questions or concerns. Thank you for your consideration of these comments.

Sincerely,

/S/
Meredith Fuchs
General Counsel